

# WORKERS' COMPENSATION NEWSLETTER

## General Tire Worker Receives \$79,252.96 Settlement For Repetitive Trauma Injury

In a recent case which I handled before the Illinois Industrial Commission, a 35 year-old Mt. Vernon man was awarded a settlement of \$79,252.96 for bilateral carpal tunnel syndrome and bilateral tennis elbow. Prior to trial, General Tire sent the employee to a company doctor in Chesterfield, Missouri. The company doctor testified that the employee's left elbow surgery was unreasonable and unnecessary. On cross-examination, **the company physician admitted that over 90% of the people he saw for work-related injuries were at the referral of the workers' compensation carrier and/or employer.** The company doctor also admitted that his medical report contained many errors and incorrect information.

The treating hand surgeon testified that the employee's continued weakness, pain, and discomfort in his hands and elbows were a direct result of the repetitive work which the employee performed as a truck tire builder.

General Tire disputed liability for the left elbow surgery. However, after the treating physician testified, General Tire agreed to settle the case for \$79,252.96, plus payment of all outstanding medical expenses, including the medical expenses related to the left elbow surgery.

Aggressively prosecuting this case allowed me to help this injured worker obtain this substantial settlement.

## Recent Settlements

### Personal Injury Settlements

01/31/03 Car Accident - Knee Sprain	\$ 11,500.00	Centralia, IL
03/28/03 Car Accident - Back Strain/ Trigger Thumb	\$ 55,000.00	Belleville, IL

### Workers' Compensation Settlements

01/27/03 Backhoe Operator - Back Surgery	\$150,000.00	Centralia, IL
03/05/03 Factory Worker - Foot Surgery	\$ 33,000.00	Belleville, IL

Spring 2003

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- Workers' Compensation
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## Illinois Supreme Court Clarifies Method For Calculation Of Weekly Workers' Compensation Benefits

In the case of Sylvester v. Industrial Commission, the Illinois Supreme Court clarified the appropriate method for calculating the average weekly wage. The average weekly wage calculation can make a substantial difference in the amount of weekly workers' compensation benefits which an injured worker receives and it can also increase the amount of the settlement at the end of the case for permanent partial disability benefits and/or permanent total disability benefits.

Many of my clients ask how the average weekly wage should be calculated. According to Section 10 of the Illinois Workers' Compensation Act, the average weekly wage equals the actual earnings of the employee during the period of 52 weeks, ending with the last day of the employee's last full pay period immediately preceding (before) the date of injury. However, the Act goes on to state that, "If the injured employee lost five or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof..."

Most of my clients have lost at least five days from their work for the year before their date of injury, whether it be through vacation days, personal days, sick days, voluntary layoffs, plant shutdowns, or family vacations. As the court recognized in Sylvester, the correct method for calculating the average weekly wage when an employee loses five days or more (which is almost always the case) the method of calculating the average weekly wage is simple. The method for making the calculation is as follows: Take the total days worked for the year before the injury and divide those days by the number of

days which constitute a regular work week. The next step is to calculate the total earnings (overtime hours should be included at the straight-time rate). Finally, take the total earnings and divide them by the actual weeks and parts thereof which the employee worked.

The injured worker should only include overtime if the overtime is regular or mandatory. The Courts are not exactly clear on what constitutes "regularly worked overtime." I have used as a rule of thumb that if the overtime is incurred over 50% of the time, it would constitute mandatory overtime.

This is a hotly contested issue. In at least one case entitled Mayes v. Ford Motor Company, the Industrial Commission found that working overtime 60% of the time constituted "regularly worked overtime." The courts have consistently held that any mandatory overtime must be included in the calculation of the average weekly wage. All overtime hours are included at the straight-time rate.

Sometimes my clients ask me whether or not vacation pay should be included within the calculation of the average weekly wage. According to the case of General Tire & Rubber v. Industrial Commission, the Fifth District Appellate Court held that vacation pay should be included as part of an employee's average weekly wage. In most cases, including vacation pay would not materially change the rate since the weeks of vacation would be included in the formula for determining the average weekly wage.

Although it may be a time consuming process, every employee should review their wage records to determine whether or not they are receiving the correct amount of weekly workers' compensation benefits. One

word of caution - be confident that your calculation of the average weekly wage is correct before requesting an adjustment by the workers' compensation carrier. I have had occasions where my client demanded that the workers' compensation carrier review its figures concerning the average weekly wage, only to find out that the workers' compensation carrier was paying more than the injured worker was entitled to. In that specific case, the workers' compensation carrier terminated benefits immediately resulting in my client not receiving any weekly workers' compensation benefits until the overpayment had been deducted. This placed a substantial financial hardship on my client and his family.

It is very important to determine the correct calculation of the average weekly wage. If an employee works more than one job, the employer is required to include the second job within the calculation of the average weekly wage if the employer knows that the employee is working a second job.

