

Workers' Compensation Newsletter

Inside this issue:

Zero Awards Exist!	1
Another Settlement Day	1
WC Department Growing	2
Commission News	2
Impact of Arbitrators' Findings	3
Denial of Benefits	4
Schedule IMEs Timely	4

Chicago:

200 N. LaSalle Street
Suite 2700
Chicago, IL 60601
Tel 312.377.1501
Fax 312.377.1502

Oak Brook:

635 Butterfield Road
Suite 240
Oak Brook Terrace, IL
60181
Tel 630.620.9100
Fax 630.620.9108

Memphis:

1922 Exeter
Suite 5
Germantown, TN 38138
Tel 901.753.5537
Fax 901.756.9022

Atlanta:

P.O. Box 800022
Roswell, GA 30075
Tel 770.642.9359
Fax 678.352.0489

www.brycedowney.com

October 2007

Two "Zero" Awards

Our firm recently received two decisions from different Arbitrators wherein we secured zero awards.

In the first case, Richard Lenkov successfully defended Performance Food Group in a fully disputed case based on notice, accident and causation, in a decision rendered by Arbitrator Giordano of Rock Island.

Petitioner, a 47-year-old truck driver, testified that he injured his right shoulder as a result of falling off an icy ramp while delivering food. Despite his testimony that his pain was 7 on a scale of 1 to 10, he failed to see any medical provider for 10 days. Moreover, when he did finally see a doctor, he provided a history of repetitive trauma, rather than a single traumatic event.

Petitioner testified that he gave proper notice to his employer on the day of the accident, a claim disputed by Petitioner's supervisor. Petitioner also admitted that his current position as a truck driver involves occasional heavy lifting, which the arbitrator found to be a more reasonable cause of his recent shoulder surgery than his alleged accident at work.

Arbitrator Giordano found for Respondent on all issues.

In the second case, Carol Cesaretti successfully defended SUPERVALU d/b/a Jewel Food Stores, in a disputed case based upon causation, in a decision rendered by Arbitrator Prieto of Chicago.

Petitioner testified that on May 21, 2005, he worked as a truck driver for Respondent. Petitioner was stacking pallets when he bumped his right knee on a mule, sustaining injury to his knee. Petitioner began treatment within three days of the injury; however, it was not until one year post-injury, May 22, 2006, that Petitioner underwent an injection to the right knee and was diagnosed with right knee arthritis.

The arbitrator agreed with Respondent, finding that there is no causal connection between Petitioner's knee injury and his current condition of ill-being.

Therefore, despite rumors to the contrary, zero awards do exist!

Another Successful Settlement Day

We just completed our second "Settlement Day" of the year, with two more scheduled for November. We settled more than 85% of cases discussed, which is a great success. We encourage all of our clients to consider scheduling at least one settlement day per year in an effort to move cases towards closure.

Our Workers' Compensation Department Still Growing

As many of you already know, our firm is very diverse. We have experienced attorneys with specialties in the following areas: Appellate Advocacy, Business Organization and Operation, Commercial Litigation, Commercial Transactions, Complex Litigation, Construction Law, Labor & Employment Law, Estate Planning, Environmental Law, Intellectual Property and Patent Law, Insurance Coverage, Premises Liability, Products Liability, Subrogation, Real Estate and Property Damage, and of course, **Workers' Compensation**.

Not only are we diverse in our practice areas, we also have several locations including: Chicago, Oak Brook, Memphis and Atlanta. Our firm has expanded and grown to meet almost every client need, and we are very proud to be able to offer such a wide variety of services.

With that said, our Workers' Compensation Department is also growing. We currently have six attorneys in our practice area and are actively seeking to add a seventh attorney to our team. We are very excited about our expansion and will continue to provide you with the best service and care. So, should you have any questions on workers' compensation issues, please do not hesitate to contact Richard W. Lenkov at rlenkov@brycedowney.com or Carol A. Cesaretti at ccesaretti@brycedowney.com or any other member of our team.

Commission News

New Commissioners

Governor Blagojevich appointed Molly Mason and Kevin Lamborn to the Commission. The governor also reappointed Chairman Dennis Ruth and Commissioner David Gore. The new panel assignments are as follows:

<i>Panel Assignments</i>	<i>Panel A</i>	<i>Panel B</i>	<i>Panel C</i>
Employee Representatives:	Molly Mason	Barbara Sherman	David Gore
Public Representatives:	Paul Rink	Yolaine Dauphin	James DeMunno
Employer Representatives:	Nancy Lindsay	Kevin Lamborn	Mario Basurto

Molly Mason filled the position vacated by Commissioner Pigott and serves as the labor representative (effective August 16, 2007). Commissioner Mason holds a B.A. degree in American history and literature from Harvard University, and a J.D. degree from Loyola University.

