

QUARTERLY NEWSLETTER

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Stephen S. Gealy

RECENT JURY VERDICTS

BY STEPHEN S. GEALY

This article is Baylor Evnen’s 22nd annual article which samples recent jury verdicts from the courts of Nebraska. Over the past couple of years, it has been pointed out that the number of verdicts across the state has diminished rather dramatically. Each year, it seems, the number of cases actually tried to verdict diminishes. We expect this is in large part because of the wide-ranging use of mediation as a conflict resolution tool.

While the number of cases being tried is diminishing, we will continue to collect data on cases which are tried and prepare this annual report for our clients in hopes that it will provide all of you with useful information in the evaluation of personal injury claims.

Douglas County (Omaha)

King v. Pettis and Crete Carrier Corp. involved an Illinois collision between two tractor-trailer rigs. The plaintiff, while operating a semi on Interstate 80, was overtaken by a semi owned by Crete Carrier and operated by its employee, defendant Pettis. After the Crete vehicle overtook the plaintiff’s vehicle, Pettis lost control of the vehicle and it jack-knifed, blocking the road in the plaintiff’s path. A collision ensued. Ultimately the defendant Crete admitted the negligence of its driver was the proximate cause of the collision.

As a result of the accident the plaintiff injured his shoulders. He underwent surgery on one shoulder, but there was a dispute as to whether a future surgery

would be necessary on the second shoulder. The plaintiff, a 54-year-old man who was self-employed as a truck driver, claimed medical expense of approximately \$22,000 and wage loss of an additional \$46,000. There was testimony that he suffered diminished earning capacity and a permanent injury to his shoulder. The Nebraska jury awarded the plaintiff \$100,000.

The plaintiff in *Potter v. Kent* was a 43-year-old woman who worked in the claims department for a health insurance company. While her vehicle was stopped in the left-turn lane, she was struck from the rear by the defendant’s vehicle. The defendant admitted that her negligence was the proximate cause of the accident.

The plaintiff sustained soft tissue injuries in her neck and upper back. She claimed neither a wage loss nor a loss of earning capacity, but did assert, through chiropractic testimony, that she sustained a 5%–8% permanent partial impairment to her neck and upper back. As a result of the accident she incurred approximately \$5,000 in chiropractic expense. The jury awarded the plaintiff \$1,375.

Hanraban v. DeBoer also arose from a rear-end accident, wherein the defendant admitted that he was negligent and that his negligence proximately caused the collision. As a result of the collision, the plaintiff, a female bus driver in her 40s, claimed soft tissue whiplash injuries to her neck. She alleged medical expense of \$6,447 and a wage loss of approximately

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CIVIL PENALTIES – \$1,000 PER DAY

BY JILL GRADWOHL SCHROEDER

On December 29, 2007, important revisions to the Medicare Secondary Payor Act were enacted through Senate Bill S.2499 and signed by the President. Key provisions now require that health, liability, and workers’ compensation insurers must determine whether a claimant is entitled to benefits under the Medicare program and, if so, must provide information about the claim to the Secretary of the United States Department of Health and Human Services. The information must be submitted “after the claim is resolved through a settlement, judgment, award, or other payment (regardless of whether or not there is a determination or admission of liability).” Those who fail to comply with these requirements will be subject to a civil money penalty of \$1,000 for each day of noncompliance with respect to each claimant. Regulations will be implemented which further define the type of information to be submitted to the Secretary and the time frame within which insurers and third-party administrators must submit that information. It is important for insurers, third-party administrators and employers to keep informed about the developments in this area, as failure to comply with this revision to the Medicare Secondary Payor Act, which became Public Law 110–173, may result in significant civil penalties.

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\$3,100. While there was no evidence that her injury was permanent or that she sustained a loss of earning capacity, her chiropractic expert testified that she could expect to incur an additional \$1,500 in future medical expense as a result of the accident. The jury awarded the plaintiff \$1,310.30.

In *Lewis v. Costanzo*, the plaintiff was northbound when his vehicle was struck by the defendant's southbound vehicle as the defendant attempted to make a left turn across the plaintiff's path. The defendant admitted that his negligence proximately caused the accident.

