



RipesNelsonBaggot&Kalobratsos, P.C.

SPRING 2005 NEWSLETTER
VOLUME 2, ISSUE 1

CONTENTS

• **Firm News**

• **RNBK Results; 2004 Fourth Quarter**

• **Attorney Profile -**

- Barbara Kalobratsos, ESQ.

• **Case Law Update**

- Lien Recovery
- Employee/Employer Relationship
- Arose Out Of and In the Course of Employment
- Penalties & Attorneys Fees
- Evidence
- Temporary Total Benefits
- Causal Connection

SUMMER 2005 ISSUE PREVIEW

- Attorney Profile -
Cristi L. Nelson, ESQ.
-

CONTACT INFORMATION:

Ripes Nelson Baggot & Kalobratsos, P.C.
205 W. Randolph Street, 19th Floor
Chicago, IL 60606
312.236.9600

www.rnbk.com

FIRM NEWS

Mike Baggot successfully represented insureds in two recent workers' compensation cases.

In the first case, the claimant alleged bilateral carpal tunnel syndrome as the result of her job duties. Petitioner began working with the insured in October 1996. She started as a cashier and then three years later was promoted to assistant manager. For a period of time, she quit her employment with the insured, but returned to work after a three-month hiatus. She subsequently took a full time job with another employer as an assistant manager and only worked part-time for the insured two to three days a week. Her job duties with the insured included opening the store, counting cartons and packs of cigarettes, forwarding paperwork, sweeping and stocking. She testified that her job duties in her full-time job consisted of unloading a truck. She would carry boxes and packages to the front of the store where she would spend most of the day stocking. She would lift boxes up to 40 pounds and spend time working on the cash register and breaking down boxes.

While working for the second employer, she was breaking down a box when she felt a "burning pain" in both arms. Following that incident, she had problems sleeping and her pain worsened, ultimately requiring carpal tunnel surgery on both hands. She then returned to work with the insured full-time with no complaints. Petitioner was examined by an IME physician at the request of both the insured and the second employer. The IME doctor opined that petitioner's activities with the insured did not contribute to her carpal tunnel syndrome, but that her work with the second employer was more indicative of the type of activities that would cause carpal tunnel syndrome.

The Arbitrator ultimately agreed with the IME physician finding that the petitioner's condition did not arise out of or in the course of her employment with the

insured, but rather her second employer. The case is *Susan Thomas v. Thornton Oil, 03 WC 022288*.

Mr. Baggot also successfully represented an insured in a nature and extent case wherein petitioner alleged injury to her right leg and back when she fell from a table while dusting an overhead object. The petitioner argued that respondent was liable for 12 3/7 weeks of TTD benefits, 3% MAW and 2% loss of use of the right leg for permanency plus payment of \$6,854.78 in medical bills and \$8,284.26 in penalties. Petitioner testified she was unable to work from August 2, 2003 through the end of October 2003. The petitioner also testified that she had current employment while working at Sodexho and that the insured was aware of that employment.

The petitioner's manager testified during hearing that the petitioner should not have been performing the work she was doing as she had a long duster to be used to clean high areas. There was no reason for the petitioner to be standing on the table to clean the cabinets. Respondent also argued that petitioner had previously been written up for work performance issues. In addition, petitioner was able to travel to Europe for two weeks. Moreover, representatives for the respondent also testified that he saw the petitioner running on August 14, 2003, which was not consistent with her alleged injuries. Respondent argued that petitioner was not entitled to benefits after August 4, 2003.

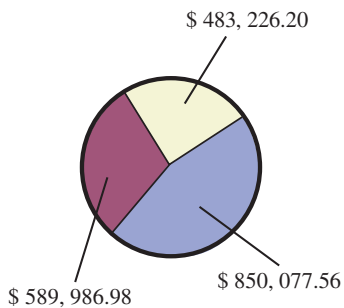
The Arbitrator adopted respondent's decision, finding petitioner suffered only a minor fracture of her rib which required medical treatment through August 4, 2003. She found that petitioner was entitled eight days of TTD benefits and 1% loss of use of a person for permanency. She further found respondent liable for medical treatment on August 2, 2003 and August 4, 2003 and that any medical treatment thereafter was not related to the accident. The case is *Eva Markova v. Sodexho, 03 WC 040215*.

