



**THIS ISSUE:**

**EMPLOYMENT:** Are Your Employees Too Connected to Their Work? ..... 1

**WORKERS' COMPENSATION:** Employee Diversions in the Workers' Compensation Setting ..... 2

**WORKERS' COMPENSATION:** When Does an Injured Worker's Termination from Employment Prohibit Payment of Temporary Total Disability Compensation? ..... 3

**WORKERS' COMPENSATION LITIGATION:** Using Subrogation as a Claim Cost Reduction Tool ..... 4

**LABOR:** NLRB Modifies "Salting" Case Standards ..... 5

**WORKERS' COMPENSATION LITIGATION:** The Role of Depositions in a Workers' Compensation Court Appeal ..... 6

**WORKERS' COMPENSATION:** The Supreme Court of Ohio Addresses "Successors in Interest" ..... 6

**ECHELON CONSULTING GROUP:** "The HR Commuter Workshop Series" ..... 7

**Attorneys**

- Alan G. Ross
- Brian K. Brittain\*
- Evelyn P. Schonberg\*\*
- Anthony A. Baucoco
- Scott Coghlan
- Chad A. Fine
- Scott W. Gedeon
- Ryan T. Neumeyer
- Nick A. Nykulak
- Carol D. Strassman\*

**Paralegals**

- Renee M. Mezera
- Lorraine J. Geiger
- Arlene M. Golias
- Carla E. Kihorany
- Elizabeth A. Krusinski
- Rosanne M. Slivka
- Lori A. Williamson

**Firm Administrator**

- Mary Ann Kuilder

**Editor**

- Anthony A. Baucoco

**EMPLOYMENT: Are Your Employees Too Connected to Their Work?**

by Ryan T. Neumeyer

In today's workforce, many employees have personal digital assistants (PDA's), such as an iPhone or Black Berry. These employees may be required to respond to emails and text messages outside normal working hours. This may create problems for an employer with respect to employees who are non-exempt under the Fair Labor Standards Act (FLSA) and Ohio minimum wage law.

Generally, in a situation where an employee is non-exempt and works outside normal working hours, said employee must be compensated for all time worked. In addition, said employee must be compensated at a rate of time and a half when he works over 40 hours in a particular week. If the employee is not properly compensated and proper records are not kept regarding such work, a company may be faced with a lawsuit that alleges violations of the FLSA or Ohio's wage and hour laws.

A single claim filed by one employee under Ohio's wage and hour laws may inflict large damage awards. However, such a claim may proliferate into a class action with the potential of astronomical damages. Further, such a claim may be very difficult to defend against since the employee or employees will generally have the evidence of engaging in such work on their PDA's.

Accordingly, companies that have non-exempt employees who use a PDA are advised to review their policies and actual practices. Companies must make certain that non-exempt employees are not being requested to use such devices when they are not "on the clock." Furthermore, companies must ensure that supervisors are not contacting said employees and requiring them to engage in work during off hours. Lastly, if said employees are required to respond to emails and messages after hours, they should be compensated for their time.

It will most certainly be less expensive in the long run to devise a time-keeping system and pay employees for time spent on their PDA's at home, then it will be to defend against a class action lawsuit. As such, now is a good time to take an inventory of employees who have PDA's and are being required to use them to complete their work after hours.

*As always, the employment attorneys at Ross, Brittain and Schonberg will be sure to advise you regarding any and all obligations under the FLSA and Ohio's wage and hour laws. Please do not hesitate to contact Lynn Schonberg or Ryan Neumeyer with any questions you may have regarding the FLSA, Ohio's wage and hour laws or any other employment laws.*

\*OSBA Certified Specialist  
Workers' Compensation

\*\*OSBA Certified Specialist  
Labor & Employment

This Publication is intended to inform clients and friends about labor and employment matters of current interest. The matters included were not given exhaustive treatments due to space limitations. This abridged information should not be construed as legal advice and is not a substitute for legal counsel. This publication is not intended to create, and receipt of it does not constitute, an attorney relationship.

