



QUARTERLY UPDATES

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Volume 1, Issue 1

Ganan & Shapiro
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Editor's Remarks

We welcome you to our new newsletter format. In the first edition of the quarterly newsletter, we will review Commission and Court decisions which affect the workers' compensation practice, and we will present timely discussions of legislative changes or trends which need to be addressed to achieve a successful and cost effective resolution of claims.

We are extremely pleased to open this issue by noting three recent decisions which our firm won. These three cases address issues of medical history, timely notice, accident in the course of employment, causal connection and the Statute of Limitations. A reading of the summary of these decisions will provide a roadmap for the claim handler when dealing with these issues. We feel these decisions evidence the fact that a well prepared and documented defense can result in a favorable decision for the employer.

In addition to reporting on these cases, as well as other decisions we feel are important to the practice, Ganan and Shapiro has recently conducted seminars for clients covering subjects as diverse as "how and when to select an IME doctor", "Medicare set asides", "how and when to use the utilization review section of the Act" and "how to calculate average weekly wage". In addition to our larger and public seminars, we are often requested to present seminars which fit a client's particular needs, and these are usually at our client's premises. We are happy to do this, just ask.

Cliff Ganan
Editor-in-Chief

Vincient Didia v. Levy Restaurant

Arbitrator Williams has denied benefits to a concession stand worker at Wrigley Field who claimed to have passed out at work due to the heat. He sought benefits for a fractured ankle which allegedly resulted from the fall.

The medical evidence failed to demonstrate he had ever related passing out to the heat, rather, had consistently reported it was due to flu-like symptoms he had been

experiencing for several days. The medical records also failed to place exactly when the ankle fracture occurred, as the claimant had been able to ambulate freely upon initial presentation in the emergency room and it was not until several hours later that he began complaining of pain.

The arbitrator denied benefits, finding no evidence of an accident arising out of and in the scope of employment.

The decision has been appealed to the Commission and is awaiting further litigation.

Estate of George Jernigan v. Ill. Workers' Compensation Comm'n, et al

The Circuit Court has now affirmed the denial of benefits by Arbitrator Fratianni and later the Commission, finding no accident, no notice, no causal connection and that claimant had failed to file within the statute of limitations.

The accident, notice and causal connection arguments were fairly standard: Jernigan claimed an injury to his low back when he claimed to have fallen into a large pit on August 2, 2000. His personal work diary failed to document the event, as did any medical records during the ensuing four years of treatment. He completed an "accident report" about 10 weeks after the claimed incident which related "years" of low back pain to regular work duties, but which failed to provide any

specific incident.

The majority of Arbitrator Fratianni's decision focused on these issues in denying benefits.

However, the arbitrator also denied the claim on statute of limitations grounds. Jernigan had not filed his Application for Adjustment of Claim until September 17, 2004, clearly well beyond the three year statute of limitations.

There were no issues of extending the statute based on workers' compensation payment of either medical bills or temporary total disability, as this claim had always been denied. However, Jernigan had purchased a Met Life long term disability policy which was actually continuing to provide him weekly benefits at the time of the

arbitration hearing in 2006. He also had continuing group medical coverage as a condition of the Met Life policy.

His employer had been dissolved in bankruptcy in February, 2002 and the successor corporation had purchased the assets but not the liabilities of his employer. He argued receipt of these payments extended the statute of limitations under Section 8(j) of the Act. Arbitrator Fratianni disagreed, finding no evidence was introduced which established the Met Life policy was paid "wholly or in part" by the "employer."

The Commission and now the Circuit Court of Cook County have affirmed, without further findings. Jernigan's attorney has already indicated an

intention to appeal to the Appellate Court, and this will continue to be an interesting matter.

Lucas Harty v. G.W. Thiel

Arbitrator Hennessy denied benefits to a construction worker who claimed a knee injury but could not be precise as to where it had occurred, had failed to timely report it, and had continued to participate in multiple outside sporting activities including playing on several softball leagues.