2004 Fourth Quarter Results

RNBK opened 181 cases and closed 61 cases during the fourth quarter of 2004. Of the 61 cases closed (an average of 1 case closed per day), RNBK saw a total demand of \$850,077.56 and settled for \$483,226.20, **saving our clients 43.2%**. Moreover, these 61 cases were **settled on an average of 18% less than authority**.

181 cases opened
61 cases closed

- DEMAND: \$850,077.56
- AUTHORITY: \$589,986.98
- SETTLEMENT: \$483,226.20



BARBARA KALOBRATSOS, ESQ. ATTORNEY PROFILE

Ms. Kalobratsos, originally from Michigan, received her Bachelor of Arts degree in Political Science with a concentration in Philosophy from Albion College. She received her Juris Doctorate degree from Chicago's John Marshall Law School, where she served as an intern for the Honorable Alexander P. White, Cook County Circuit Court Judge, Workers' Compensation Division. Her duties included researching and analyzing the law pertinent to workers' compensation matters, drafting judicial opinions and monitoring various legislative proposals and their effect on the Illinois Workers' Compensation Act.

Ms. Kalobratsos concentrates her practice in the defense of workers' compensation matters and subrogation claims. She also has experience in cases involving automobile negligence and product liability. Having practiced since 1991, she has successfully defended complex workers' compensation cases, including death, asbestos-related exposure, heart attack and psychological stress-related claims. Ms. Kalobratsos is also a member of the Workers' Compensation

Lawyers' Association and the Hellenic Bar Association.



Ms. Kalobratsos has been married to Peter Wachowski since 1993 and has three children; Phillip (8), Christine (6 1/2) and "Wild" William (4). She and her family reside in Park Ridge, Illinois.

"LIEN RECOVERY"

Bernard Sheppard v. Bozena Rabidis

In this case, Sentry Insurance Company appealed an Order of the Circuit Court of Cook County that held it did not have a lien pursuant to Section 5(b) of the Illinois Workers' Compensation Act. In 2001, claimant, Bernard Sheppard, was involved in three work-related accidents while employed by Maytag. The first accident occurred on October 17, 2000, the second on December 21, 2000 and the third on June 26, 2002. The claimant filed separate claims for benefits under the Act with the Industrial Commission. In each instance, Sentry was Maytag's insurance carrier. To settle Sheppard's claim for the October 17, 2000 accident, Sentry agreed to pay a lump sum of \$50,000.00. The agreement was approved by the Industrial Commission on September 10, 2002. Sentry agreed to pay only \$1.00 as a lump sum payment for the December 21, 2000 accident and the settlement agreement specified there had been no temporary disability as a result of that accident. The settlement contract was signed by Sentry's attorney on October 8, 2002 and approved by the Commission on January 13, 2003. With regard to the June 26, 2002 accident, the parties again agreed there had been no lost time and Sentry would pay the lump sum of only \$1.00. An agreement was approved by the Commission on January 10, 2003.

Prior to the settlement of the workers' compensation claims, Sheppard filed a personal injury suit against Bozena Rabidu, the third party involved in the December 21, 2000 accident. Sentry filed a Petition to intervene in that civil suit.

Therein, Sentry asserted that as a result of the December 21, 2000 accident it had paid Sheppard over \$90,000.00 in benefits which represented its lien pursuant to Section 5(b) of the Act. On July 2, 2003, Rabidus and Sheppard settled the personal injury claim for \$400,000.00. Sheppard subsequently filed his Petition to adjudicate the workers' compensation lien, asking the court to enter an order allowing recovery of the lien in the amount of \$19,523.37. To support his position, Sheppard argued the parties settled the case for the December 21, 2000 accident for only \$1.00 and that there was no payment of temporary total disability benefits. Sheppard maintained that the only item properly included in the lien for that date of accident was the medical expenses paid by Sentry pursuant to Section 8 of the Act which was in the amount of \$19,523.37.

