

LEGAL LINES

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- Workers' Compensation Developments
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Front of the Line

Employer's IME Rights Upheld

By Jeffrey A. Redick

The Appellate Court of Illinois recently issued a decision in which it sustained an employer's defense to payment of TTD benefits in a case where the Petitioner failed to attend an independent medical exam (IME). The decision reaffirms the statutory requirements in Section 12 of the Illinois Workers' Compensation Act (Act).

The case *R.D.Masonry, Inc. vs. The Industrial Commission*, 2004 WL 1171361 (1st Dist. 2004) involved a Petitioner that allegedly sustained injuries as part of his employment with the Respondent. Subsequent to the Petitioner filing a request for benefits the Respondent scheduled an IME. That exam took place as scheduled. Based on the examiner's report the Petitioner's claim for benefits was denied.

Thereafter, a hearing pursuant to Section 19(b) of the Act was conducted and the Arbitrator found that the Petitioner sustained a compensable injury and was entitled to benefits under the Act. Specifically, the Arbitrator found that the Petitioner was temporarily and totally disabled through the date of the hearing and awarded TTD benefits. The Arbitrator specifically found that the independent medical examiner's opinion's were "non-persuasive," but the Petitioner's request for penalties was denied.

The Respondent sought review of the Arbitrator's decision by the Illinois Industrial Commission (Commission). While the review was pending, another exam was scheduled with the same independent medical examiner. The Petitioner's attorney instructed the Petitioner not to attend the second exam. Subsequently, the Respondent refused to pay the Petitioner TTD benefits from the date of the second scheduled IME which the Petitioner refused to attend. A second hearing pursuant to Section 19(b) of the Act was conducted. At the second 19(b) Hearing, the Arbitrator found that the Petitioner was not entitled to any benefits after the date of the second scheduled exam as a result of the Petitioner's failure to attend said exam. The Arbitrator's decision was appealed. The Commission modified the decision of the Arbitrator and awarded the Petitioner TTD benefits through his release to work, thereby overturning the Arbitrator's decision related to the denial of TTD benefits as a result of the Petitioner's failure to attend the Section 12 exam. The Commission based its award on the Appellate Court's decision in *Fenci-Tufo Chevrolet, Inc. vs. The Industrial Commission*, 169 Ill.App.3d 510, 523N.E. 2d 926 (1988).

Although the Commission found that the Petitioner was not required to attend the second scheduled IME and his failure to attend did not constitute a defense to TTD benefits, it found that the Petitioner's need for further treatment and his work status as of the time of the second scheduled examination were not known. As such, the demand for the second IME was for a proper purpose and not for the purpose of harassment.

The decision of the Commission was affirmed by the Circuit Court. That decision was then appealed to the Illinois Appellate Court. The Appellate Court found that the Petitioner's failure to attend the IME was in violation of Section 12 of the Act. Therefore, Petitioner's failure to attend the examination constituted a basis for denial of TTD benefits. As such, the Appellate Court overturned the decision of the Commission and Circuit Court.

The Court found that the Commission erred, "as a matter of law" in awarding TTD benefits to the Petitioner for the period of time between the second scheduled exam and the subsequent release from care. The Court held that where an employee refuses to submit to an IME pursuant to Section 12 of the Act, the employee's rights to compensation shall be suspended until the employee has submitted for the exam.

The Court found Section 12 to be governing authority and relied upon the plain meaning of the statute in its decision. Specifically, Section 12 states:

"An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination If the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period."

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*The Power Line***News From The World Of Worker's Compensation**

By John F. Power III

April 13, 2004—Congratulations go out to attorney John Fassola and the University of Illinois for their zero award before Arbitrator O'Malley on the issue of arising out of and in the course of the employment for a repetitive trauma hand case.

May 3, 2004 – Congratulations go out to attorney Matt Sheriff and again the University of Illinois for a zero award on the issue of nature and extent in a case involving a compensable concussion with minimal lost time.

Spring 2004 – *Legislature Approved.* A change in the name of the Illinois Industrial Commission to the Illinois Workers' Compensation Commission becomes effective January 1, 2005.

June 2, 2004 – Attorney Cecil Porter was appointed to serve as a member of the 2004-2005 Young Lawyers Division Council for the Illinois State Bar Association.

