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**LABOR: Traditional Labor Law is Evolving with the Internet**

by Nick A. Nykulak

In October 2010, the Regional Office of the National Labor Relations Board, located in Hartford, Connecticut, issued a "first ever" complaint against American Medical Response of Connecticut after American Medical fired an employee who had posted derogatory comments about a supervisor on her Facebook page. The Region alleged that the Facebook comments were protected speech under the National Labor Relations Act (Act).

Dawnmarie Souza was a technician working for American Medical who several patients had complained about. Her supervisor at American Medical asked Ms. Souza to prepare a report addressing the patient complaints. Ms. Souza requested to have her union representative involved, which American Medical denied. Irate about the denial, Ms. Souza went home and posted on her Facebook page several expletives about her supervisor and further stated, "Looks like I am getting some time off. Love how the Company allows a 17 to be a supervisor." "17" is what American Medical refers to as a psychiatric patient. Several of Ms. Souza's coworkers, who are her "friends" through Facebook, posted supportive comments in response to her statements about her supervisor. Shortly after the Facebook postings, Ms. Souza was suspended and eventually terminated from her employment with American Medical.

The Complaint alleged that American Medical interfered with Ms. Souza's right to engage in "protected concerted activity," namely her ability to discuss with other coworkers the conduct of her supervisor. The Act protects the rights of union and non-union employees to discuss with other employees the hours, terms and other conditions of their employment. Here, the Region decided that the discussion on Facebook about Ms. Souza's supervisor should be treated no differently than any other discussion employees have in person, at a restaurant, or around a water cooler, which have always been protected by the Act. The Region claimed that Ms. Souza's posting about her supervisor being a "17" was a protected discussion about the conditions of her employment with American Medical.

The Region also claimed that American Medical's overbroad internet posting and blogging policy also violates the Act because it flatly prohibits employees from posting pictures of themselves that depict American Medical or from making disparaging, discriminatory or defamatory statements about American Medical, supervisors or fellow coworkers. The Region claimed this overly broad policy may have a chilling effect on protected concerted activity because it prevents employees from depicting American Medical or its supervisors "in any way" over the internet without American Medical's approval.

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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.

## LABOR: Traditional Labor Law is Evolving with the Internet (CONTINUED)

We will have to wait and see if the National Labor Relations Board decides to expand its reach to social media and other internet forums, as this particular case was recently settled. However, employers who have broad social media policies that may restrict protected concerted activities of employees, or who are thinking about terminating an employee for making comments on the internet about the company, its

supervisors, or working conditions, should first consult with labor counsel. With the advent of social media websites such as Facebook, Twitter and YouTube, which provide employees with endless opportunities outside of the workplace to discuss wages, hours and other terms and conditions of employment, employers must be aware that traditional notions of what constitutes the workplace, or protected

discussions about the workplace, are being expanded exponentially.

*If you have any questions about this article, or if you need additional information regarding the implications of social media policies, please feel free to contact our experienced labor attorneys, Nick Nykulak or Alan Ross.*

## WORKERS' COMPENSATION: In-House Machines and Product Liability

by Meredith L. Ullman

For employers who build their own machines, should there be concern over a product liability lawsuit if an employee is hurt using the machine? For example, let's say the employer is a shoe manufacturer and develops a unique machine to help with the soling of shoes. The machine is built in-house by the employer and used in the production of their product. The machine malfunctions and injures an employee. The employee, in addition to a workers' compensation claim, also brings a product liability action against the employer. Is the product liability lawsuit a viable action? The simple answer is "no."

statute for an injury incurred while the employer was compliant.