Sentry, however, argued the settlement contracts were negotiated and resolved in "unity," such that the \$50,000.00, though identified in the settlement contract relating to the October 17, 2000 accident, gave rise to a lien with regards to the December 21, 2000 accident. Sentry's attorney testified that she was assigned to handle Shepard's workers' compensation claims and further testified after negotiating with the Petitioner and his attorney, she recommended Shepard's claims be settled together for a total of \$50,000.00. She acknowledged the contract date in relation to the December 21, 2000 accident did not make reference to the October 17, 2000 accident and did not allocate payments for temporary total disability. She admitted she was fully familiar with the significance of the settlement contracts when she signed it. Sheppard's workers' compensation attorney testified that the \$50,000.00 settlement was for resolution of a single case and not for the other two claims which settled for \$1.00 each. He denied the claims for the October 17, 2000 incident and December 21, 2000 incident were settled together for \$50,001.00. According to Sheppard's attorney, the different dates that appeared next to the signature of Sentry's attorney on the two documents indicated to him that the contracts were negotiated at separate times. He further testified the three claims were never consolidated before the Industrial Commission.

The trial court determined that Sentry did not have a lien on the settlement of the third party action and the Appellate Court affirmed. The court found that Sentry's claim for total temporary disability

was denied by the records because the settlement contracts for the September 21, 2000 claim stated there was no lost time or total temporary disability benefits paid. Furthermore, Sentry's claim that it was owed \$50,000.00 for permanent partial disability was also without merit as the same settlement contract revealed Sentry agreed to pay Sheppard the lump sum of \$1.00 for permanent partial disability stemming from the December 21, 2000 accident. The Appellate Court further relied on Sentry's attorney's testimony that she understood the consequences of signing the settlement contract. Of particular relevance to the Court was the fact the settlement contract addressing the September 21, 2000 accident made no mention of the October 17, 2000 accident and was signed by the attorney over two months after she signed the contract settling the claim for the October 17, 2000 accident. In other words, there was nothing in these contracts that connected the three incidents to each other which was critical in the analysis made by the Court.

"EMPLOYEE / EMPLOYER RELATIONSHIP"

Mikashus v. Land Star Ranger

The Illinois Industrial Commission recently found that an employee/employer relationship existed between a freight hauling company and a truck driver who was injured while connecting a tarp to a load. The Commission held that despite the fact the driver signed an agreement identifying himself as an independent contractor, the freight hauling company "controlled" many aspects of his job. In this case, the driver owned his truck yet leased it to the freight hauling company. The company, in turn, provided the driver with assignments and paid him per delivered load. In arguing its case, the company argued the driver was an independent contractor, not an employee as set forth in the lease agreement signed by the claimant. In assessing the issue of control, an Arbitrator found significant that the claimant was injured while performing the activity of tarping the load, which was the company's policy and a required activity controlled by the company. Although the employer attempted to set up a network to disassociate its dispatchers and drivers as employees, it continued to control many aspects of the driver's job. In this case, the company determined the qualifications for hire, the times for picking up and delivering, whether the driver was

required to tarp a load, the insurance maintained by the driver, physical examinations, drug testing, inspection and repair of vehicles, payment of fuel taxes and dispute resolution between customers, dispatchers and drivers. The company also conducted a mandatory orientation so that all drivers would conform to the company's requirements, subject to termination.

"AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT"

Barry v. Eagle Concrete

The Industrial Commission held that an assault between a claimant and his supervisor, which occurred after the claimant splashed concrete on the supervisor, did not arise out of the claimant's employment. In this case, the claimant accidentally caused concrete to splash into the supervisor's face.

Words and profanities were exchanged and the supervisor then pushed the claimant. The claimant then grabbed the supervisor and they wrestled and fell to the ground with the claimant landing under the supervisor. In denying benefits, the Arbitrator explained that the altercation between the claimant and supervisor stemmed from a purely personal matter not related to the employer's business. Therefore, the claim did not arise out of the claimant's employment.