The employer had been particularly diligent about documenting all interaction with the claimant, during none of which he reported any claimed work injury, and it was not until after he had been laid off for the season about eight weeks later that he first claimed a work injury and sought

medical attention.

The decision is not being appealed and is final.

Illegal Alien Entitled to Odd-Lot Perm-Total Award

Economy Packing v. IWCC, 387 Ill. App. 3d 283 (2008)

1st District:

Claimant was an undocumented Alien working for Economy Packing when she sustained injuries in the course of her employment.

The Commission affirmed the Arbitrator’s decision of permanent total disability under the odd-lot theory. The Circuit Court of Cook County affirmed the Commission and Economy appealed. The Appellate Court held: 1) Aliens are considered “employees” under the Act; 2) field preemption

does not bar an award of PTD to undocumented aliens; 3) the award of PTD benefits to an undocumented alien is not precluded by conflict preemption; and 4) evidence supported Commission’s finding that Claimant was permanently and totally disabled.

In determining aliens are employees under the act, the Court looked to 820 ILCS 305/1(b)(2) (West 2002) for the definition of “Employee” which states “[e]very person in the service of another under any contract of hire . . .

including aliens. While the term “aliens” was not defined, the Court looked to the plain meaning of the word in reaching the conclusion that undocumented aliens were covered by the act.

The Court next turned to whether the Immigration Reform and Control Act of 1986 (“IRCA”) preempted an award of workers’ compensation to an undocumented claimant.

In concluding IRCA did not preempt workers’
(Continued on page 4)

Intoxication Bars Claim of Benefits

Powell v. Int’l Crown Construction,

Our office was successful in reversing an award of over \$250,000 in temporary total disability, medical bills, and permanency to a construction worker who went out drinking with co-workers at 11:30 am on a windy day.

Several hours, and several drinks later, the worker returned to the job site to retrieve their vehicles and drive home. The Claimant and an equally intoxicated foreman decided to go on to a 20 foot roof to

complete another run before leaving for the day.

At the time of the fall, the Claimant had a blood alcohol count of over .248, and testified he did not recall anything after leaving the tavern. Within minutes of reaching the roof, Claimant fell through the open roof to the cement floor below and sustained several injuries, including a burst vertebral fracture.

Arbitrator Williams awarded 30% of a person, significant temporary total disability, and medical

bills, reasoning that as the claimant’s foreman was one of the two up on the roof, the claimant had been “ordered” back to work and thus was in the scope of his employment.

The Commission reversed Arbitrator Williams’ decision and noted where evidence of intoxication is significant enough to hold as a matter of law that the injury arose out of the drunken condition and not the employment, recovery under the Act will be denied.

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Illegal Alien Entitled to Odd-Lot Perm-Total Award

Economy Packing v. IWCC, 387 Ill. App. 3d 283 (2008)

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compensation benefits awards, the Court first analyzed whether field preemption applied. The Court stated field preemption applies where a federal law covers an area of law so thoroughly there is no room for the States to supplement it.

In holding field preemption did not apply, the Court cited IRCA's legislative history which indicated the statute "was not intended to diminish labor protections in the existing law."

The Court next turned to whether conflict preemption applied. Conflict preemption is where it is physically impossible to comply with both federal and state law or where the state law

obstructs the purpose of the federal law.

The Court reasoned the award of PTD benefits did not continue a violation of IRCA, and therefore did not conflict with federal policy. Further the Court stated the purpose of IRCA was to diminish the employment magnet that attracts aliens here illegally. The Court explained workers' compensation benefits could not be described as an incentive for undocumented aliens. The Court reasoned excluding undocumented aliens would give incentive to employers to hire such workers because they would not be required to pay them benefits if they were injured. The Court held this would contravene the

purpose of IRCA by creating a financial incentive to hire undocumented workers.