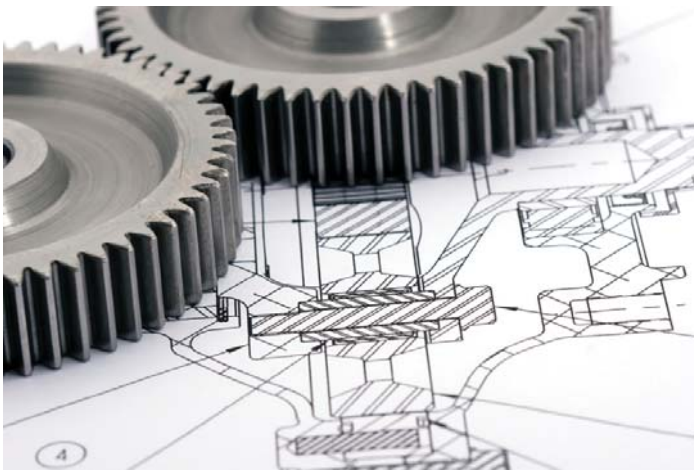
The main exceptions to this rule are intentional torts and the "Dual-Capacity Doctrine." The Dual-Capacity Doctrine allows an injured worker to bring a negligence lawsuit against their employer for violation of a duty that arises from a relationship unrelated to the employment relationship.

Employees have attempted to allege product liability under the Dual-Capacity Doctrine when they have been injured using a machine built by their employer. Employees have been unsuccessful in such actions. As a general rule put forth by Ohio courts, "it is universally held that where an employer designs and manufactures a product for use by its employees and not for sale to the general public, an employee injured while using that product within the scope of his employment may not maintain a products liability action against his employer under the dual-capacity doctrine on the theory that the employer assumed an independent role as manufacturer."

The Supreme Court of Ohio further expanded the rule to include products that are mass marketed to the general public, so long as the product was being used for employment purposes. The case wherein the Supreme Court of Ohio made this decision involved an injured worker who was driving a company vehicle for Firestone with Firestone tires. A tire blew out and the employee suffered injuries. The employee alleged, among other theories, product liability based upon the defective tire. The Supreme Court of Ohio held that even if the product was for sale to the general public, if the product was also being used for the company's own use, and the product was being used within the scope of the employee's employment, the employee still could not bring a product liability action against his employer under the Dual-Capacity Doctrine. The tires were furnished to the injured worker solely as an employee and not as a member of the consuming public.

Based upon these decisions, an employer that builds a machine in-house for use in production should not be concerned over the possibility of a product liability claim.

*Please do not hesitate to contact Meredith Ullman or any of the experienced workers' compensation attorneys at RBS with questions or concerns regarding workers' compensation injuries involving in-house machines.*



Generally speaking, the only method of recovery for an injured worker against an employer is through the workers' compensation system. The Ohio system denies an injured worker the right to damages at common law or by

# WORKERS' COMPENSATION: An Introduction to the "Coming and Going" Rule

by Chad A. Fine

The "coming and going" rule has influenced workers' compensation law in the state of Ohio for over 70 years. More likely than not, as an employer in Ohio, you have had a workers' compensation claim filed against your company that was decided based upon this rule. The rule provides that an employee with a fixed place of employment, who is injured while traveling to or from the fixed place of employment, is not in the course and scope of employment because the requisite causal connection between the injury and the employment does not exist. Simply put, an employee injured while traveling to or from work generally does not have a compensable workers' compensation claim. Of course, as will be discussed in this article, there are exceptions to the rule.

The most important question that must be asked and answered is whether or not the injured worker is a "fixed situs" employee. The coming and going rule applies to fixed situs employees, or employees with a fixed place of employment. To determine if an employee has a fixed place of employment, the focus is on whether or not the employee commences substantial employment duties only after arriving at a specific and identifiable work place, as designated by the employer. The focus remains unchanged even though the employee may be reassigned to a different work place on a monthly, weekly, or even daily basis. An employee who periodically relocates to a different job site may still be considered to have a fixed place of employment. Of course, on the other hand, an employee who does not have a fixed place of

employment would not be bound by the coming and going rule. As noted above, Ohio courts have also consistently described three exceptions to the coming and going rule.

First, if the employee's injury occurs within the "zone of employment," the coming and going rule will not apply. The zone of employment is the place of employment and the areas thereabout, *including the means of ingress and egress*, under the control of the employer. The zone of employment includes a parking lot owned/controlled by the employer and used exclusively by its employees.

Second, if the employment creates a "special hazard" that caused and/or contributed to the injury, the coming and going rule will not apply. The focus here is on whether or not the employee would have been at the location where the injury occurred, but for his employment, and whether or not the risk of injury is distinctive in nature and greater than the risk to the common public.

