EVANS & DIXON LLC
ATTORNEYS AT LAW

IL Newsletter

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ILLINOIS WC PRACTICE TIPS & TRENDS –

Paul Krauter

Be cautious when selecting physicians through an IME vendor. Recently we have noticed that some IME vendors seem to be "pushing" or recommending certain physicians. This appears to be based on the physician availability for appointments and willingness to adhere to the vendor guidelines. However, this can sometimes lead to a weakened defense and problems with the claim down the road.

For example, we have noticed certain orthopedic physicians on IME vendor panels will agree to examine any part of the body even if it is not part of their regular practice. This might involve a physician examining the spine even though their practice involves treatment of the knee and shoulder. There are no rules under Section 12 of the Workers' Compensation Act that prohibit this activity. However, if the claimant is treating with an orthopedic surgeon that specializes in treatment of the spine and the IME does not perform spine surgery, that case will be difficult to defend.

As we know, the Commission is an employee friendly environment. If the only issue is "IME v. Treater", the claimant typically has the advantage. Therefore, when the case involves a defense based on an IME physician that does not specialize or treat the body part involved it can create significant problem for the employer.

These types of issues often arise prior to the claimant retaining counsel or prior to the case being referred to defense counsel. When the file is referred out with this type of situation, it often results in having to "unwind" the situation. That process can sometimes result in a new IME with higher credibility specializing in the body part involved or an agreed exam. Unfortunately, this results in another IME fee and often payment of TTD or a PPD advance to buy time for the exam.

We have also noticed some IME vendors cautioning our clients about scheduling exams with well-respected physicians because they do not have an agreement to adhere to their particular guidelines. Thus, they sometimes try to push out top notch physicians respected by the Commission in favor of less qualified physicians who will follow their rules.

This is certainly not to suggest that IME vendors should not be used. We understand the advantages these companies provide regarding time management, pricing, and quality control. However, we do not recommend summarily accepting their recommendations unless you are familiar with the physician they are suggesting.

IME's are about match-ups. If the claimant is treating with a chiropractor for multiple body parts then it might be wise to choose the IME with the quickest availability and be less concerned about their specialization. If the claimant is treating with an orthopedic physician that specializes in the foot and ankle, then you should choose an equal match-up.

The IME vendors are typically not familiar with the reputation of the physicians at the Commission. They have not deposed the physicians and are not familiar with their demeanor. They do not know if a Arbitrator holds a particular physician in high regard or with disdain.

We recommend the following:

• Ask the IME vendor if that physician has an active treating practice or does mostly medical-legal exams.

• Ask the IME vendor if the physician has a sub-specialty.

• Ask the IME vendor if the physician regularly treats the body part to be examined and if so how often.

• Ask the IME vendor how many surgeries a year the physician performs to the body part to be examined.

• Ask the IME vendor if they have information regarding how that physician holds up at the Commission. Are they familiar with any recent Commission decisions issued in reliance on the opinion of that physician?

• Reach out to defense counsel (even if the case is not litigated) and inquire about the physician being recommended.

• Remember that sometimes there is a reason why a physician has availability for a quick exam. It might be worth paying several weeks of TTD to wait for a more qualified physician.

EVANS & DIXON, LLC RECENT WINS

Jesse Lanshe recently secured a win for defense in ***Jose Valdez v. Travel Centers of America***. Petitioner, a mechanic, who had a decades-long history of bilateral shoulder pathology, had recently settled a prior bilateral shoulder claim from 2018, on a fully disputed basis, with the same Respondent. In that prior claim, irrespective of accident/causation, it was unclear whether Petitioner had actually reached MMI, due to his continued complaints and the treater's recommended future treatment at his last office visit in Sept. 2018.

The disputed settlement contracts were approved in April 2019, but Petitioner began treating again (with a different treater) in May 2019, alleging an onset of pain one month prior. Petitioner had not informed the arbitrator in the prior claim of his continued pain when the settlement contracts had been approved.