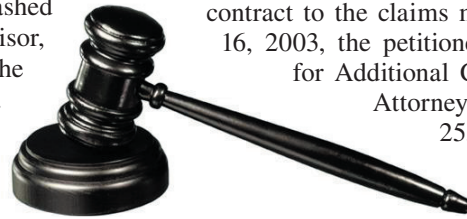
In assault cases, there must be evidence of a quarrel over the proper manner of performing the employer's business. Benefits will be awarded in cases where evidence shows the injured employee was not responsible for the insult and it arose from a quarrel concerning the employer's business. In this case, the words and profanities exchanged between the claimant and the supervisor did not relate to how or why the concrete got splashed or how the work should be performed. Rather, the argument concerned the "combatant's" attitude which is insufficient to prove the incident arose out of employment.

"PENALTIES AND ATTORNEYS FEES"

Guzman v. United Globe Nippon

In this case, the Commission found

that the claimant was entitled to receive additional compensation pursuant to Section 19(k) in the amount of \$1,675.80 and attorney's fees pursuant to Section 16 in the amount of \$670.32. The cumulative effects of not responding to phone calls and not promptly processing a settlement contract after it was forwarded on two occasions constituted unreasonable delay in payment of the claim. On May 28, 2003, petitioner's attorney mailed a copy of the approved settlement contract to the employer's insurance carrier. After not receiving payment on the claim, petitioner's attorney made several phone calls in June and July 2003 leaving messages for the claims adjuster handling the case. The adjuster did not return the phone messages. On June 17, 2003, the petitioner's attorney sent another copy of the settlement contract to the claims manager. On July 16, 2003, the petitioner filed a Petition for Additional Compensation and Attorneys Fees. On July 25, 2003, the carrier issued payment of the settlement agreement to



the claimant. In awarding penalties and attorneys fees, the Commission found it significant that the contract was sent to and received by the carrier on two occasions and that petitioner's attorney spoke with the claims manager and left several messages for the claims adjuster. Accordingly, the Commission found that the failure to pay the settlement contract when it was initially received may well have been inadvertent. However, the Commission further found that the cumulative effect of not responding to phone calls and not promptly processing the contract after it was forwarded on two occasions amounted to more than simple inadvertency. It constituted an unreasonable delay in payment on the claim.

"EVIDENCE"

National Wrecking Company v. Industrial Commission

The Appellate Court of Illinois, First District, held that the Arbitrator and Commission erred in admitting claimant's hospital records into evidence. Since these records played an important role in the Commission's decision, the Court reversed and remanded the case for a new hearing on the issues of permanent disability and medical expenses. The Court held that in order to be admissible, hospital records must be certified pursuant to Section 16 of the Workers' Compensation Act.

In this case, a laborer injured his lower back lifting wood timber weighing approximately 300 pounds. The Commission found the claimant was permanently and totally disabled under Section 8(f). The trial court affirmed that decision.

On appeal, the employer argued the Arbitrator and the Commission erred in admitting the claimant's hospital records without being certified pursuant to Section 16. The Appellate Court agreed, noting that although Section 16 makes it easier to introduce hospital records, the language and purpose of that section demonstrated that the legislature intended certification as a "minimum" foundational requirement which must be satisfied before the records may be admitted. The claimant argued that the hospital records were inherently reliable and therefore admitted pursuant to the case Fencl-Tufo Chevrolet Inc v. Industrial Commission. In Fencl-Tufo Chevrolet Inc. v. Industrial Commission, the Appellate Court recognized that the rule against the admission of hearsay evidence was not absolute and under certain circumstances, the probability of accuracy and trustworthiness may act as a substitute for cross-examination under oath.