Third, if there is a causal connection between the employee's injury and his employment based upon the "totality of the circumstances" surrounding the injury, the coming and going rule will not



apply. The totality of the circumstances exception involves three distinct factors. The first factor is the proximity of the scene of the accident to the place of employment. The second factor is the degree of control the employer has over the scene of the accident. The third factor is the benefit the employer received from the employee's presence at the scene of the accident.

These are all complicated factual and legal questions that need to be analyzed on a case-by-case basis. More often than not, Ohio caselaw will provide guidance as to whether or not an injury is compensable.

*Please contact Chad Fine or any of the experienced workers' compensation attorneys at RBS with questions concerning the "coming and going" rule, or with any other workers' compensation questions you may have.*

## FIRM NEWS: Recognizing Our Newest Certified Specialist

It is with pride that we announce the recognition of Nick Nykulak as a Certified Specialist in Labor & Employment by the Ohio State Bar Association. Nick, an attorney with the firm since July of 2005, was recently notified of this distinction after completing a lengthy application process and passing a rigorous exam in Columbus. With this achievement, Nick joins Brian Brittain, Lynn Schonberg and Carol Strassman as firm attorneys recognized by the Ohio State Bar Association as being experts in their field of practice. Congratulations, Nick!

# EMPLOYMENT: The EEOC Issues Final Genetic Information and Nondiscrimination Act Regulations

by Ryan T. Neumeyer

The Equal Employment Opportunity Commission (EEOC) has released the final regulations interpreting the Genetic Information Nondiscrimination Act (GINA). The employment provisions of GINA (covered in Title II of the law) prohibit employers from discriminating on the basis of genetic information, prohibit employers from requiring or requesting genetic information from employees or family members, and require employers to keep genetic information confidential.

Genetic information includes, among other things, information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether or not someone has an increased risk of getting a disease, disorder, or condition in the future.

The following are the important highlights found in the final GINA regulations:

**Medical Requests:** The final regulations provide that an employer may inadvertently receive genetic information when it legitimately requests medical information. For example, an employer that asks an employee to submit a medical certification for FMLA leave or documentation of a disability and need for reasonable accommodation under the ADA may also inadvertently receive genetic information. In these situations, there will be no violation of GINA if the employer had properly communicated to the employee or health care provider not to provide genetic information. The regulations provide the following sample language that must be attached to all forms requesting medical information:

*The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA includes*

*an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

**Inadvertent Discovery:** If genetic information is acquired inadvertently or through information that is publicly and commercially available, this does not violate GINA. The final regulations make it clear that an employer's deliberate act of acquiring genetic information is not included within this exception. Therefore, searching for genetic information online on a social media website or conducting an internet search that is likely to yield genetic information would violate GINA. However, if a manager or supervisor is Facebook friends with an employee or has access to an employee's Twitter feed and sees an employee's post or tweet which

will also ensure compliance under the ADA, which requires that all medical information be kept in a separate, secure file.

**Wellness Programs:** An exception applies to health or genetic services offered as part of a wellness program, as long as employee participation is knowing and voluntary, among other requirements. The final regulations state that "voluntary participation" means when incentives to participate in the program are offered. For example, if an employer offers \$100 to employees to complete a health risk assessment with 100 questions and the last 20 of them concern family medical history or other genetic information, the instructions must make clear that \$100 will be provided regardless of whether the employee answers the final 20 questions. Accordingly, if you offer incentives to employees for taking risk assessments then you must make sure that either there are no questions regarding genetic information or employees are still compensated if they do not answer questions related to genetic information.



discloses personal genetic information, the inadvertent exception protects an employer in this situation.

**Personnel Files:** Genetic information placed in employee personnel files before the effective date of GINA (November 21, 2009) does not have to be removed. However, I still recommend that employers remove all medical information from personnel files, including genetic information, and place such information in a separate file, kept in a secure location with limited access. This will not only ensure that GINA is complied with, but

*If you would like additional information regarding GINA, or have any questions or concerns regarding the highlights outlined above, please do not hesitate to contact our experienced employment attorneys, Ryan Neumeyer or Lynn Schonberg, to discuss the same.*