Kevin Lamborn replaced Commissioner Ulrich and serves as the business representative (effective September 1, 2007). Commissioner Lamborn holds a B.A. degree in political science and criminal justice from Valparaiso University and a J.D. from the John Marshall Law School.

Arbitrator Reassignments

Effective September 25, 2007, Arbitrator O'Malley took over Arbitrator Lammie's Wheaton docket. Effective October 9, 2007, Arbitrator Lammie took over Arbitrator Cronin's role as the arbitrator hearing the pro se cases in Chicago. Arbitrator Cronin has taken over Arbitrator O'Malley's Chicago docket.

2008 Medical Fee Increase

The fees under the fee schedule will increase 2% effective January 1, 2008, as provided by Section 8.2(a) of the Act, wherein the IWCC increases the fees by the percentage change in the Consumer Price Index for the period August 2006-2007. The fees will be posted to the IWCC website before January 1, 2008.

The attorneys at BryceDowney constantly strive to keep you updated regarding the latest developments in Workers' Compensation law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of Illinois and Indiana Workers' Compensation law, please contact Richard W. Lenkov at 312.377.1501 or rlenkov@brycedowney.com, or any member of our Workers' Compensation team. © Copyright 2007 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

Arbitrators' Findings on Witness Credibility and Their Impact

In *S & H Floor Covering, Inc. v. Workers' Compensation Comm'n*, 373 Ill.App.3d 259, 870 N.E.2d 821 (4th Dist. 2007), the Fourth District Appellate Court discusses whether the Commission should give deference to an arbitrator's findings of credibility of witnesses.

Petitioner testified he last worked for Respondent on August 2, 2002. After leaving work that day, Petitioner drove to Wichita, Kansas to install flooring at a friend's home. Petitioner testified that upon arriving in Wichita, he was unable to walk due to severe right knee pain. Petitioner testified he first sought medical treatment with Dr. Mark Hanson on August 28, 2002. Petitioner testified he telephoned "Sandy" at Respondent's office a few days after seeing Dr. Hanson and explained to Sandy that he was suffering from knee problems that would require surgery. Petitioner underwent knee surgery on October 29, 2002. At the time of Arbitration, Petitioner had yet to return to work despite a full duty release with no restrictions.

Respondent called numerous employees to testify in response to Petitioner's testimony. All of Respondent's witnesses contradicted Petitioner's testimony that he sustained an injury at work. Some of the witnesses even testified that Petitioner had told them he injured himself while in Kansas working for his friend.

The arbitrator did not find Petitioner credible and, consequently, found that Petitioner did not sustain an injury arising out of and in the scope of his employment. "The arbitrator noted claimant was able to perform all of his job duties up to his last day of employment with employer. The arbitrator stated something happened to claimant after he left work on August 2, 2002, that dramatically changed his condition, preventing him from being able to walk, drive, or work." Despite the above stated testimony and statements of the arbitrator, the Commission overturned the findings of the Arbitrator relating to Petitioner's credibility.

The Appellate Court discussed the issue of giving deference to the arbitrator's findings on credibility in length. The Appellate Court acknowledged that the Commission exercises original jurisdiction and is not bound by the arbitrator's findings, including those relating to witness credibility. However, the Appellate Court went on to cite and discuss the seminal case on this issue., *Cook v. Industrial Comm'n*, 176 Ill.App.3d 545, 531 N.E.2d 379 (1988). In *Cook*, the Illinois Supreme Court went as far as stating, "while recognizing that the Commission is in no way bound by an arbitrator's decision, we note that the arbitrator's decision is not without legal effect. Further, we note that in performing its role as reviewer of the record, the Commission is at a practical disadvantage as compared to the arbitrator. The arbitrator, having heard the live testimony, is actually in a better position to evaluate that evidence."

Since *Cook* was decided in 1988, multiple cases have found that the Supreme Court in *Cook* inaccurately stated the law. These cases stand for the principal that, "regardless of whether the Commission hears testimony in addition to that heard by the arbitrator, it exercises original jurisdiction and is in no way bound by the arbitrator's findings."

