TIMOTHY BUHMEYER, Plaintiff, v. CASE NEW HOLLAND, INC. and GALLAGHER BASSET SERVICES, INC., Defendants.

3:04-cv-90095

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, DAVENPORT DIVISION

2006 U.S. Dist. LEXIS 42762

June 22, 2006, Decided

SUBSEQUENT HISTORY: Motion for new trial denied by, Motion denied by *Buhmeyer v. Case New Holland, Inc., 446 F. Supp. 2d 1035, 2006 U.S. Dist. LEXIS 61963 (S.D. Iowa, Aug. 29, 2006)*

COUNSEL: [*1] For Timothy Buhmeyer, Plaintiff: Christopher D Spaulding, Berg, Rouse, Spaulding & Schmidt, PLC, Des Moines, IA.; Donald G Beattie, BEATTIE LAW FIRM PC, DES MOINES, IA.

For Case New Holland Inc, Gallagher Bassett Services, Inc., Defendants: Craig A Levien, BETTY NEUMAN & MCMAHON, DAVENPORT, IA.; Martha L Shaff, Betty Neuman & Mcmahon, LLP, Davenport, IA.

JUDGES: ROBERT W. PRATT, Chief Judge.

OPINION BY: ROBERT W. PRATT

OPINION

ORDER ON MOTIONS IN LIMINE

Before the Court are Defendants' Motion in Limine, filed June 13, 2006 (Clerk's No. 41), Defendants' Supplemental Motion in Limine (Clerk's No. 60), filed June 20, 2006, Plaintiff's Motion in Limine (Clerk's No. 52), filed June 19, 2006, and Plaintiff's Supplemental Motion in Limine (Clerk's No. 58), filed June 20, 2006. Plaintiffs filed a Resistance (Clerk's No. 59) to Defendants' Motion in Limine on June 20, 2006. Defendants filed a Resistance (Clerk's No. 57) to Plaintiff's Motion in Limine on June 20, 2006. The Court held a hearing on the motions on June 21, 2006. Trial is scheduled to begin in this case on June 27, 2006.

A. *Defendants' Motions in Limine*

Defendants request that the Court exclude evidence relating to the following six [*2] subject matters: (1) the Iowa Workers' Compensation Division decision awarding Plaintiff penalty benefits and the affirmance of the award of penalty benefits; (2) any or all claims related to settlement of either the workers' compensation case or the bad faith case; (3) any testimony from Plaintiff regarding Plaintiff's medical condition; (4) any damages incurred by Plaintiff for

his alleged loss of use of money; (5) any claim of punitive damages; and (6) hearsay evidence of statements or records from physicians. Each is discussed below.

1. *Administrative decision.*

Defendants first argue that Plaintiff should not be permitted to present evidence of a Deputy Iowa Workers' Compensation Commissioner's decision awarding Plaintiff penalty benefits under *Iowa Code § 86.13*, or of the affirmance of that decision. Plaintiff argues that he should be able to present evidence of Deputy Commissioner Heitland's decision and the decision on appeal because the award of penalty benefits is relevant to his bad faith tort action. In particular, Plaintiff contends that Defendants did not pay the penalty benefits ordered by the Deputy Insurance Commissioner, and that this [*3] failure to pay the penalty benefits is relevant to Plaintiff's bad faith claim.

The case law in this area does not provide a concrete answer to the question whether evidence of an administrative penalty award may be admitted in a subsequent bad faith tort action. In *McIlravy v. N. River Ins. Co., 653 N.W.2d 323, 329-30 (Iowa 2002)*, the Iowa Supreme Court examined whether a decision rendered by the commission under *§ 86.13*, in favor of the plaintiff, should be given preclusive effect in a subsequent bad faith tort action brought by the plaintiff. The court concluded that issue preclusion was inapplicable because the burden had shifted from the defendant employer/carrier to the plaintiff. The court explained that in the administrative procedure, the burden was on the defendant employer/carrier to prove that its denial of benefits had a reasonable basis. However, in the civil tort action, the plaintiff, or insured party, bears the burden of proof. *Id.; see also Etten v. U.S. Food Service, Inc., 2005 U.S. Dist. LEXIS 29018, No. C-05-0083-LRR, 2005 WL 3054554, at *3 (N.D. Iowa Nov. 14, 2005)* (applying *McIlravy* and declining to invoke issue preclusion in favor of the plaintiff). [*4] *Cf. Brcka v. St. Paul Travelers Cos., 366 F. Supp. 2d 850, 857 (S.D. Iowa 2005)* (allowing the employer to use issue preclusion defensively and distinguishing *McIlravy* because the *McIlravy* plaintiff sought to invoke offensive issue preclusion); *Gardner v. Hartford Ins. Accident & Indemnity Co., 659 N.W.2d 198, 203 (Iowa 2003)* (same). The shifting of burdens from defendant to plaintiff, together with the Iowa Supreme Court's holding that offensive issue preclusion is not appropriate in this kind of case, counsels against allowing Plaintiff to present any evidence of the Deputy Commissioner's penalty award.