As a result of the accident, the plaintiff, an employee at Union Pacific Railroad in his mid-50s, claimed primarily soft tissue neck and back injuries. His physician testified to approximately a 15% permanent impairment. Mr. Lewis incurred medical expense of approximately \$5,700 and lost wages of approximately \$718. The jury awarded the plaintiff the sum of \$5,772.43.

In *Thompson v. Flying J*, the plaintiff slipped and fell while walking on an ice-covered sidewalk outside the defendant's truck stop. The plaintiff, a female semi driver in her 40s, parked her truck in the lot behind the truck stop and initially attempted to enter the building through a rear entrance. That entrance, however, was not designated for customer use and she was unable to enter the building through that entrance. She then walked around the building and encountered a sidewalk which had not been cleared. It was here that her fall occurred.

As a result of her fall, Ms. Thompson sustained a broken ankle. She lost wages in the sum of \$4,850 and incurred medical expense of approximately \$17,000. No medical expert was called at the time of trial so there was no evidence of permanency or diminished earning capacity. The jury found in favor of the plaintiff and awarded her \$40,000.

The plaintiff in *Smith v. McDonald* claimed she was injured when her westbound vehicle was struck in an open intersection by the defendant's northbound vehicle. The defendant admitted that her negligence was the proximate cause of the collision.

At the time of the accident, Ms. Smith was a daycare provider in her early 30s. She was diagnosed

with long term soft tissue injuries, fibromyalgia and chronic myofascial pain. Her primary treating physician offered the opinion that the plaintiff's injuries were permanent and would prevent her from ever working again.

The plaintiff claimed medical expense of \$10,000. In addition, she claimed lost wages to the time of trial of \$65,480 and future lost income of \$72,540. The jury awarded the plaintiff \$23,266.57.

Gage County (Beatrice)

The defendant in *Hackler v. Parde* left a Beatrice stop sign and drove into the plaintiff's path. The defendant admitted that her negligence proximately caused the accident. The plaintiff, a 41-year-old dental assistant, suffered soft tissue injuries for which she received primarily chiropractic treatment. The plaintiff's treating chiropractor testified at trial with respect to his treatment of the plaintiff. A second medical expert assigned the plaintiff a permanent partial impairment rating of 8%.

The plaintiff's medical expense was approximately \$9,500. Of that total, approximately \$1,450 was billed by the hospital emergency room while the remaining amount was all chiropractic expense. The plaintiff's lowest settlement demand was \$45,000 while the defendant offered \$20,000 prior to trial. The jury awarded the plaintiff \$4,456.

Lancaster County (Lincoln)

The plaintiff in *Koch v. Allstate Insurance* was a 32-year-old man who worked in natural resources. In 2003, while he was a college student, Mr. Koch was involved in a car accident which was caused by the other driver. That driver's insurer ultimately paid Koch, with Allstate's consent, its \$50,000 liability policy limit. In addition, Mr. Koch received the benefit of his own medical payments coverage in the amount of \$1,000. In this case the plaintiff sought underinsured motorist coverage from his own carrier.

As a result of the 2003 accident, the plaintiff sustained an exacerbation of a pre-existing left shoulder injury which limited his physical activities. Testimony indicated that the injury prevented him from carrying out his work as a construction employee during his college days. In addition, the injury limited his ability to hunt with a bow and arrow and to work

in his current employment with big game. No surgery was ultimately deemed necessary and Mr. Koch incurred medical expense of \$7,705. In addition, there was evidence of lost wages of approximately \$25,000.

The plaintiff's neurologist, Dr. George Wolcott, assigned Mr. Koch a 14% whole person impairment. A functional capacity assessment was undertaken by a physical therapist who offered the opinion that the plaintiff had a 6% impairment and was capable of working at the medium physical demand level for 8 hours a day. While there was no specific evidence of diminished earning capacity, there was testimony from the plaintiff's supervisor that his ability to work in his chosen field was limited due to the injury. The jury determined that Mr. Koch's damages totaled \$120,000. Judgment was then entered for that amount less the amounts previously paid by the underlying carrier.