In National Wrecking Co. v. Industrial Commission, the Appellate Court rejected the claimant's argument, concluding that the Fencl-Tufo decision only addressed hearsay and did not address the certification issues articulated in Section 16. In the present case, the Court opined that the proponent must still lay an adequate foundation for the admission of documents into evidence. To authenticate a document, evidence must be presented to demonstrate that the document is what its proponent claims it to be. That was not accomplished in this case even by the simplest method, which is certification as referred by Section 16. Regardless of the certification requirement, the Court also found that the Commission did not abuse its discretion by allowing reports of certain doctors made in the course of the claimant's medical treatment into evidence. The Court opined that because the reports were not prepared for litigation purposes but instead to assist in the treatment of claimant's injury there was no reason to suspect their trustworthiness. Therefore, the Court's decision requiring certification extended only to hospital records and not to reports made by the petitioner's treating physicians prepared in the course of the claimant's medical treatment.

"TEMPORARY TOTAL BENEFITS"

Spelde v. Saint James Hospital

In this case, the Commission affirmed an award for payment of 47 weeks of temporary total disability benefits to an EMT who injured his lower back as a result of a work-related injury. Contrary to the employer's assertions, the claimant's doctor did not order a functional capacity evaluation. Rather, the doctor stated that if the claimant responded to conservative treatment, the functional capacity evaluation would be helpful to determine restrictions for future employment. To that end, the Commission held that a doctor's determination that a functional capacity evaluation is an option in the future is not inconsistent with an award for temporary total disability. In this case, an EMT suffered a herniated disk as the result of a work accident. The Arbitrator awarded temporary total disability benefits for 47 weeks.



The employer appealed, arguing that the Arbitrator was incorrect to conclude that the claimant's doctor recommended a total work restriction because the same doctor ordered a functional capacity evaluation. The employer reasoned that the doctor would not have ordered a functional capacity evaluation if the claimant was unable to perform the work. The Commission rejected this argument and affirmed the Arbitrator, noting that the doctor's evaluation report stated that the claimant could not return to his prior employment as an EMT. He strongly encouraged aggressive re-entry into physical therapy. If the claimant responded in part or full to conservative options, a functional capacity evaluation would be helpful to determine restrictions or lack thereof relative to employment. Contrary to the employer's assertions, the doctor specifically stated that at that time of his evaluation, a functional capacity evaluation would be meaningless, as the claimant had been out of active treatment for some time.

"CAUSAL CONNECTION"

Bourne v. Mead Electric

The Commission held that the petitioner's knee condition was causally related to his employment as an electrician with the respondent, even though he sustained two prior injuries to the same knee that led to surgery and arthritis. Therefore, an employee's prior medical history is not a bar to filing a workers' compensation case or an award for further treatment to that same body part. The claimant testified he was working on uneven gravel on a rainy day when he slipped on wet rocks causing his leg to twist. He was diagnosed with marked degenerative changes and a knee strain. Following conservative treatment, his doctor opined that the claimant was a candidate for a total knee replacement. Evidence indicated petitioner suffered a work injury to the same knee thirty years earlier and again injured the knee twelve years prior. He underwent surgery twice and returned to full-duty work after each injury. Of particular interest was the possible need for a total knee replacement after each procedure. In light of undisputed existence of a compensable accident at work, the Commission found that petitioner's clearly and credibly established employment with Mead Electric, while not the sole factor, was a causative factor that aggravated or accelerated his pre-existing knee condition. Accordingly, the Commission awarded temporary total disability benefits and ordered the employer to pay for the costs related to the recommended surgery for a total knee replacement.

The Commission acknowledged that the claimant experienced two prior workers' compensation accidents that led to surgery of the left knee with resulting arthritis and speculation that he would refuse a total knee replacement in the future. However, prior to the most recent accident, the claimant was able to work in what was described as a very physical job that taxed his knees on a regular basis, requiring he walk, squat, climb up and down ladders and kneel. The claimant worked ten hours per day, seven days per week and the un rebutted evidence established that he could work consistently as an electrician the past thirteen years preceding the accident with Mead Electric. These facts were critical in the Commission's assessment of the veracity of the complaints and injury as it related to the need for treatment that had been recommended but apparently unwarranted until the injury with Mead Electric.