## WORKERS' COMPENSATION: Employee Diversions in the Workers' Compensation Setting

by Anthony A. Bauccho

A cashier for a popular supermarket chain finishes her shift, clocks out, and does some personal grocery shopping in the supermarket. After purchasing her groceries, the cashier proceeds to her car, which is parked in the supermarket's parking lot. The cashier slips on some ice near her car while loading her groceries and falls, suffering injuries. She subsequently files a workers' compensation claim. Is this a compensable claim? Fortunately, this exact fact pattern came before the Second District Court of Appeals in Montgomery County this past year.



The supermarket chain originally argued before the trial court that this was not a compensable claim because the cashier had not been injured “in the course and scope of her employment.” The supermarket chain basically argued that there was no connection between the cashier’s employment and the injurious activity, based upon the time, place and circumstances of her injury. The supermarket chain pointed out that the cashier had left her work station, clocked out, shopped for personal items and was loading these items in her car when she fell. Therefore, the supermarket chain felt that the cashier’s personal grocery shopping after her shift had ended, in addition to the act of loading her groceries into her car, removed her from the course and scope of her employment.

The cashier argued before the trial court that she was within her “zone of employment” when she slipped and fell and that her injury was therefore compensable. The zone of employment has been defined as the place of employment and “the area thereabout,” including means of entry and exit, under the control of the employer.

The trial court ultimately applied the “coming and going” rule to this fact pattern because the cashier was leaving her workplace when she was injured. The coming and going rule provides that an employee with a fixed place of employment, who is injured while traveling to or from her place of employment, does not have a compensable claim due to the

lack of a causal connection between the injury and the employment. However, the trial court then applied the zone of employment exception to the coming and going rule (as argued by the cashier) and found that this was, in fact, a compensable claim. Unfortunately, the trial court failed to address or acknowledge the supermarket’s claim that the cashier was outside the course and scope of her employment when she was injured.

The supermarket chain appealed to the Second District Court of Appeals. The court noted that the trial court confused the “zone of employment” analysis with the “course of employment” analysis and improperly concluded that the zone of employment analysis was dispositive. Simply put, the court found that the fact that the cashier’s injury may have occurred within the zone of employment is not enough to establish that the injury occurred in the course and scope of, and arose out of, her employment. Therefore, the court opined that further analysis was necessary.

Considering the totality of the circumstances, the court held that the cashier’s injury did occur in the course and scope of, and arose out of, her employment. The court held that although the cashier briefly engaged in some personal grocery shopping immediately after her shift, she would have had to return to her car regardless. The court felt that the cashier’s departure from the store was logically related to her employment,

because she had to leave at the end of her shift. The court also opined that the cashier’s brief diversion to shop was “limited in time, space, and purpose.” The court held that the supermarket chain controlled the parking lot and that there was no evidence the condition of the parking lot worsened in the ten minutes the cashier spent grocery shopping. In response to the supermarket chain’s spirited argument that the cashier was injured while loading her groceries into her car and that said act took her outside of the course of her employment, the court held that if the cashier’s brief diversion to shop was still logically related to her employment, the act of placing her groceries in her car would not change that relationship. The court ultimately concluded that the cashier’s actions did not fundamentally break the connection with her employment.

*What can employers take away from this decision by the Second District? First, if you control your parking lot, buy and apply plenty of salt this winter! Second, remember that a brief diversion by an employee, as seen here, may not be significant enough to sever the requisite causal connection between that employee’s injury and his employment. As always, the specific facts of a claim go a long way in determining compensability. Do not hesitate to contact Anthony Bauccho or any of the workers’ compensation attorneys at RBS with any questions or concerns regarding the compensability of a claim.*

# WORKERS' COMPENSATION: When Does an Injured Worker's Termination from Employment Prohibit Payment of Temporary Total Disability Compensation?

by Carol D. Strassman

Employers frequently ask whether temporary total disability compensation is payable if an injured worker has been terminated from employment. An injured worker who was terminated under circumstances that amount to a voluntary abandonment of employment is legally precluded from receipt of temporary total disability benefits. The Supreme Court of Ohio has ruled on this issue on many occasions.

The basic premise is set forth in the Louisiana-Pacific case. The Supreme Court of Ohio held that termination constitutes voluntary abandonment of employment when a claimant violated a written work rule that clearly defined the prohibited conduct, had previously been identified by the employer as a dischargeable offense, and was known or should have been known to the employee.