In *McIlvary,* the court did not address the question whether any evidence of the prior decision could come in at trial in a plaintiff's civil tort action. It appears that some evidence of a Deputy Commissioner's penalty decision was admitted in an earlier case that was reviewed by the Iowa Supreme Court. *See Gibson v. ITT Hartford Insurance Company, 621 N.W.2d 388, 397 (Iowa 2001)*. In *Gibson,* the court concluded that there was sufficient evidence to submit the plaintiff's bad-faith and punitive damages claims to [*5] the jury, where the evidence presented at trial apparently included the deputy industrial commissioner's earlier determination in favor of the plaintiff on the question of penalty benefits. *Id.* The *McIlvary* court distinguished *Gibson* on the ground that *Gibson* was merely a review of the sufficiency of the evidence, but did not address whether such evidence could be given preclusive effect. *McIlvary, 653 N.W.2d at 329*. A district court in the Northern District of Iowa allowed evidence of reports of the Iowa Industrial Commission in a case with facts similar to the current case. *See Reedy v. White Consol. Indus., Inc., 890 F. Supp 1417, 1450-51 (N.D. Iowa 1995)*. In doing so, the court observed: "[T]he issues being litigated here are sufficiently different from those addressed by the reports, which pertain only to termination or continuation of [the plaintiff's] workers compensation benefits, that the reports do not amount to admitting the opinion of an expert witness as to what conclusions the jury should draw in this case." *Id.* Thus, in deciding to admit the Industrial Commission reports, the Northern District pinpointed the primary [*6] concern in this case: that the jury, consisting of laypersons, will defer to the Deputy Commissioner's penalty benefits decision, rather than making independent findings of fact on the current bad faith claim. *See generally Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1105 (8th Cir. 1988)* (discussing the need for trial courts to exercise their discretion to ensure that unfair prejudice does not result from the admission of an administrative report at trial), *overruled in part on other grounds; see also Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1309 (8th Cir. 1984)* (holding that determinations of the Equal Employment Opportunity Commission in Title VII cases are admissible at the discretion of the trial judge, if their probative value is not outweighed by their prejudicial effect); *Fed. R. Evid. 403*. This concern is particularly salient in light of the fact that the Defendants had the burden in the administrative proceeding, but the Plaintiff bears the burden in the current civil case, as the Iowa Supreme Court emphasized in

McIlvary.

This case presents a unique scenario because Plaintiff wishes to [*7] offer evidence that Defendants did not pay the penalty benefits, an allegation that Plaintiff contends supports his bad faith claim. In order to avoid the potential prejudicial effect of this evidence, Plaintiff is ordered to make his offer of proof outside of the jury's presence, at which point the Court will rule on its admissibility. Accordingly, the Court reserves ruling on this question. The Court wishes to make clear that neither party should refer to this potential evidence during voir dire examination or during opening statements.

2. *Claims related to settlement of either the workers' compensation case or the bad faith case.*

Defendants next request that the Court exclude evidence of "[a]ny or all claims related to settlement of either the workers' compensation case or the bad faith case." In his Resistance to Defendants' Motion in Limine, Plaintiff contended that he would offer testimony that Defendants' workers' compensation attorney, Tom Cady, offered to settle his claim for 50 cents, and that this offer is relevant to Plaintiff's claims for bad faith and punitive damages because it demonstrates Defendants' willful and wanton disregard for Plaintiff's rights. At the [*8] hearing on the motions in limine, the parties informed the Court that Plaintiff is no longer planning to call Cady to testify. Accordingly, this portion of Defendants' Motion in Limine is moot.

3. *Testimony regarding Plaintiff's medical condition and psychological damages.*

Defendants next request that the Court exclude "[a]ny testimony from Plaintiff or Plaintiff's witnesses regarding any medical condition or medical damages, including any psychological damages claimed by Defendants' conduct." Defs.' Motion P 3. Defendant states that Plaintiff has not disclosed an expert on the issue of medical or psychological damages suffered by Plaintiff.

