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**WORKERS' COMPENSATION: To Certify or Not to Certify – That is the Question**

*by Michael J. Reidy*

All workers' compensation injuries are not created equal. The indemnity and medical expenses associated with one individual's rotator cuff strain may be a small fraction of the expenses associated with the exact same condition in a different employee. What sometimes starts out as a rather innocuous sprain may lead to a monumental workers' compensation claim; therefore, the decision to certify or reject a claim is fraught with peril. Employers must recognize that the value of a workers' compensation claim depends on several factors, many of which are unrelated to the injury. The injured worker's education, socioeconomic status, level of job satisfaction, marital status, financial prudence or lack thereof, and psychological health all need to be taken into account.

When I began my workers' compensation practice as the in-house claims administrator for one of Cleveland's auto companies, I will never forget two injured workers who were in my office within a week. I learned of the first employee's injury, a hand contusion, not from the employee but from his lawyer's letter. Before the employee had come to my office, he had already retained a lawyer and was "gearing up" for his claim. The injury was only a contusion, but the "writing on the wall" was clear from the outset. As it turned out, the claim featured unnecessary medical expense, an inordinate amount of lost time, and an attempt to maximize permanent partial disability. This employee was a general laborer in the casting plant who was a high school dropout with financial, as well as marital, problems.

His personnel file demonstrated he knew how to "work" the company's attendance policy and it also demonstrated alcohol-related issues. It was clear this individual's degree of job satisfaction was incredibly low. His attitude was "you owe me."

The following Monday, another employee was in my office with his dominant hand wrapped as large as a boxing glove. This gentleman was a first generation immigrant from Germany who was a highly skilled machine repairman at the upper end of the pay scale for the auto company. He had been married for over 40 years and lived in the same modest house in a west side Cleveland neighborhood. He had been educated in "the old country" as a machinist. He was in my office to explain to me that on Saturday while he was working overtime, his right little finger was caught by a machine and was amputated and never found. I asked the gentleman who his physician was and how long the doctor estimated he would be off work. The gentleman indicated that he was at the hospital on Saturday, took Sunday off, and returned to work the morning he was in my office. His supervisor had given him a clipboard and provided him with an inspection job relating to preventive maintenance on the company's machines. On Monday, he was back to work full time, missing a finger on his dominant hand, whereas "contusion boy" would attempt to stay on temporary total disability for two and a half months.

The goals of both of these injured workers were apparent from the start and led to an entirely different

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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.

## WORKERS' COMPENSATION: To Certify or Not to Certify – That is the Question

(CONTINUED)

handling of their workers' compensation claims. The contusion was fought "tooth and nail" within the bounds of the law, whereas the amputation gave rise to no disputes. The bottom line is that it is not the injury alone which dictates how the

claim will proceed through the system; it is also the sociological and psychological makeup of the injured worker. The difficult task for the decision-maker is to weigh these factors at the outset and make the right call.

*Please feel free to contact Mike Reidy or any of the experienced workers' compensation attorneys at RBS with questions or concerns regarding claim certification, or any other workers' compensation issue on your mind.*

## WORKERS' COMPENSATION: Mediation - An Emerging Trend in Workers' Compensation Court Appeals

by Scott W. Gedeon

Recently, the Cuyahoga County Court of Common Pleas joined a growing list of courts that have begun utilizing court-ordered mediation in an attempt to resolve workers' compensation appeals. Through mediation, a trained mediator will work with the parties to reach a mutually beneficial resolution to litigation. In the context of a workers' compensation appeal, the mediator works with the parties to negotiate a financial settlement that is acceptable to the injured worker, employer, and Bureau of Workers' Compensation.

The mediation process is fairly standard throughout Ohio's courts. Approximately one week prior to mediation, the parties will file a mediation statement that gives their respective positions on the merits of the case and their position on settlement. The parties will then come together with the mediator at the courthouse. At the outset of mediation, with the parties together, the mediator will ask the

parties to give a brief statement outlining the strengths of their case and what they hope to accomplish through mediation.

The mediator will then split the parties up and "caucus" with each party privately to get a better understanding of their case and to begin the process of communicating settlement demands and offers between the parties. As negotiations begin, the mediator works as a "go between," communicating additional offers, demands, and information between the parties who remain segregated from each other. Good mediators will take an active role in "bridging the gap" between the parties and stress the "give and take" that is often necessary to reach settlements.

If a settlement is reached, the mediator will have the parties sign an entry for the court stating that the case has settled. If mediation is unsuccessful, the mediator will report to the court that a settlement was not reached and

the case will return to the court's active docket. Ohio law does require that in the event a settlement is not reached, the communications made during mediation remain confidential and are inadmissible during trial.

Mediation remains a cost-effective and often productive means to resolving workers' compensation disputes. While participation in court-ordered mediation is mandatory, the employer is certainly not obligated to agree to a settlement that adversely impacts its workers' compensation premiums or is otherwise unacceptable to the employer.

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

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# WORKERS' COMPENSATION: From a Stuck Bag of Potato Chips to a Contested Workers' Compensation Claim: Analyzing the Unusual and Uncommon Workplace Injury

by Anthony A. Bauccho

It has happened to all of us. It's somewhere around 3:00 on a busy afternoon and your stomach starts to rumble. A bag of Cool Ranch Doritos starts calling to you from the vending machine in your company's break room. A quick fix to your hunger pangs is a short walk and mere 60 cents away. You gather up some nickels and dimes and head over to the vending machine. After depositing your coins and selecting your snack, the vending machine coils start to move...and your bag of Cool Ranch Doritos gets stuck.