May 2004 – Senate confirmation is denied to Commissioner James Serkland representing the public community and thus Commissioner Serkland returns to private practice. Subsequent

to this event the balance of the Commissioners awaiting appointment were confirmed by the Senate consisting of public member Paul Rink, from employer member to public member. The panels were reconfirmed to consist of the following: First Panel Commissioner Susan Pigott *employee member*, Commission James DeMunno *public member*, and Commissioner David Akemann *employer member*, Second Panel: Commission Barbara Sherman *employee member*, Commissioner Paul Rink *public member* and vacant employer member.

September 23, 2004—Save this date for our annual medical/legal seminar. This year's seminar will focus on the credibility of the injured worker. Speakers will include: Michael Keenum discussing FCE's, Dr. Julie Wehner, orthopedic surgeon, discussing claimant credibility and Dr. Ron Pawl discussing credibility of presenting claimants from a neurosurgical and pain treatment perspective. Invitations will be forthcoming!

*Join Us On**September 23, 2004**Between The Line***LEGISLATIVE NEWS**

BY JOHN F. POWER III

This past Spring Session of the Illinois General Assembly was notable by contentious debate and record overtime. The issue of workers' compensation and the need to reform our law here in Illinois was also a topic of the Legislature. House Bill 805, which sought to make changes in workers' compensation law was unveiled less than 24 hours before it was presented in Executive Committee. Curiously, the subject matter of this bill would ordinarily be heard before the Labor and Commerce Committee. Although it was originally touted as an "agreed bill," substantial opposition was voiced by many within the business community as well as doctors, hospitals, higher education institutions, self-insured organizations, and local governments. The Illinois Chamber of Commerce opposed HB805 and cited the following:

Workers' Comp Measure HB 805 Held Until Fall...Chamber to Lead Effort for Revised Approach

A broad based employer effort led by the Illinois Chamber Employment Law Council stymied efforts to pass HB 805. With the assistance of the Senate Republican Caucus, the measure was not able to muster the necessary votes needed for passage. In addition, as time passed and more scrutiny of the proposal was made, slippage of support was also found in the Senate Democratic caucus.

Analysis and commentary of HB 805 from the National Council on Compensation Insurance (NCCI) was reviewed by the Council's Workers' Compensation Committee and resulted in the Committee's recommendation of opposition. Attached is the Chamber's position paper on HB 805 that determines that HB 805 could cost Illinois employers as much as \$38 million in higher workers' compensation.

<http://www.legis.state.il.us/legislation/billstatus.asp?DocNum=805&GAID=3&DocTypeID=HB&LegID=1237&SessionID=3>

Sen. Dan Cronin (R-Elmhurst) who led the opposition to HB 805 in the Senate, has asked the Illinois Chamber to lead a group of interested parties to discuss, negotiate and draft alternative legislation. In a letter to his Senate Colleagues, Sen. Cronin indicated: "I intend to introduce legislation that reforms the workers' compensation laws in a meaningful way." He added, "We intend to engage in a more open process".

As the legislature debates the issues of workers' compensation, Power & Cronin remains committed to meaningful reforms enhancing productivity of business and ensuring fair and prompt services to injured workers.

*Illinois Chamber
acknowledges
Cronin for his ongoing
efforts in keeping
Workers' Compensation
costs from
rising*

Front of the Line
IME Rights Upheld

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In denouncing the decision of the Arbitrator, the Commission implied that a Petitioner must know for certain, presumably through the actual payment of benefits by the Respondent, that he is entitled to receive benefits before the Petitioner is required to attend an IME. The Court stated, however, that premise was without authority in the language of Section 12 or any known case law.

The Commission's decision was based upon the holding in *Fencl-Tufo*. According to the Court, however, reliance on that holding was improper. The Court found the cases to be distinguishable on the facts. It was pointed out that in *Fencl-Tufo*, the employer unilaterally suspended the Petitioner's TTD benefits after it received a report from an investigator stating that the Petitioner was seen playing golf. The Petitioner attended an exam pursuant to Section 12 with a physician selected by Respondent. The examining doctor admitted the Petitioner to a hospital for three days to conduct a lumbar myelogram. The Petitioner was discharged and advised not to return to work and to contact the examining physician in one to two weeks. The Petitioner followed up as instructed and was told to return to the examining physician for follow up in six months. Approximately three months after that Respondent requested that the Petitioner be examined by a different physician. The Petitioner in that case failed to attend the scheduled follow up IME. The Court found that where "an employer has arbitrarily suspended payments and (the employee) has already complied with one requested exam, the claimant's failure to attend a further exam does not violate Section 12."