Under *Federal Rule of Evidence 402*, relevant evidence is generally admissible unless proscribed by the rules of evidence or other laws. Furthermore, *Federal Rule of Evidence 701* permits a lay witness to give opinion testimony regarding matters that are: "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized [*9] knowledge." *Fed. R. Evid. 701*. Lay opinion testimony about physical or mental condition is routinely admitted in this type of case. The Eighth Circuit has long held that it is permissible for "any witness to testify from observation that a person appeared to be in pain." *Chicago & N. W. R. Co. v. Green, 164 F.2d 55, 63 (8th Cir. 1947)*; *see also Niagra Fire Ins. Co. v. Muhle, 208 F.2d 191, 196 (8th Cir. 2954)*. The Court finds that Defendants' objections pertain more to the weight to be given such testimony, rather than to its admissibility in the first instance. Accordingly, Plaintiff will be permitted to present evidence about his subjective perceptions, including those regarding his emotional and physical state.

4. *Evidence of damages for alleged loss of use of money.*

Defendants argue that Plaintiff should not be permitted to present evidence of damages incurred by Plaintiff for the alleged "loss of use of said money." Defendants correctly state that Plaintiff should not be able to recover interest which he has already received, or will receive, pursuant to Iowa law. *See, e.g., Iowa Code § 85.30* [*10] (awarding interest for compensation payments made pursuant to Iowa Workers' Compensation statute). Plaintiff contends that he should be able to recover compensatory damages for his loss of use of money, above any amount recovered as interest.

It is well-settled that a plaintiff alleging a bad-faith denial of worker's compensation benefits may recover compensatory damages for emotional distress. *See Niver v. Travelers Indem. Co., 412 F. Supp. 2d 966, 2006 WL 1545483, at * 15 (N.D. Iowa 2006)* (examining Iowa law). A more difficult question is whether Iowa law permits litigants to recover damages for economic loss. In *Niver,* the Northern District of Iowa concluded that Iowa law does permit such recovery if the situation calls for it. *Id.* Examining cases in Iowa and other states, the court noted that the Iowa Supreme Court upheld a jury verdict awarding damages for "'economic loss arising from the premature dissipation

of the plaintiff's assets,'" and that courts in other states have explicitly recognized that a bad faith claimant may recover additional economic losses proximately caused by the bad faith acts. *Id.* (quoting *Nassen v. Nat. States Ins. Co., 494 N.W.2d 231, 237-38 (Iowa 1992)* [*11] and citing *Izaguirre v. Texas Employers' Ins. Ass'n, 749 S.W.2d 550, 553 (Tex. App. 1998)*; *Travelers Ins. Co. v. Savio, 706 P.2d 1258, 1270-71 (Colo. 1985))*. The Court finds the Iowa Supreme Court's decision in *Nassen* to be on point. Although the Iowa Supreme Court did not discuss the merits of the trial court's decision to allow damages for economic loss, the court clearly sustained the award for economic loss due to dissipation of assets. *Nassen, 494 N.W.2d at 237*. Accordingly, Plaintiff will be permitted to present evidence of "loss of use of the money," beyond that covered by interest.

5. *Claim for punitive damages.*

Defendant requests that Plaintiff's claim for punitive damages be excluded until "the proper showing has been made pursuant to *Iowa Code Chapter 668A*." It is the Court's practice to allow a plaintiff to present a claim for punitive damages if, and only if, the jury returns a verdict for the plaintiff. Accordingly, if the jury returns a verdict for Plaintiff, he will be permitted to present his claim for punitive damages after the verdict is returned. No discussion or evidence of punitive damages will be allowed [*12] unless and until Plaintiff prevails before the jury with respect to compensatory damages.

6. *Physician statements.*

In their Supplemental Motion in Limine, Defendants move to exclude "[a]ny and all hearsay statements from any physical related to medical diagnosis, treatment or opinions expressed by physicians." Defendants state that no physicians are listed as witnesses in this case. Plaintiff will be permitted to present evidence of his physician's records, subject to the authentication requirements of *Federal Rules of Evidence 803(6)* and *902*. And, as discussed above, Plaintiff may present lay opinion testimony of his subjective physical and emotional state. Accordingly, Defendants' motion to exclude hearsay evidence is granted only to the extent that the hearsay is not subject to the business records exception or some other exception to the hearsay rule.

B. *Plaintiff's Motions in Limine*

Plaintiff requests that the Court exclude evidence relating to the following subject matters: (1) testimony from attorney Tom Cady; (2) evidence about whether Plaintiff ever received any type of government benefits, [*13] including unemployment insurance; (3) evidence or arguments that would violate the "Golden Rule," such as how an award would affect the jurors in their own lives; (4) evidence or arguments concerning the effects of lawsuits or the abundance of lawsuits; (5) "Money Tree" argument, that is, evidence or arguments concerning how much could be earned with a sum of money if it were invested at the present time; and (6) evidence or arguments that Plaintiff has already been compensated for his worker's compensation claim. Each is discussed below.