All elements of this case must be met. First and foremost, there must be a written work rule. The work rule must be specific as to the conduct which is prohibited. The rule must inform the employee that violation can lead to discharge. This is usually stated in language to the effect that a violation of the rule will result in discipline, "up to and including termination." The rule must be known by the employee, meaning the

employee was provided with the rule book or handbook.

The Supreme Court of Ohio has narrowed or clarified the Louisiana-Pacific case. The Supreme Court of Ohio subsequently held in the McCoy case that if an injured worker re-enters the workforce after his termination, by finding other employment, the injured worker then becomes eligible to receive temporary total compensation. Of course, the injured worker must have the requisite medical documentation supporting temporary total disability after his re-employment.

If an employer believes it has the requisite proof that there was a termination under circumstances amounting to a voluntary abandonment of employment, an attorney should be present with the employer at the hearing. This is due to the fact that case law must be argued and witnesses must be questioned.

In order to be prepared for hearing on this issue, the applicable written work rule must be provided to opposing counsel and the hearing officer. In addition, the acknowledgement form signed by the injured worker must be filed. This is proof that the injured worker received the handbook or rule book. Finally, a

representative from the employer must be at the hearing, usually the human resource manager. The witness on behalf of the employer must be the person with specific knowledge as to the facts surrounding the injured worker's termination, as well as familiarity with the written work rules. In some cases, it may be necessary to have the injured worker's supervisor in attendance as well.

A ruling from a hearing officer that a claimant voluntarily abandoned his employment for violation of a written work rule is a legal argument, not a medical argument. The claimant's actual medical condition is irrelevant to an argument under Louisiana-Pacific. If all of the requirements of Louisiana-Pacific are met, the hearing officer will find that the claimant is not entitled to temporary total disability compensation, effective the date of the termination from employment.

*Do not hesitate to contact Carol Strassman or any of the workers' compensation attorneys at RBS with any questions regarding what might constitute an injured worker's voluntary abandonment under the Louisiana-Pacific case.*

## FIRM NEWS

**Alan Ross, Brian Brittain and Lynn Schonberg** have once again been named "Ohio Super Lawyers" for 2010 by *Ohio Super Lawyers* magazine. This magazine publishes a diverse and comprehensive list of outstanding lawyers in Ohio. Congratulations to Alan, Brian and Lynn on this remarkable achievement!

**Anthony Baucio** has been named an "Ohio Rising Star" for 2010, also by *Ohio Super Lawyers* magazine. This magazine publishes a listing of the top lawyers in Ohio who are 40 years old or

younger or who have been in practice for ten years or less. Congratulations to Anthony on this accomplishment!

**Alan Ross** has once again been named "ABC Beam Club Member of the Year" for Region Six in recognition of his outstanding efforts to recruit new members into Associated Builders & Contractors. Congratulations to Alan on this achievement!

# WORKERS' COMPENSATION LITIGATION: Using Subrogation as a Claim Cost Reduction Tool

by Scott Coghlan

Many employers are familiar with handicap reimbursement awards and the favorable impact such awards often have on claim costs and workers' compensation premiums. "Subrogation" is a lesser known tool that can be utilized to reduce claim costs and premiums as well.

Subrogation permits the Bureau of Workers' Compensation (BWC) or a self-insured employer to assert an interest in a settlement or judgment between an injured worker and the third party tortfeasor that caused the injury. For instance, where an employee is injured in an automobile accident while in the course of his employment, the BWC or self-insured employer can assert the right to recover claim costs from the motorist at fault in the accident.

The Ohio Revised Code states that the payment of workers' compensation benefits creates a right of recovery in favor of the BWC and self-insured employers against the person or entity (the tortfeasor) that is responsible for causing an employee's injury. Under the statute, the BWC and a self-insured employer are defined as "statutory subrogees" and their "subrogation interest" includes past, present and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits and any other costs or expenses paid to or on behalf of the claimant.