Turning to whether the alien could be permanently disabled under the odd-lot theory, the Court conceded the traditional test for odd-lot disability would not apply to undocumented aliens because, as a matter of law, the alien would always be unemployable and able to show no jobs existed and the employer would never be able to refute that assertion. Nonetheless, the Court held so long as the unemployability was not based on the worker's immigration status a claim could be made under the odd-lot theory for permanent total disability,

"[E]xcluding undocumented aliens would give incentive to employers to hire such workers because they would not be required to pay them benefits if they were injured. This would contravene the purpose of IRCA by creating a financial incentive to hire undocumented workers."

Intoxication Bars Claim of Benefits

Powell v. Int'l Crown Construction,

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The Commission noted Claimant had been drinking for 4 to 4 ½ hours, and had no recollection of anything after leaving the tavern. He had relied on the testimony of co-workers who themselves had been drinking along with the Claimant. One such co-worker, Claimant's foreman, was so intoxicated, he walked

home from the job site in Chicago Heights to Kankakee.

In successfully defending this claim, we secured the testimony of the first police officer on the scene, who noted a strong odor of alcohol on the Claimant's breath, and the drunken behavior of the foreman at the scene.

Much credit should also be given to the claims

adjustor who timely investigated all aspects of this claim.

International Crown Construction avoided liability based on the intoxication of the Claimant.

SAWCA Says “No” to Federal Oversight

The Southern Association of Workers’ Compensation Administrators (SAWCA) has adopted a resolution in opposition to HR 635, a House measure aimed at establishing a National Commission on State Workers’ Compensation.

This National Commission would decide the adequacy of state workers’ compensation laws and mandate alternative or additional remedies. H.R. 635, the National Commission on State Workers’ Compensation Laws Act of 2009, was introduced to the House of Representatives on January 22, 2009. The Bill was proposed as a solution to the finding that serious questions exist concerning the fairness and adequacy of present

workers’ compensation laws in light of the growth of the economy, changing nature of the labor force, and other factors.

Under H.R. 635, the Commission would review the findings of the previous National Commissions on State Workmen’s’ Compensation laws, study and evaluate State workers’ compensation laws in order to determine if the laws provide an equitable system, and study and evaluate whether additional remedies should be recommended to ensure prompt and good faith payment of benefits and medical care to injured workers and their families. The Commission would have the power to hold hearings, take testimony,

received evidence, and minister oaths and subpoena evidence, records and testimony.

SAWCA’s resolution argues the state workers’ compensation system has been successful and has effectively protected injured workers, employers and the public for more than 100 years. These “one size fits all” federal oversight and mandates will prevent states from adopting innovations responsive to their changing needs and will have other adverse consequences.

The Southern Association of Workers’ Compensation Administrators is opposed to HR 635

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No 24-Hour Coverage Amendment Offered by Finance Committee

Thanks to the efforts of employers and insurers making contacts with members of the Senate Finance Committee in opposition to Senator Rockefeller’s amendment C4, the amendment was not offered and was not included in “America’s Healthy Future Act.” The amendment mandated “24-hour health coverage.”

The amendment proposes to merge the medical components of workers’ compensation and auto insurance with health insurance. In a letter to

the Chairman of the Senate Finance Committee, 6 groups of insurers and employers expressed that the integration of the medical components of workers compensation and auto insurance is a very complex issue that would do serious damage to our nation’s workers’ compensation and auto insurance systems.

Health insurance reform is already a major legislative undertaking and this integration would be a very complex issue in its

own right.

The letter provided a list of reasons not to add the Rockefeller Amendment to the pending bill. Among the reasons mentioned were: 1) “24-hour coverage” will not reduce occupational and non-occupational health care costs; 2) workers’ compensation is not a medical program, it is a disability program with a medical component – this merger would result in a loss in “coordinated care”;

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“Health insurance reform is already a major legislative undertaking and this integration would be a very complex issue in its own right.”

EEOC Settles Claim against Sears for \$6.2 Million

The Equal Employment Opportunity Commission (EEOC) recently announced the entry of a record-setting settlement resolving lawsuit against Sears, Roebuck and Co. under the Americans with Disabilities Act (ADA) for \$6.2 million. The consent decree, approved on Sept. 29, 2009, represents the largest ADA settlement in a single lawsuit in EEOC history.