1. *Testimony from Tom Cady.*

As discussed above, the parties stated at the hearing on June 21, 2006, that Tom Cady will not be called as a witness. Accordingly, this portion of Plaintiff's motion is moot.

2. *Evidence about government or unemployment benefits.*

Plaintiff urges the Court to exclude any evidence about whether Plaintiff has ever received any type of government benefits, including unemployment benefits. Defendants state in their Resistance that they do not plan to present any such evidence. Accordingly, this portion of Plaintiff's motion is granted.

3. *"Golden Rule" evidence or arguments.*

Plaintiffs next argue that the [*14] Court should prohibit any argument designed to "make the jury reach their

verdicts in the case based upon how such a decision will affect their own lives." In response, Defendants state that they do not plan to present any such arguments. Although the "Golden Rule" takes many forms, it generally stands for the proposition that "a jury's decision should be based on the relevant facts in evidence and the applicable law[,] not sympathy, prejudice, emotion, or some other extraneous matter." Timothy J. Conner, *What You May Not Say to the Jury, 27 No. 3 Litig. 36 (2001)*. Because such arguments are inappropriate, this portion of Plaintiff's motion is granted.

4. *Effects of Lawsuits.*

Plaintiffs request that the Court exclude any evidence or argument about the effects of lawsuits on society, such as arguments about the abundance of lawsuits, frivolous lawsuits, or the costliness of lawsuits. The Court will conduct a limited, balanced inquiry during voir dire to ascertain whether the prospective jurors have biases in favor of or against either of the parties in this matter, including biases that may stem from perceptions of the justice system. Aside from limited inquiry during voir [*15] dire, such topics are generally not appropriate, and are closely related to the "Golden Rule," discussed above. Because of the possibility that these topics will arise during voir dire, and because of the broad nature of Plaintiff's request, the Court will reserve ruling on this question. The parties may object to any line of evidence or argument they deem inappropriate at trial.

5. *"Money Tree" argument.*

Plaintiffs next request that the Court exclude any evidence or arguments "concerning any questions, testimony or comments with respect to annuity contracts and/or how much could be earned with a sum of money if it were invested at the present time." Plaintiff contends that such arguments are irrelevant and prejudicial. The Court agrees that such arguments, used by Defendants in an attempt to improperly influence the jury on the question of damages, would be inadmissible because they are irrelevant and prejudicial. On the other hand, Defendants and Plaintiff seem to agree that it may be necessary to instruct the jury to reduce any award for future damages to present value. *See Iowa Code § 624.18(2)*. Accordingly, the Court will rule on objections [*16] to any such evidence at the time of trial.

6. *Evidence that Plaintiff has already been compensated.*

Plaintiff next requests that the Court exclude "[a]ny testimony, comment, or argument that Plaintiff has already been compensated for his workers' compensation claim, including issues pertaining to penalty benefits." Pl.'s Supp. Mot. P 6. Plaintiff contends that any prior compensation award is irrelevant to this separate, common law claim for bad faith. In particular, plaintiff argues that Defendants should not be permitted to characterize the current lawsuit by Plaintiff as an attempt to make a "double recovery."

As discussed above in part A.1 of this order, the question whether evidence of an administrative penalty award may be admitted in a subsequent bad faith tort action is not clearly settled under Iowa law, although it appears that admission of such evidence is in the discretion of the trial court. At oral argument on the current motions in limine, Defendants argued that evidence of the amount of the compensatory award, but not the penalty award, must be admissible at trial in the bad faith claim. While the Court agrees with Plaintiff that Defendant may not characterize [*17] this lawsuit as an attempt by Plaintiff to make a "double recovery," evidence of the prior compensation may be relevant for other purposes. *See Fed. R. Evid. 403* (stating that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). Accordingly, and in the interest of fairness, the Court will impose the same rule on the Defendants as on the Plaintiffs: Defendants are ordered to offer any evidence of a prior award outside of the jury's presence, at which point the Court will rule on its admissibility. Accordingly, the Court reserves ruling on this question. Again, the Court wishes to make clear that neither party should refer to this potential evidence during voir dire examination or during opening statements.

CONCLUSION

For the reasons discussed above, Defendants' Motions in Limine (Clerk's Nos. 41 and 60) are GRANTED in part and DENIED in part. Plaintiff's Motions in Limine (Clerk's Nos. 52 and 58) are also GRANTED in part and DENIED

in part.

IT IS SO ORDERED.

Dated this 22nd day of June, 2006.

ROBERT W. PRATT, Chief Judge

[*18] U.S. DISTRICT COURT