Phelps County (Holdrege)

Parrish v. Holdrege Medical Clinic is a slip-and-fall action brought by a 60-year-old gentleman. Mr. Parrish had an early morning appointment with his doctor and arrived approximately 15 minutes prior to the appointment on a wintry day. The evidence established that there was no salt or other ice melt treatment applied in the area of the clinic's front door. As Mr. Parrish approached the door and reached for the handle, he slipped and fell on the ice. As a result of this fall, he sustained a torn rotator cuff which required surgical repair.

At the time of this incident, the plaintiff was retired and received social security disability benefits as a result of a pre-existing heart condition and prior heat stroke. He worked part-time at a gravel pit and earned the maximum amount he was allowed under social security regulations. As a result of his accident and the resulting surgery, Mr. Parrish missed five months of work and claimed an income loss of \$4,500.

The jury found that the defendant was negligent, but also found that 25% of the negligence which combined to cause the accident was attributable to the plaintiff. The jury fixed the plaintiff's damages at \$100,000. In accordance with the comparative negligence finding, judgment was entered against the defendant for \$75,000.

REDUCTION, SUSPENSION OR LIMITATION OF WORKERS' COMPENSATION BENEFITS

BY JENNY L. PANKO



Jenny L. Panko

Section 48-162.01(7) of the Workers' Compensation Act provides that if an employee unreasonably refuses to participate in a physical, medical, or vocational rehabilitation program, the Court may reduce, suspend or limit the compensation otherwise payable to the employee. How might employers utilize this provision? Might this section be utilized by employers in defending against an application filed by an employee to modify a prior award? A recent case from the Nebraska Supreme Court addresses how this section of the Act might come into play.

In *Lowe v. Drivers Management, Inc.*, the employee received an award of permanent partial disability and vocational rehabilitation. The employee filed an application to modify the initial award, claiming that he had become permanently totally disabled. The trial court determined that the employee was permanently totally disabled, but also determined that pursuant to Neb. Rev. Stat. §48-162.01(7), the employee's benefits for a period of time prior to the modification proceeding should be reduced due to his failure to participate in the vocational rehabilitation program that was awarded in the initial award. Neb. Rev. Stat. §48-162.01(7) provides, "If the injured employee without reasonable cause refuses to undertake or fails to cooperate with a physical, medical, or vocational rehabilitation program determined by the compensation court or judge thereof to be suitable for him or her...the compensation court or judge thereof may suspend, reduce, or limit the compensation otherwise payable under the Nebraska Workers' Compensation Act." The employee appealed the determination that his benefits should be reduced for the period of time prior to the modification proceeding.

The Nebraska Supreme Court utilized a two-part test to determine whether a reduction, suspension or limitation of benefits pursuant to §48-162.01(7) was warranted. First, the employee must refuse to participate in the program at issue and, second, the refusal must be unreasonable. The Court determined that it was undisputed that the employee

in *Lowe* did not participate in the vocational program. The Court further determined that the employee's failure to participate was unreasonable because after entry of the original award, the employee failed to respond to the vocational counselor's efforts to contact him, thereby causing the counselor to submit a closure report to the compensation court.

After determining that the two-part test had been met, the Nebraska Supreme Court determined that the trial court properly reduced the employee's benefits for the period of time prior to the modification proceeding.

Additionally, in *Lowe* the employer asserted that the trial court was incorrect in determining in the modification proceeding that the employee was permanently totally disabled because, had he participated in the vocational program, he would have obtained employment. The Nebraska Supreme Court noted that the employer in *Lowe* did not present any evidence to support a finding that had the employee participated in the vocational program, he would have obtained employment and would not have been permanently totally disabled at the time of the modification proceeding. The Court indicated that it would not speculate as to what "might have ensued" relative to the permanent total disability claim had the employee participated in the vocational plan.

The Court's determination of this issue indicates that if the employer wants to carry its burden to prove that the employee's benefits, following the modification proceeding, should be reduced for failure to participate in the vocational program, the employer must produce evidence to support such a finding. The *Lowe* decision indicates that the employer should obtain expert evidence to show that had the employee participated in the vocational program, he or she would have obtained employment and would not be permanently totally disabled.