The suit alleged that Sears maintained an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, in violation of the ADA.

The case began when a

former Sears's service technician, John Bava filed a charge of discrimination. Bava was injured on the job, took workers' compensation leave, and repeatedly attempted to return to work. Bava was fired when his leave of absence expired.

Pre-trial discovery in the lawsuit revealed that hundreds of other employees who had taken workers' compensation leave were also terminated by Sears without seriously considering reasonable accommodations to return them to work. In addition to providing monetary relief, the decree includes an injunction against violation of the ADA and retaliation. It requires that Sears will amend its workers' compensation

leave policy, provide written reports to EEOC detailing its workers' compensation practices' compliance with the ADA, train its employees regarding the ADA, and post a notice of the decree at all Sears locations.

The lawsuit, filed in November 2004 is captioned EEOC v. Sears Roebuck & Co., N.E. Ill. No. 04 C 7282. The court will hold a final hearing, currently slated for approximately February 2010, at which time the court will make a final determination as to the fairness of the individual distributions from the \$6.2 million settlement fund.

This case raises concern for businesses with an auto-termination policy in

place for extended absences. This large settlement may lead to governmental attacks on auto-termination policies.

As a result, this case raises questions as to what an HR department should do when an injured worker is off of work and the auto-termination time period passes. HR policies may need refining and employers should use the EEOC case as a warning.

As a precaution, Employers need to follow their auto-term policies, address any issues that come up with pending workers' compensation claims, and keep track of all requests for accommodation and the decisions made.

IME Report Not Enough to Evade Retaliatory Discharge Claims

Grabs v. Safeway, Inc., 2009 WL 3161754 (Ill. App. 2009)

1st District: Recently it was determined that an employer may not rely exclusively on a Section 12 report in deciding to terminate an employee. The Court found that when an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, an employer may not rely solely on an IME in terminating an employee for failing to return to work or for failing to call in his absences.

Due to conflicting evidence, the

determination regarding plaintiffs' ability to return to work can only be made by the Commission. However, a per se standard was not established in the holding of this case.

Plaintiffs were still obligated to establish the element of causation in support of their retaliatory discharge claims. If defendants had a valid basis, which was not pre-textual, for discharging plaintiffs, then the element of causation in support of their retaliatory discharge claims. If defendants had

a valid basis, which was not pre-textual, for discharging plaintiffs, then the element of causation is not met. However, if the plaintiffs can show that they were discharged in retaliation for exercising their rights under the Act, then plaintiffs can establish a claim for retaliatory discharge and the grant of summary judgment may be appropriate.

“[A]n employer may not rely solely on an IME in terminating an employee for failing to return to work or for failing to call in his absences.”

Trier of Fact Could Determine Firing was a Pretext

Herman v. Power Maintenance Contractors, 388 Ill. App. 3d 352 (2009)

4th District. In another recent retaliatory discharge case, a genuine issue of fact remained as to whether refusal to recall a worker was a pretext for filing a workers' compensation claim.

The employer laid the employee off because of medical restrictions resulting from a work-related injury, for which the employee received workers' compensation benefits. After the employee recovered from the injury and sought to go back to work, the employer refused to recall him. The employer's stated reason

was that his work had been unsatisfactory.

The appellate court found a genuine issue as to whether the employer's stated reason for refusing to recall the employee, unsatisfactory job performance, was a pretext for retaliating against him because of the workers' compensation claim.

While the letter the employer sent to the local union stated that the employee had done poor work, the performance evaluations told a different story, as the employee's

supervisors had given him mostly good or excellent ratings and no rating below average. Further, the termination slip said nothing about substandard performance.

The Court concluded a reasonable trier of fact could have inferred that the employer gave a false reason for its refusal to recall the employee and that the employer gave a false reason because the employer was aware retaliation for filing a workers' compensation claim was actionable.