# WORKERS' COMPENSATION: Temporary Total Disability: Always Total, Seldom Temporary

by Michael J. Reidy

When Ohio's Legislature designed the workers' compensation system, its goal was to protect injured workers in a manner which was expedient and fair to both workers and their employers. Prior to the codification of the law, a workplace injury could lead to a personal injury lawsuit and a potential large recovery by the injured worker. However, at the same time, employers were able to defend against such lawsuits by asserting the common law defenses of contributory negligence and assumption of the risk. A bargain was struck whereby injured workers gave up their right to pursue lawsuits (with the exception of an intentional tort) and employers gave up common law defenses, in exchange for the Industrial Commission hearing process and a set schedule of benefits. The goal of the Legislature was to provide a system for the recognition of legitimate injuries, provide benefits to those injured while they recuperated, pay appropriate medical expenses, and return the worker to employment at the earliest possible time.

As this system evolved over the years, and as injured workers more frequently retained counsel to present their claims, many of the original goals of the Legislature were lost. Originally, lawyer compensation was a percentage of temporary total disability (this is no longer the case, except for accrued amounts) and permanent partial disability benefits received. In order to maximize dollars for their clients and themselves, it was always beneficial for the attorney to keep the injured worker off work and receiving "temporary" total disability benefits for as long as possible. It was also beneficial to expand the allowed conditions in a claim so that a greater permanent partial disability award could be generated. Obviously, these two goals are diametrically opposed to the Legislature's original goals.

Perhaps the biggest thorn in the side of Ohio employers has been and remains the payment of temporary total disability

benefits. Those tax-free benefits (based upon the prior wage levels of the injured worker) are designed to compensate an injured worker during the period of recuperation until a return to work. The rules require that benefits commence after the seventh day of missed work



and continue until the injured worker returns. After fourteen continuous days of being off work, the first seven days are retroactively paid as well. Section 4123.56(A) of the Ohio Revised Code provides, in part:

*Payments shall continue pending the determination of the matter, however payment shall not be made for the period when any employee has returned to work, when an employee's treating physician has made a written statement that the employee is capable of returning to the employee's former position of employment, when work within the physical capabilities of the employee is made available by the employer or another employer, or when the employee has reached the maximum medical improvement.*

The statute identifies four events every employer should keep in mind regarding the termination of ongoing temporary total disability benefits. The first one is clear: the benefits stop when the employee has returned to his regular job. The second event is also clear: an employer is not liable for continued benefits if it has received a written statement from the treating physician that the employee is capable of returning to his former position of employment – whether or not he does. In those two instances, the employer can stop the payment of benefits unilaterally without a hearing before the Industrial Commission of Ohio. The third event, when work within the physical capabilities of the employee is made available, may be a bit more problematic. The best way for an employer to seek a termination of benefits in that instance is to secure written restrictions from the physician of record, provide or create a specific job within those restrictions, share the job information with the treating physician, and have him "sign off" on the return to work. If an employer takes these steps and yet the injured worker refuses to return after being given a good faith written job offer, a motion should be filed with the Industrial Commission seeking termination of benefits. A hearing officer will then have to determine if the employer has complied with Section 4123.56(A).

The last event, a finding of maximum medical improvement, could or could not lead to a hearing. If the treating physician provides the employer with written documentation that the claimant has reached maximum medical improvement, benefits can be unilaterally terminated. Maximum medical improvement has been defined as "a treatment plateau (static or well-stabilized) at which no fundamental functional or physiological change can be expected within reasonable medical probability in spite of continuing medical or rehabilitative procedures." All this really means is that the injured worker has reached a level where his condition is no longer expected to improve and he is, therefore, no longer temporarily

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## WORKERS' COMPENSATION: Temporary Total Disability: Always Total, Seldom Temporary (CONTINUED)

disabled. An injured worker can attain that plateau and continue to receive medical treatment but is no longer entitled to ongoing benefits. Should an employer obtain a statement of maximum medical improvement from its physician after an independent medical evaluation, it cannot unilaterally stop benefits, but must file a motion, request a hearing, and have a hearing officer make that decision.

The fact that temporary total disability benefits may be stopped for any of the above referenced reasons does not mean the injured worker is foreclosed from future temporary total disability. The injured worker may be able to demonstrate

“new and changed circumstances” such as a subsequent surgery for the allowed condition in his claim, leading to a period of recuperation and an additional period of temporary total disability.