The *Lowe* decision also brings to light two other important points. First, the Workers' Compensation Act provides that an award can be changed by agreement of the

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WORKERS' COMPENSATION EQUITY AND FAIRNESS SEMINAR

Nebraskans for Workers' Compensation Equity and Fairness is sponsoring a seminar, "Getting Control of WC Costs and Handling Day-To-Day WC Problems," on February 15, 2008. Dallas Jones is chair of the group, which is comprised of over 150 businesses and carriers established to represent the interests of Nebraska employers and carriers in the workers' compensation area. The group has been instrumental in passing recent legislation intended to lower workers' compensation costs. Dallas Jones will lead a panel of business and industry representatives discussing cost savings measures, and Gail Perry will lead a panel to discuss handling problem employees. If you are a member of this organization or interested in becoming a member, please contact Dallas Jones.

NEW RATES

Effective January 1, 2008, the maximum weekly workers' compensation indemnity benefit in Nebraska was increased to \$644. The mileage rate was increased to 50.5 cents per mile.

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parties or by filing an application to modify the award. *Lowe* clarifies a third scenario under which an award can be changed, that being an application to reduce or limit benefits pursuant to §48-162.01(7). It also appears that such application may be filed outside the confines of a modification proceeding. Specifically, an application to modify cannot be filed until six months after entry of an award. However, the six-month period does not appear to apply to the filing of an application to reduce or limit benefits under §48-162.01(7). Thus, an employer could initiate an application to reduce or limit benefits under §48-162.01(7) at any time after an award is entered. Second, it appears that it is allowable

to utilize §48-162.01(7) to reduce or limit an employee's benefits for a period of time prior to a modification proceeding. The *Lowe* decision indicates that use of §48-162.01(7) is not limited by the holding in *Starks v. Cornbusker Packing*, which states that a modification award cannot be applied retroactively beyond the date the application for modification is filed. The Court in *Lowe* determined that it was permissible to reduce the employee's benefits for unreasonable refusal to participate in the vocational program during the period of time before the modification proceeding was filed. Thus, it appears that the use of §48-162.01(7) to obtain a reduction in benefits is not subject to the same

time requirements as an application to modify.

Employers should keep in mind the possibility of utilizing §48-162.01(7), under appropriate circumstances, in defending against modification claims. An application to reduce or limit benefits under §48-162.01(7) may also be utilized outside of a modification proceeding when the employee unreasonably refuses to participate in a physical, medical, or vocational plan. When §48-162.01(7) is utilized in either type of situation, employers should make sure that appropriate evidence is developed and presented in order to give such a position the best possible chance for success.

BAYLOR EVNEN CLIENT SEMINAR

Baylor Evnen will host its annual client seminar on March 27, 2008. The focus of this year's seminar will be employment issues. The general topics to be addressed in this full-day seminar include:

- The Hiring Process: Background Checks and Drug Screening
- Managing Employee Terminations
- The Latest ADA Developments and Trends
- USERRA / Military and Family Leave
- Handling Unemployment Hearings
- Return to Work Strategies
- Retaliatory Discharge and Retaliatory Demotion Claims
- EEOC Claims

If you are interested in attending or have questions, please call Susan Blackwell at (402) 475-1075 or e-mail sblackwell@baylorevnen.com for additional information. We hope you can join us.



NOTES FROM THE FIRM

In October, **Walt Zink** spoke about negligent hiring at the Nebraska Trucking Association's annual convention.

Also in October, **Chris Ferdico** was one of the Nebraska representatives attending the American Inns of Court annual Celebration of Excellence dinner and presentation hosted at the United States Supreme Court in Washington, D.C.

In November, **Chris** spoke to Lincoln employers about managing military employees. Baylor Evnen sponsored the event in conjunction with the Lincoln Chamber of Commerce.

In December, Baylor Evnen transportation lawyers **Chris Ferdico**, **Steve Gealy**, **Randy Goyette** and **Walt Zink** presented an in-house seminar for adjusters to discuss handling investigations of large motor freight accident claims.

To find additional newsletter articles, go to our website at www.baylorevnen.com.

This Baylor Evnen publication provides substantive information and reflects the firm's opinions and views on current issues. The content is not legal advice. It cannot replace consultation with an attorney on specific matters, nor does it create an attorney-client relationship.