The reason *S & H Floor Covering* is noteworthy is it attempts to reverse the flow of decisions supporting the argument that no deference needs to be given to the findings of the arbitrator, including those relating to the credibility of witnesses. Although the Appellate Court ruled against the findings of the arbitrator in this particular case, the court went on to state, "although not appropriate in this case, we will consider giving credence to *Cook*, which provides for "**an extra degree of scrutiny**" (emphasis added) to be applied to the record in determining whether there is sufficient support for the Commission's decision, especially when the Commission makes credibility determinations regardless of the arbitrator's findings." This statement sends a strong message to the Commission that an arbitrator's findings regarding witness credibility cannot simply be ignored. On appeal, respondents have long argued that an arbitrator's findings that a petitioner is not credible need to be given deference, because the arbitrator, unlike the Commission, was able to view the petitioner while testifying. *S & H Floor Covering* has provided renewed strength to that argument.

Practice Tip: Findings of credibility can impact the decision on a case drastically. Therefore, examine each case for inconsistent statements made by Petitioner. In addition, verify whether there are any witnesses that can contradict Petitioner's history while the events are still fresh in their minds. Lastly, obtain surveillance of petitioners where appropriate, i.e. where there are allegations Petitioner may be malingering. This additional investigation can be time consuming and costly. However, if the investigation leads to an arbitration finding that Petitioner is not credible, we can now be more confident that the Commission will affirm that finding due to the Appellate Court's discussion of an extra degree of scrutiny being applied to Commission decisions.

Denial of Payment of Benefits May Not Be Unreasonable

The Illinois Workers' Compensation Commission recently overturned an arbitrator's award of penalties and attorneys' fees, finding Respondent's conduct was not unreasonable or vexatious. In *Blake v. Village of Mokena*, 07 I.W.C.C. 0851 (2007), the employee injured his right knee in a work accident on June 27, 2005. He continued to work and testified that he worked through his pain for fear of losing his job. He did not seek medical treatment until August 17, 2005, where an MRI revealed a tear of the medial meniscus. Respondent denied payment of temporary total disability benefits for Petitioner's failure to timely seek treatment. Petitioner thereafter filed a petition for penalties and attorneys' fees. At trial, the arbitrator awarded temporary total disability benefits and also, based on Respondent's failure to pay any benefits or authorize treatment, also assessed penalties and attorneys' fees against Respondent.

On appeal to the Commission, the award for penalties and fees was reversed. The Commission noted that there was a gap in time between the accident and when Petitioner first sought medical treatment. Thus, Respondent's denial of benefits, under these circumstances, was not unreasonable and did not merit the award of penalties and attorneys' fees.

Practice Tip: *It is important to remember that respondents should carefully examine each claim on an individual basis when there is a delay in treatment before rendering a decision on the denial of benefits.*

Schedule IMEs Timely

The Illinois Workers' Compensation Commission recently affirmed an arbitrator's denial of Respondent's request made on the day of trial to schedule an independent medical examination under Section 12 of the Act. In *Wright v. Unilever Best Foods*, 01 I.W.C.C. 0752 (2007), Respondent argued that it was entitled, as a matter of right, to assert a defense by obtaining a Section 12 examination. The arbitrator held that Respondent does not have an unfettered and unqualified absolute right to a Section 12 examination, especially when Respondent waits until the start of trial to request a continuance to conduct the examination. The arbitrator found a lack of diligence on Respondent's part by failing to request an examination before trial.

The Commission affirmed and adopted the arbitrator's decision. One Commissioner dissented stating that based on the facts of the case, the denial of the request for a continuance was prejudicial to Respondent and contrary to Respondent's rights under the Act. Moreover, in her view, the continuance would not have prejudiced Petitioner because the medical review was scheduled by Respondent to address new matters that arose in the deposition of Petitioner's treating physician.

Practice Tip: *This case should act as a reminder to respondents to promptly schedule an independent medical examination under Section 12 of the Act, as it is within the arbitrator's discretion to allow or deny a trial continuance requested by respondent on this basis.*

BryceDowney is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations every day while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Oak Brook, Memphis and Atlanta and attorneys licensed in multiple states, BryceDowney is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

- Appellate Advocacy
- Commercial Litigation
- Business Organization and Operation
- Commercial Transactions
- Complex Litigation
- Construction Law
- Creditor/Debtor
- E-Commerce
- Employment
- Environmental Law
- Estate Planning and Administration
- General Counseling
- Insurance Coverage
- Integrated Legal Management
- Intellectual Property
- International Transactions
- Labor
- Patent
- Personal Injury
- Premises Liability
- Products Liability
- Professional Liability
- Property Damage
- Real Estate
- Subrogation
- Toxic Tort
- Transportation and Commercial Vehicle Accidents
- Workers' Compensation