Petitioner continued to treat through May, June and July of 2019, when a third treater recommended surgery, without knowing the full extent of Petitioner's prior bilateral shoulder pathology. At that point, more than 50 days after seeking treatment in May, Petitioner provided notice to Respondent, but did not make clear to the supervisor that he was alleging a new claim. The supervisor believed it to be a continuation of the 2018 claim; in part due to Petitioner's reference to the surgical recommendation resulting from "years" of work-related activities.

Petitioner ultimately underwent conservative treatment for the left shoulder, and a right shoulder replacement resulting in a permanent 50lb. lifting restriction.

At trial, Respondent offered multiple defenses, including: accident, causation and notice. These defenses were based in part on the suspicious timeline of the disputed 2018 claim, the dubious MMI finding in the 2018 claim, Petitioner's failure to advise the Commission of his continued complaints when contracts were approved in April 2019, his immediate resumption of treatment in the month following contract approval, the lack of symmetrical pathology on shoulder imaging (indicating that the pathology was not work related) and Petitioner's failure to provide notice until well after the 45-day period prescribed by the Act.

Ultimately, the arbitrator relied on the notice factor, noting that Petitioner knew or should have known of his alleged work-related accident at least as of May 2019 when he resumed treatment. The arbitrator found that Petitioner failed to provide notice to Respondent within 45 days as the Act required and denied his request for payment of medical bills, TTD and PPD.



Case Law Updates – *Jesse Lanshe and Caroline French*

Smith v. Joliet Public S.D. 86, 18 WC 035748 30 ILWCLB (Ill. W.C. Comm 2022)
Prepared by Jesse Lanshe

Petitioner (a custodian) was returning from a twice daily break period (while clocked in), when he slipped on an icy ramp, injuring his hip/back and left hand. Petitioner did not ascend the ramp from its base, but rather from its side. Per Respondent's witness, this side

maneuver was practiced by employees on a regular basis and resulted in no reprimands.

Respondent argued that the side maneuver was a risk personal to Petitioner (i.e. a short cut), removing him from the scope of his employment. Respondent cited prior cases; one where a Petitioner had jumped over a puddle and one where a Petitioner had taken a short cut down a grassy slope. In both instances, the courts had found that those Petitioners had taken personal risks, either for convenience or by poor choice.

The arbitrator rejected Respondent's argument (and the Commission affirmed) on the basis that there was no substantial deviation from the path to the ramp, such side maneuvers were practiced by employees on a regular basis and this had only involved a simple step up to the ramp. It was noted that Petitioner may have been safer had he accessed the ramp from the base, but failing to do so did not rise to the level of personal risk.

It was noted that, per the Segler decision, "despite the fact that an employee chooses an unreasonable and unnecessary risk, the employer may, nonetheless, be held liable if he has knowledge of or has acquiesced in such a practice or custom."

Practice Tip/Takeaway: enforce safety rules strictly and uniformly. Allowing employees to bend the rules on occasion could result in transforming a personal risk into a compensable accident.

McGuire v. ADM, 22IWCC0241 and 18 WC 17331

Prepared by Jesse Lanshe

Petitioner (an operator) came to work 30 minutes early and went to sit at a table in the break room. While straddling the attached side-bench, the table flipped, resulting in a right arm injury. While the table at issue was approximately 1.5 feet longer than the other tables, there was no defect in the table, which had the same number of brackets as the other tables. Respondent confirmed that, while no job duties occur in the break room, it was customary for employees to show up and wait in the break room prior to clocking in.

At trial, the issue was whether the accident arose out of Petitioner's employment. The arbitrator cited prior cases holding that injuries on an employer's premises, going to or from employment, within a reasonable amount of time before or after work, are compensable.

However, the arbitrator noted that Petitioner weighed over 360 pounds and chose to sit on/straddle the bench at the end of the bench, resulting in the upturned table and Petitioner's corresponding sliding/falling off of same.

Ultimately, the arbitrator found that the accident was a personal risk, due to Petitioner's weight and the decision to straddle the bench in the manner chosen (i.e. physics). The Commission affirmed, with one commissioner dissenting (opining that the longer table was defective as it did not have more brackets than the shorter tables).