No Personal Comfort Doctrine for Third Parties

Circuit City Stores v. Illinois Workers' Compensation Comm'n, 330 Ill. Dec. 961 (2009)

2nd District- Claimant was entitled to Workers' Compensation benefits for injury sustained in helping a co-worker retrieve a bag of chips from a vending machine.

Petitioner fractured his hip when he assisted his co-worker in shaking a vending machine which had malfunctioned and failed to drop the bag of chips the co-worker had purchased. The Commission awarded compensation under the personal comfort doctrine, however, the Circuit Court of McHenry County

reversed.

On Appeal, Petitioner argued 1) the personal comfort doctrine applies to the [facts of the case]; 2) the doctrine should be extended, as a matter of law, to cover an employee who is injured while coming to the aid of a co-worker seeking personal comfort; and, 3) the Commission did not err in finding that his injuries arose out of and in the course of his employment.

The Court held Petitioner was entitled to compensation for the

injuries he sustained, however, in reinstating the Commission's decision, the Court explained "The [personal comfort] doctrine has never applied, and does not apply, to injuries sustained by an employee while assisting a co-worker who is seeking personal comfort." "[T]he so-called 'good Samaritan doctrine' is applicable instead."

"The [personal comfort] doctrine has never applied, and does not apply, to injuries sustained by an employee while assisting a co-worker who is seeking personal comfort."

**Ganan & Shapiro,
P.C.**

Chicago Office

210 W. Illinois
Chicago, IL 60654

PHONE:
312.822.0040

FAX:
312.321.1414

Peoria Office

411 Hamilton
Boulevard, Suite 1006
Peoria, IL 61602

PHONE:
309.637.7313

FAX
309.637.7317

We're on the Web!

See us at:

www.Ganan-Shapiro.com

Wallyball Game in the Course of Employment

Elmhurst Park District v. IWCC, citation pending (2009)

1st District: Claimant was a fitness supervisor for the park district when he agreed to participate in a "Wallyball" game with another off-duty employee and regular customers. Shortly after the game began, Claimant suffered a broken leg.

In affirming the Commission's decision to award compensation to Claimant, the Court held

Section 11 did not apply to the instant case. In support thereof, the Court stated "recreation" was inherent in Claimant's duties as a fitness supervisor and so the Court looked to why Claimant participated.

A review of the testimony lead the Court to believe Claimant participated because part of his duties were to "promote different

classes and programs." As such, the Court determined Claimant's participation was in the course of his employment, as Claimant was participating to accommodate the customers of the park district.

***The Court also noted Claimant had participated on three other occasions and was never disciplined.

No 24-Hour Coverage Amendment Offered by Finance

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3) "24-hour coverage" will not eliminate the need for determining work causation or lower administrative expenses; 4) reducing medical benefits payable under a 24-hour plan will lead to increased litigation against employers, as injured

workers seek to recover medical expenses previously paid on a first-dollar basis; 5)"24-hour coverage" will jeopardize worker safety by eroding the predictive value of workers compensation experience rating and thereby shift costs to safer employers away from less safe employers.

On October 2, 2009 Chairman Baucus released a statement as to next steps for the pending America's Healthy Future Act. The bill will be progressing to the Senate Floor in the weeks ahead without any sign of the 24-hour coverage amendment.

SAWCA Says "No" to Federal Oversight

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SAWCA strongly believes that states should continue as the sole regulators of the workers' compensation system and SAWCA strongly opposes any federal proposals for

mandates, oversight commissions and any other actions that compromise the ability of states to continue serving their workers and employers through effective state workers compensation programs.

*As of October 14, 2009 lists eleven congressmen as co-sponsors/supporters of H.R. 635.

Our Pledge...

Ganan & Shapiro, P.C. pledges to maintain a level of excellence for the clients that have remained loyal to the firm for so many years, and to the new friends that join our family in the future. We

make a commitment to vigorous defense claims, to provide personalized attention, and to meet or exceed the expectations of each of our clients. We will continue to actively represent clients

throughout the state of Illinois. We will also actively participate in statewide and national organizations which further interests of our clients."