The statute sets forth a mathematical formula to be used to determine the amount of the subrogation interest. The mechanics of the formula are beyond the scope of this article; however, it should be noted that the formula permits the injured worker to offset the subrogation interest by the amount of attorney fees, costs or other expenses incurred by the injured worker while trying to obtain

the settlement or judgment. Thus, it is unusual that the statutory subrogee recovers all of the claim costs incurred as a result of the tortfeasor's conduct. In the event that the statutory subrogee and the injured worker cannot agree on the amount of the subrogation interest, the matter may be referred to the BWC for a settlement conference. Alternatively, the parties may agree to utilize some other binding or non-binding alternative dispute resolution process, such as mediation.



As statutory subrogees, the BWC and a self-insured employer have an automatic interest in an injured worker's claim against the tortfeasor. No settlement, compromise, judgment, award, or other recovery in any action or claim by an injured worker can be finalized unless the statutory subrogee is given prior notice and a reasonable opportunity to assert its subrogation rights. If notice is not given, or if a settlement or compromise excludes any amount paid by the statutory subrogee, the tortfeasor and the injured worker are jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest.

In addition, the statute authorizes the statutory subrogee to step into the shoes

of the injured worker in order to assert its subrogation interest. Thus, a statutory subrogee is permitted to institute legal proceedings against the tortfeasor if the injured worker is unwilling to do so, and may fully participate in any settlement negotiations.

In the case of a state-funded employer, the net amount recovered by the BWC reduces the employer's claim costs dollar for dollar which, in turn, can lead to a reduction in workers' compensation

premiums. However, noticeably absent from the definition of a statutory subrogee is the state-funded employer itself. Thus, a state-funded employer that has paid salary continuation in lieu of the BWC paying temporary total disability (TTD) compensation does not have a statutory claim against the injured worker or the tortfeasor to recover any amounts paid. Therefore, it is important for the state-funded employer to consider whether the payment of salary continuation will

be more beneficial than authorizing TTD compensation and relying on subrogation to keep claim costs in check.

*If your company has questions regarding workers' compensation litigation or would like to discuss strategies that utilize subrogation and other cost reduction methods to minimize the impact of workers' compensation claims, please contact Scott Coghlan or Scott Gedeon.*

## LABOR: NLRB Modifies “Salting” Case Standards

by Nick A. Nykulak

“Salting” is a union organizing strategy in which paid or unpaid union supporters or organizers (called “salts”) seek employment with a non-union company with the goal of organizing the company’s workforce. Often times, “salts” are terminated or laid off from employment and the legality of those employment decisions are tested. Last year, the National Labor Relations Board (NLRB) issued two decisions, Toering Electric and Oil Capitol Sheet Metal, which altered the burden of proof for proving discrimination and awarding back pay in salting cases. In response to these decisions, the Office of the General Counsel for the NLRB issued two memorandums establishing guidelines for its personnel to follow when investigating and prosecuting these types of cases.

In Toering Electric, the NLRB held that a salt is not presumptively entitled to protection against discrimination under the National Labor Relations Act (Act) based upon union affiliation or activity, unless the General Counsel for the NLRB can prove the salt made a bona fide application for employment and was “genuinely interested” in becoming an employee of the hiring employer. Before the Toering decision, the salt’s genuine interest in employment with the hiring employer was presumed. The memorandum issued by the Office of the General Counsel for the NLRB provides that the General Counsel must prove the salt had actually applied for employment or had specifically authorized someone to do so on his behalf. When multiple employment applications are submitted for a position with the hiring employer, the General Counsel must investigate whether the applicants authorized union submitters to do so on their behalf.

The memorandum further provides that a hiring employer may counter the General Counsel’s evidence and raise an issue as to

whether the salt had a “genuine interest” in employment by establishing that: (1) the salt had recently refused similar employment with another employer; (2) the salt made belligerent or offensive comments on the employment application; (3) the salt engaged in disruptive or antagonistic behavior during the application or interview process or engaged in conduct otherwise inconsistent with a genuine interest in employment; or (4) the salt’s application for employment was stale or otherwise incomplete.

If the hiring employer can prove any of these elements, the salt would not be



entitled to protection under the Act for discrimination, unless General Counsel could then show through contrary evidence that the salt: (1) would have accepted the position with the hiring employer; (2) properly followed the employer’s application procedures; (3) possessed the relevant work experience required; or (4) was seeking similar employment with other employers. The General Counsel could also establish, through contrary evidence, that (5) the salt’s activity with the union would not interfere with working for the hiring employer.