Employers should always keep in mind these four events which terminate ongoing benefits. Employers should also be on watch for conduct solely designed to keep the injured worker off work and receiving benefits. Examples include changing the physician of record after the injured worker receives a report adverse to his continuing temporary total disability benefits or seeking a psychological allowance after temporary total disability is terminated for

the underlying physical condition. These are popular “ploys” utilized by certain attorneys. Other conduct includes injured workers deliberately delaying necessary treatment and/or rehabilitation for the sole purpose of staying temporarily totally disabled.

*Please feel free to contact Mike Reidy or any of the experienced workers' compensation attorneys at RBS with questions concerning “temporary” total disability compensation and termination of the same. Also, please note Carol Strassman's article in this edition of the newsletter for additional information on temporary total disability.*

## WORKERS' COMPENSATION: Righting a Wrong: The Employer's Use of Mandamus Proceedings

by Scott W. Gedeon



At times, the receipt of a refusal order from the Industrial Commission of Ohio (an order denying a third-level hearing) may result in a discussion with our office as to whether or not further appeal

may be taken to an adverse decision.

If the issue pertains to extent of disability (essentially any issue other than whether or not the claimant has the right to participate in the workers' compensation fund for a particular injury, occupational disease, or death), then your remedy lies in mandamus. Through a complaint in mandamus, an employer may seek an order from the Tenth District Court of Appeals in which the court finds that the Industrial Commission abused its discretion in awarding benefits such as permanent total disability or temporary total disability. An employer may also challenge the decision of the Industrial Commission to deny an employer's request for relief (such as an application for handicap reimbursement)

or a motion to terminate temporary total disability benefits.

In the typical mandamus case, the employer will file a complaint with the Tenth District Court of Appeals requesting that a particular order of the Industrial Commission be vacated. The other parties to the case (the injured worker and the Industrial Commission) will answer the complaint. The parties will then assemble and stipulate to an evidentiary record to be considered by the court during the course of briefing and argument. The evidentiary record is limited to those documents in the Industrial Commission's file at the time an issue is heard by the Industrial Commission and may include medical records, witness statements, Industrial Commission orders, and other evidence offered by the parties on an issue.

The parties will then file briefs outlining their respective positions. Generally, if requested, the court will allow oral argument. Mandamus cases are initially heard and decided by the court's magistrate. If an employer is unhappy with the decision of the magistrate, objections may be filed with further briefing and argument to be considered by a panel of three members of the court before a final order of the court

is rendered. Further appeal to an adverse decision would be taken to the Supreme Court of Ohio.

A decision of the Industrial Commission will be vacated if the employer establishes that the Industrial Commission abused its discretion. The Industrial Commission will be found to have abused its discretion if its order was not supported by sufficient evidence in the record. If the court holds that the Industrial Commission abused its discretion, it will issue an order called a “writ of mandamus” which will vacate the Industrial Commission's order and provide the employer with the relief sought.

It should be noted that mandamus should only be reserved for those circumstances that warrant its use, as the briefing and oral argument is extremely time intensive. In the right circumstances, however, mandamus is a powerful tool to undo an injustice delivered by the Industrial Commission.

*If your company has questions regarding mandamus proceedings or workers' compensation litigation in general, please do not hesitate to contact Scott Gedeon or any of the experienced workers' compensation attorneys at RBS.*

# WORKERS' COMPENSATION: More Frequently Asked Questions Regarding Workers' Compensation Claims and Hearings

by Carol D. Strassman

## FAQs

**Q: When is an injured worker entitled to temporary total disability compensation?**

A: An injured worker is entitled to receipt of temporary total compensation when he is unable to return to the former position of employment as a result of the allowed conditions in the claim. This is the legal definition of temporary total disability. Please note that the issue is whether or not the injured worker can return to his former position of employment. Thus, if the treating physician allows the injured worker to return to work with restrictions, and those restrictions cannot be accommodated, the injured worker is still entitled to receipt of temporary total compensation. If the treating physician does in fact allow the injured worker to return to work with restrictions, a decision then needs to be made as to whether the restrictions can be accommodated and the injured worker brought back to work. This, of course, would involve a case-by-case determination, depending on the nature of the restrictions and the employer's ability to accommodate those restrictions. In addition, an employer does not want to create a permanent light duty position.