The Court in *R.D. Masonry, Inc.*, found that the Respondent had not "arbitrarily" suspended benefits to the Petitioner. The Court relies upon the fact that, in the two previous hearings under Section 19(b) of the Act the Petitioner's request for penalties was denied. Further, the second scheduled IME was for the proper purpose of determining the Petitioner's work status and need for additional treatment.

The Court's decision in *R.D. Masonry, Inc.*, makes it clear that the penalty to a Petitioner that is set out within Section 12 of the Act for his failure to attend a properly scheduled IME remains intact despite the prior finding of the Court in the *Fencl-Tufo* case. Specifically, failure of the Petitioner to attend a properly scheduled exam pursuant to Section 12 will result in the suspension of benefits until such time as said exam shall take place.

However, if a Respondent denies the Petitioner's claim for benefits without legal basis such denial would seem to be "arbitrary" in nature and a subsequently scheduled IME might be deemed "harassing" in nature and thereby negate the provisions of Section 12 which relate to the suspension of benefits for the Petitioner.

According to the Court's decision in *R.D. Masonry, Inc.*, the Petitioner argued that he was not required to attend the exam because Respondent failed to provide an advance of travel expenses and the exam was not scheduled for a convenient time as it apparently conflicted with his ongoing physical therapy schedule. The Court did not address that issue because the Petitioner failed to raise the issue at the Commission and Circuit Court levels.

The Court's decision, however, appears to relate only to properly conducted Section 12 exams. As such, if an employer provides proper notice of an exam by a duly qualified medical practitioner or surgeon at a place and time that is reasonably convenient to the employee, the Petitioner should be required to attend the exam, as provided by Section 12 of the Act. This also takes into account that advance payment is made to the Petitioner for travel expenses as well as the cost of meals necessary during the trip and payment of any lost wages for the day of the exam. A Petitioner's failure to attend an exam, so long as benefits have not been arbitrarily discontinued and there is a proper purpose to be gained by the exam, will result in termination/suspension of his right to recover benefits under the Act until such a time that the Petitioner does attend the exam.

So long as the Respondent acts in good faith and uses sufficient and legal basis for suspending benefits, a defense in the suspension of benefits set forth in Section 12 of the Act remains in full effect.

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What's My Line

BY MICHAEL J. SCULLY

I grew up on the Southside of Chicago, in the Beverly area, where my family still resides. After high school, I moved to the Northside and attended DePaul University, where I received my undergraduate degree. It was at DePaul where I developed an interest for the law, as a member of the Student Government Association.

After college, I did what the majority of young graduates do and traveled through Europe. I made my way through England, France, Switzerland and Italy, saw as much as I could see and met some really interesting people, some of who I still talk to today. After funds ran short I returned to Chicago and shortly thereafter began law school.

I come from a family of police officers so it was expected that I follow in their footsteps. When I broke the news I was enrolling in law school, I received some very memorable responses, many of which can't be printed. The family managed to get over me breaking this pattern, as long as I practiced Criminal Prosecution for the State.

So, after receiving my degree from The John Marshall Law School, I made them proud and began my career in Insurance Defense as an Associate at Baker & Enright, in Chicago. There I had the opportunity to work on malpractice cases and gain valuable courtroom experience.

I joined Power & Cronin in March of this year and in that short time have had the opportunity to work with a great team of lawyers and a variety of clients.

Power & Cronin, Ltd. is an Illinois law firm with a state-wide litigation practice. Our lawyers have trial and appellate experience in the areas of:

General Civil Litigation

Municipal Law

Insurance Defense

Civil Rights Defense

Professional Liability Defense

Workers' Compensation Defense

Employment Litigation Defense

Tort Defense of Municipalities, Individuals and Businesses

Our clients include a wide range of employers, local governments, insurance companies, public and private risk management pools, self-insured companies, third-party administrators and service companies.

At Power & Cronin, Ltd., we pride ourselves on expert legal representation and personal attention to details. We interact with our clients to assist in developing procedures to contain current losses and avoid losses in the future. Additionally, we provide aggressive and cost efficient representation in order to protect our clients' interests.

We thank you for considering our firm to represent you and we look forward to working with you in the future.

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