The Board’s decision in Toering Electric bolsters an employer’s ability to defend against frivolous salting practices meant solely to cause economic damage to the hiring employer where the union salt never

intended to enter into an employment relationship with the hiring employer.

Similarly, the NLRB’s decision in Oil Capitol Sheet Metal further protects employers from frivolous salting practices by requiring the General Counsel to prove that the salt is entitled to back pay. In Oil Capitol, the NLRB held it would no longer apply a rebuttable presumption against the hiring employer that a salt who was not hired because of his union activity would have continued to work indefinitely for the employer and is entitled to back pay for the period from the date of the discrimination until the employer made a valid hiring offer.

Oil Capitol places the burden on the General Counsel to establish if (and for how long) the salt would have worked for the hiring employer, in order to determine back pay.

The second memorandum issued by the Office of the General Counsel instructs its personnel that in order to establish a salt’s back pay, General Counsel must consider whether the salt’s employment was temporary or limited in duration, analyze the union’s salting policies and practices to determine how long

the salt would have been employed, analyze the union’s plans against the targeted employer, look to union agreements with the salt for instructions regarding the salt’s anticipated duration of employment and examine historical information regarding the duration of a typical salt’s employment. The Oil Capitol decision and the elimination of the rebuttable presumption against the employer will limit the back pay due to a salt who is found to have been discriminated against under the Act.

*If you have any questions regarding the guidelines discussed in this article, please feel free to contact Alan Ross or Nick Nykulak for more information.*

## WORKERS' COMPENSATION LITIGATION: The Role of Depositions in a Workers' Compensation Court Appeal

by Scott W. Gedeon

If your company has never been party to a lawsuit, you may not know what a deposition is and why a deposition is important in a workers' compensation appeal.

In the event that you find your company a party to a workers' compensation appeal in the court of common pleas, you will most likely be contacted by your attorney regarding the scheduling of depositions.

A deposition is the opportunity to question an injured worker, witness, or medical provider, under oath, regarding the circumstances resulting in the alleged occupational injury or disease. Depositions are transcribed by a court reporter who attends the deposition and records all the questions of counsel and the answers of the deponent (the person being deposed). Depositions may also be videotaped for playback at a subsequent hearing or trial. In a workers' compensation appeal, it is

often helpful to depose the injured worker, their medical expert, and any fact witness or medical provider who the injured worker may call to testify at trial.

Deposition testimony is helpful for a number of reasons. First, it allows your attorney the opportunity to discover facts not previously known, such as the identity of a doctor who treated an injured worker or the specifics of an injured worker's medical history. Second, deposition testimony can be used to contradict or impeach an injured worker or witness' testimony at trial in order to bring their credibility into question. For example, if an injured worker "changes his story" at trial regarding how he was injured, deposition testimony can be used to impeach him during cross-examination by showing that the injured worker has given inconsistent answers during deposition and at trial. Lastly, deposition testimony can be useful in determining the value of a case for purpose of settlement.

In addition to depositions taken during the discovery portion of a case, Ohio law provides that the testimony of expert medical witnesses can be recorded by way of deposition and later presented to the jury as a video replay at trial. This provides a substantial savings for employers as they are not burdened with the expense of paying for an expert witness to wait days or hours at court for their opportunity to testify.

*Depositions are an important tool in the workers' compensation litigator's tool box as they provide an effective means to both prepare for and succeed at trial. If your company has questions concerning depositions or workers' compensation litigation in general, please do not hesitate to contact Scott Gedeon or Scott Coghlan.*

## WORKERS' COMPENSATION: The Supreme Court of Ohio Addresses "Successors in Interest"

by Chad A. Fine

The Supreme Court of Ohio in the Valley Roofing decision recently addressed the question of what liabilities a successor in interest assumes when purchasing an entity from a financial institution. Specifically, the Court held that a successor in interest does not assume the purchased entity's workers' compensation experience rating when the entity is purchased from a bank. The workers' compensation experience rating of a purchased entity is only transferred to a successor in interest when the other entity is purchased directly.