**Q: How do we go about bringing an injured worker back to work with restrictions?**

A: The treating physician's restrictions must be reviewed and all restrictions must be accommodated. The light duty job should be put in writing describing all the duties which are required for performance of the light duty job. It is then best to have the treating physician sign off on the



light duty job. This will indicate to the injured worker and to the BWC that the treating physician agrees with the job duties and that the injured worker can perform those duties. The Ohio Administrative Code then requires that the light duty job offer to the injured worker be in writing. In addition, you must allow the injured worker 48 hours for the actual return to work to the light duty position.

**Q: What if the injured worker does not return to work pursuant to our written light duty job offer?**

A: If the injured worker does not return to work following a good faith written light duty job offer, this is a basis for termination of temporary total disability compensation. If the claimant does not return to work after the written light duty job offer, a motion should be filed immediately requesting termination of temporary total compensation. The motion should also request the hearing be scheduled on the next available docket. A copy of the written job offer must be attached to the motion. The claimant's temporary total compensation cannot be terminated until the date of the hearing. This will very likely create an overpayment in the claim.

*Please feel free to contact Carol Strassman or any of the experienced workers' compensation attorneys at RBS with questions concerning temporary total disability compensation and bringing an injured worker back to work in a light duty capacity. Also, please note Mike Reidy's article in this edition of the newsletter for additional information on temporary total disability.*

# WORKERS' COMPENSATION: The Industrial Commission of Ohio Discontinues the Regular Use of Video Hearings

by Anthony A. Bauccho

If you recall, my article in the last newsletter was entitled "The Industrial Commission of Ohio Initiates Video Hearings." I emphatically told you that video hearings were "here to stay." As you can see, my prediction was a bit off, as the title of this article will tell you. Keep in mind that I also picked the Browns to win the Super Bowl in 2008, so that should tell you a little something about my prognosticating skills.

On a serious note, the Industrial Commission of Ohio effectively discontinued the regular use of video hearings on January 25, after approximately seven months of use.

To refresh your memory, a video hearing is the same as a regular Industrial Commission hearing, with one exception. Instead of a hearing officer physically sitting at a desk in the hearing room, a video monitor is in his place. The hearing officer is visible on the video monitor to all parties in the hearing room. The hearing officer is able to see and hear everything that takes place in the hearing room and is able to easily communicate with all parties.

Due to significant concerns voiced by employers and injured workers alike, the Industrial Commission of Ohio decided to no longer regularly schedule video hearings; however, the video equipment will still be utilized, as video hearings may still be held in certain specific situations.

As per the Industrial Commission of Ohio, video hearings may be held in three situations:

1. When there is inclement weather;
2. When a hearing officer is ill and cannot attend a scheduled hearing,

another hearing officer may conduct the hearing via the use of the video equipment; and,

3. When a pre-hearing conference is scheduled.

Please note that in each of these situations, all parties must agree to proceed with the video hearing. Therefore, if at least one party does not wish to proceed with the video hearing, the hearing officer is obligated to continue the hearing and reset the matter.



From a practical standpoint, we, as your attorneys, will need to make a quick judgment call as to whether or not to proceed with a video hearing if the situation presents itself. The issue set for hearing and the complexity of the same will likely be the determining factors; however, many different issues would also factor into our decision. For instance, if our motion to terminate an injured worker's temporary total disability compensation was at issue, I might not want to continue the video hearing and essentially give the claimant another

month of disability compensation. Likewise, if a relatively straightforward treatment dispute was at issue, I might be comfortable proceeding with a video hearing. On the other hand, if I have four witnesses present for a strongly contested initial allowance hearing, I would probably prefer not to go forward with a video hearing. Of course, these are just a few scenarios that might arise. At the end of the day, if I feel that I can adequately represent your interests at a video hearing, I will do so. If not, I will respectfully request that the hearing be continued.

*Please do not hesitate to contact Anthony Bauccho or any of the experienced workers' compensation attorneys at RBS to discuss the use of video hearings or any other workers' compensation matter that's on your mind.*