By determining the correct amount of the average weekly wage, I have been successful in increasing the amount of weekly benefits received by my clients. I have obtained thousands of dollars in back pay for my clients and have also increased their settlements by thousands of dollars based upon closely reviewing the wage records and demanding the appropriate payment of weekly workers' compensation benefits.

If you believe that you are not receiving the correct amount of weekly workers' compensation benefits, please contact me at my toll-free number - (877) 235-2562.

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## 42-Year-Old Coal Miner Awarded Permanent Total Disability, Lifetime Medical Expenses and \$2,647.13 In Mileage Expenses For Low Back Injury

My client, a 42-year-old underground coal miner, injured his low back while removing a structure on October 3, 1997.

He was diagnosed with three herniated discs in his low back. He went to a spine surgeon in Evansville, Indiana. The spine surgeon performed a laminectomy and discectomy. My client's back pain continued. He returned to the Evansville spine surgeon and had a second low back surgery including a fusion with BAK cages. The second surgery failed to relieve my client's low back pain. Thereafter, the surgeon refused to address my client's complaints of pain and practically ignored him.

I sent my client to a neurologist in St. Louis, Missouri for a second

opinion. The neurologist testified that my client was permanently and totally disabled due to his low back injuries and that the surgeries did not improve my client's complaints of pain. I also hired a vocational expert who testified that my client was permanently and totally disabled. To help us prove he was unemployable, my client contacted over 300 prospective employers. He did not receive a single job offer.

Kerr-McGee Coal Corporation terminated my client's weekly benefits and refused to pay for his medications or mileage expenses. The coal company failed to make any reasonable settlement offers prior to trial. The case was tried before the Arbitrator on September

11, 2002. The Arbitrator awarded permanent total disability benefits ordering the coal company to pay my client his weekly workers' compensation benefits for the rest of his life. In addition, the Arbitrator awarded lifetime medical expenses for my client's low back injury and \$2,647.13 in mileage expenses. I also helped my client obtain social security disability benefits so that he could receive a monthly check and additional future medical benefits under Medicare.

Preparation, persistence, and perseverance helped me force the coal company to pay every penny they owed to my client.



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### Choosing The Right Physician Is Crucial For The Injured Worker



The Illinois Workers' Compensation Act provides injured workers with the right to choose two physicians for medical treatment required as a direct result of a work-related injury. The workers' compensation carrier is required to pay all reasonable, necessary, and related medical expenses from any two choices of physician and any referrals from those two choices.

Many injured workers are uncertain as to who they should see for a work-related injury. Many individuals do not have a personal treating physician because they have not been sick or required medical treatment prior to a work-related injury.

It is important to carefully select your treating physician after a work-related injury. You are limited to two physicians and referrals from those physicians. You do not want to pick a physician who is unwilling to help you if you have problems with the workers' compensation carrier. Moreover, many physicians see patients at the referral of workers' compensation carriers. You do not want to select a physician who is biased toward the workers' compensation insurance carrier and who will send an injured worker back to work merely because the workers' compensation carrier wants to limit the amount of weekly benefits paid to the injured worker.

When clients ask me who they should see for a treating physician, I always recommend that they consider two important factors. First, they must pick a physician who provides excellent medical care and treatment and is willing to refer patients to other physicians for treatment that is not particularly within his or her specialty. Second, the physician must be willing to help the patient with issues that arise in workers' compensation cases, such as an employee's ability to work, light duty restrictions, and opinions concerning the permanent residual problems and/or difficulties which an injured worker may experience as a direct result of a work-related injury.

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*Taking care of the injured  
worker is my most important*

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## Great News For Injured Workers... Trials Get Priority!

The new Industrial Commission Chairman, Dennis Ruth, has established new policies for Arbitration, including procedures allowing parties present and ready for trial to be given priority over parties who are not ready or those requesting pre-trials.

According to the Industrial Commission website, Chairman Ruth has established that, "All additional rules or requirements of Arbitrators, as a condition to obtaining a trial, that are inconsistent with a mandate of

Section 16 that procedures be simple and summary shall be immediately discontinued."

This is wonderful news for the injured workers in the State of Illinois. For the past 16 years, I have struggled to get cases to trial only to have the cases delayed by insurance company's requests for additional examinations, additional time to get ready for trial, and whatever other excuse they can think of for not allowing the injured worker to receive a trial.

Governor Blagojevich should be complimented on his selection of Dennis R. Ruth as Chairman for the Industrial Commission. Chairman Ruth has assigned Arbitrator Edward Lee to cover the Carlyle, Mt. Vernon, and Carlinville Dockets until a new Arbitrator is assigned to the territory.

For additional information, please refer to the Illinois Industrial Commission website. You can find the site by clicking on "helpful links" at [www.levenhagen.com](http://www.levenhagen.com).