By way of background, the Supreme Court of Ohio has defined the term "successor in interest" as a transferee of another employer, "in whole or in part." Simply put, a successor in interest is a company that purchases another company. The Ohio Revised Code applies the term "successor in interest" to the Ohio Workers' Compensation System. The statute states that a successor in interest is an entity that assumes "in proportion to the extent of the transfer . . . the [prior]

employer's account and shall continue the payment of all contributions due under this chapter." One element of the worker's compensation account is the prior employer's experience rating. Therefore, a successor in interest normally assumes the workers' compensation experience rating of the purchased employer. However, in the Valley Roofing decision, the Supreme Court of Ohio held that a company that purchases another company from a bank does not assume the purchased company's workers compensation experience rating.

In this specific case, PNC Bank foreclosed on the assets of Tech Valley Contracting (Valley Contracting). Valley Roofing Company (Valley Roofing) bought those assets from PNC Bank and continued the business operation. The Bureau of Workers' Compensation subsequently transferred Valley Contracting's experience rating to Valley Roofing as a successor in interest. Valley Roofing objected, and the Court of Appeals held that a transferee-company does not become a successor in interest

to the BWC experience of a transferred company if the transferred company was purchased from a bank. The transferee-company does become the successor in interest if it purchases the transferred company directly.

The Supreme Court of Ohio affirmed the Court of Appeal's decision. The Supreme Court held that the purchase of the experience must be a voluntary act of the purchasing employer and not the involuntary transfer of the employer's business through an intermediary bank. Consequently, an entity that purchases the assets of another entity from a bank is not the successor in interest of the purchased entity's workers compensation experience rating.

*Feel free to contact Chad Fine or any of the workers' compensation attorneys at RBS with any further questions or concerns regarding The Supreme Court of Ohio's decision in Valley Roofing and "successors in interest."*

ECHELON CONSULTING GROUP presents:

## “The HR Commuter Workshop Series”

- Do you work for a small company?
- Are you responsible for personnel issues?
- Do you need some help with that?

The HR Commuter Workshop Series offers non-HR staff or less-experienced HR staff a chance to work on real and current HR issues and leave with a problem solved and a lesson learned.

The workshops are free to clients of Echelon Consulting Group and Ross, Brittain & Schonberg.

The workshops take place on the second Tuesday of every month at 8:30 a.m. and are held in the ground floor auditorium at 6480 Rockside Woods Blvd. South. The instructor will provide a brief topic overview and then participants will work as a group, sharing best practices. The workshops last one hour and the instructor will field questions afterward for a half hour. Participants should come prepared with questions or copies of materials they want to work on.

*Please contact Jane at (216) 906-6776 (cell) or at [jplank@echelon-cg.com](mailto:jplank@echelon-cg.com) to register.*

### **February 9, 2010 - Evaluations**

Are you having trouble with non-compliant supervisors? Bring your evaluation tools and procedures. We will share some of the best practices to help make dealing with a non-compliant supervisor easier and quicker.

### **March 9, 2010 - Hiring Practices**

Not getting the right fit? If you have trouble writing ads, coming up with good interview questions or doing background checks, bring your biggest challenge and we will help guide you to better hires.

### **April 13, 2010 - Leave of Absence Forms and Tracking**

Looking at PTO? Bring your policy and forms and we will share some of the best practices for managing and tracking leave time.

### **May 11, 2010 - Personnel Records**

Are you sure you know what goes where and how long to keep it? Bring the table of contents from your personnel record and we will review it and give you the federal guidelines for record retention.

### **June 8, 2010 - Turnover**

Do you say good bye too often? Bring your turnover data and exit interview policy and we will show you a dashboard.

### **July 13, 2010 - Documentation for Payroll**

Does payroll make your eyes cross? Bring in your payroll forms and we will share some of the best practices for the payroll preparation process.

### **August 10, 2010 - Performance Improvement Plans**

Do you struggle with poor performers? Bring in an anonymous example of a performance problem on an employee who needs to improve and we will show you some documentation alternatives.

### **September 14, 2010 - Morale Boosters**

Work no fun? Bring in your ideas and needs for improving morale and we will help you create a plan for improving morale.



6480 Rockside Woods Blvd. South, Suite 390 - Cleveland, OH 44131 - 216-520-1010

**We Make it Our Business**  
**To Take Good Care of Your Business**