Practice Tip/Takeaway: ensure to provide employees with safety training, even if the subject would be mundane and obvious to a typical person. Hold railings, watch your step, etc.

Randall Burns v. City of Chicago, 09WC043763, 30 ILWCLB 104 (Ill. W.C. Comm. 2022)

Prepared by Caroline French

Facts: Petitioner worked for Respondent as a Disease Control Investigator. As a part of his job duties, he was required to travel to various locations. He would also deliver medications to patients and drove patients to the clinic. On October 5, 2009, while traveling around for work, Petitioner was rear-ended by another vehicle involved in a police chase. Petitioner injured his right wrist, right knee, neck and back. Petitioner achieved almost all of the goals set by his physical therapist by October 1, 2010. He was released to return to work without restrictions on October 4, 2010. Petitioner retuned to the physician on October 15, 2010, and noted that he had no cervical pain and that he was tolerating his full duty work. Petitioner was placed at MMI. On December 1, 2010, Petitioner presented to the ER and reported his neck pain had returned in mid-November after he slept on his couch for two nights.

Arbitration Decision: Petitioner was awarded medical, TTD, and permanency benefits to the right wrist, right knee, neck and back.

Commission Decision: Upon review, the Commission clarified the Arbitrator's decision, as

the Arbitrator failed to directly address whether the Petitioner's on-going cervical spine

complaints were causally related to the work accident. The Commission found Petitioner was at MMI for his cervical spine with full resolution of his work-related condition on October 15, 2010.

Analysis/Rationale: The Commission noted the severity of Petitioner's cervical symptoms on December 1, 2010, were noticeably more severe than his recorded complaints in October of 2010. The Commission ruled that where a Petitioner is declared at MMI for a work related cervical condition with documented resolution of pain and the ability to perform full and unrestricted work and develops severe cervical pain a month after being declared at MMI noted to have arisen from an alternative source, such as sleeping on a couch for two nights, there is sufficient evidence to conclude the Petitioner's current condition of ill-being is no longer related to his work injury subsequent to the date he was declared to be at MMI.

If you have any questions about these cases or recent decisions please reach out to:

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NOTES, EVENTS & VOLUNTEERS

- Effective October 17, 2022, Joliet-based Rosario Cibella & Associates joined with Evans & Dixon, LLC. This partnership has added two members (Ross Cibella and Jacob Schneider) to the firm's roster of full-time attorneys, and a new office location in Joliet, IL increasing the firm's footprint to eight different cities.

- The addition of Ross and Jake has also allowed the firm to add the state of **Indiana** to our geographic coverage! We will be hosting an Indian focused workers' compensation webinar in January – stay tuned!

- This past week we hosted a webinar titled, "*The Anatomy of a Workers' Compensation Claim: Comparing and Contrasting Illinois vs. Indiana*". If you did not get a chance to listen in, click HERE for the recording.



New Joliet team!

- For folks who live in the St. Louis area, our firm will be hosting a holiday party on Monday, December 5th from 4:30 - 8:30 PM at Westport Social. All are welcome to attend – registration and event details can be found HERE.

GETTING TO KNOW: Jacob Schneider



HOW LONG HAVE YOU BEEN WITH E&D?

I recently came from the Law Firm of Rosario Cibella & Associates LTD. My first day with Evans & Dixon was October 17, 2022

WHAT'S THE TOP DESTINATION ON YOUR MUST-VISIT LIST?

I would like to go to South America, but also would like to travel so many other places

IF YOU HAD TO TEACH A CLASS ON ONE THING WHAT WOULD IT BE?

Advocating for children and teaching children how to advocate for themselves

WHAT ARE SOME OF YOUR HOBBIES & INTERESTS OUTSIDE OF THE OFFICE?

Anything outdoors, tinkering, building things, and home projects

WHAT'S YOUR FAVORITE TEAM TO ROOT FOR?

Chicago Blackhawks

WHAT IS SOMETHING ABOUT YOU THAT PEOPLE WOULD NEVER GUESS?

I am fascinated with exploring different cultures and foods.