Now, if you're anything like me, you decide to rock that machine back and forth until that bag of Cool Ranch Doritos drops. But what if you decide to ask the nice old janitor for help, as he just happens to be wiping down tables in the break room at that exact moment? And what if that nice old janitor is happy to oblige and starts rocking the vending machine back and forth? And what if, while trying his best to free your bag of Cool Ranch Doritos, that nice old janitor happens to rupture his Achilles tendon? First, you're going to feel really bad for asking for help. Second, you're going to ask yourself "I wonder if that nice old janitor has a compensable workers' compensation claim?" Hopefully you'll be pondering that question while enjoying some Cool Ranch Doritos.

Fortunately, we do not need to look too far for some guidance. A very similar fact pattern recently came before the Second District Court of Appeals. In that case, a similarly injured janitor argued that at the time of his injury, he was engaged in an activity that is "logically related" to his employment as a janitor. The Bureau of Workers' Compensation (BWC) and the employer, on the other hand, argued that there was no association between the janitor's job duties and the act of tipping a vending machine to retrieve a stuck bag of chips. This case came before the Second District after the trial court rendered summary judgment in favor of the BWC and the employer.

Of course, the issue here is whether or not the janitor's injury was sustained "in the course of" and "arising out of" his employment as a janitor.

If you recall, the "in the course of" prong relates to the time, place and circumstances surrounding an injury. Under this prong, an injury is considered compensable if it is sustained by an employee while that employee engages in activity that is "consistent with the



contract for hire and logically related to the employer's business." The Second District decided that there were "genuine issues" regarding whether the janitor's actions were related to his contract for hire and logically consistent with the employer's business.

The "arising out of" prong simply concerns whether or not there is a "causal connection" between an injury and employment. This prong takes into consideration the proximity of the scene of

the accident to the place of employment, the degree of control the employer has over the scene of the accident and the benefit the employer received from the employee's presence at the scene of the accident. The Second District decided that the first two "factors" were satisfied, as the janitor was injured at his place of employment, in an area controlled by the employer. With respect to "benefit," the janitor argued that he was trying to help a co-worker and that he regularly pushed desks, bookshelves and other furniture, as per his job duties. The janitor argued that he was not engaged in horseplay, as he did not ignore any warnings and was not disregarding company policy and procedure. The BWC and the employer argued that no benefit existed, as tipping a vending machine was not an "ordinary risk" that the janitor experienced while performing his job duties. In the end, the Second District again decided that there were genuine issues of material fact concerning whether the janitor's presence at the scene of the accident created a benefit to the employer.

The Second District essentially decided that a reasonable jury could conclude that an employee hired to perform janitorial services might be expected by his employer to assist other employees with problems they encounter in the workplace, especially in an area where the employee regularly performs janitorial services. Accordingly, the Second District could not support the finding of summary judgment and held that genuine issues of material fact existed that must be resolved through a trial.

***Stuck bag of chips? Please do not contact Anthony Bauccho. Questions or concerns regarding a hotly contested workers' compensation claim? Please feel free to contact Anthony Bauccho or any of the experienced workers' compensation attorneys at RBS to discuss defense of the claim.***

# EMPLOYMENT: United States Supreme Court Decision May Provide Additional Protection to Employers

by Ryan T. Neumeyer

Wage and hour complaints are becoming more and more prevalent these days. One type of wage and hour complaint is a collective action brought pursuant to the Fair Labor Standards Act (FLSA). A collective action allows one or a few employees to sue an employer on behalf of other similarly situated employees. Such lawsuits are very costly and time consuming.

Recently, in the *Concepcion* decision, the United States Supreme Court held that an arbitration clause could limit class action lawsuits. Specifically, *Concepcion* found that a consumer arbitration agreement which required consumers to bring arbitration complaints individually, as opposed to on a class-wide basis, was valid and not against public policy. *Concepcion* could be used to support an arbitration agreement that prohibits an employee from bringing a FLSA collective action, thus requiring employees to arbitrate FLSA actions on an individual basis.

Although some lower courts have found that such provisions are not enforceable

in the context of FLSA collective actions, these decisions were all rendered prior to the Supreme Court's decision in *Concepcion*. Accordingly, it is probable that those courts would have found



differently, in light of *Concepcion*. Moreover, other lower courts have found that arbitration agreements which limit class actions are enforceable.

Given the Supreme Court's strong preference for enforcing specific terms of arbitration agreements, employers

may consider implementing arbitration agreements as a tool to limit FLSA collective actions. Such a provision could be included, for example, in an offer letter to a new employee, or as a stand-alone agreement. Valid arbitration agreements must, among other things:

- Be announced to the employee;
- Have clear and unequivocal language;
- Have important terms, such as the waiver of the right to a class or collective action, be conspicuous;
- State that the agreement is accepted in exchange for continued employment;
- Not affect substantive rights, but only the venue for dispute resolution; and
- Be signed by the employee.

*If you would like additional information regarding the use of arbitration clauses with respect to employment-related claims, please do not hesitate to contact our experienced employment attorneys, Ryan Neumeyer or Lynn Schonberg, to discuss the same.*

## FIRM NEWS:

### Congratulations to Attorney Ryan T. Neumeyer

Mr. Neumeyer has been awarded a Certificate of Outstanding Volunteer Service from The Cleveland Metropolitan Bar Association for his volunteer work with the Bar Association's "The 3R's – Rights · Responsibilities · Realities" program. This program works directly with Cleveland and East Cleveland city high schools, preparing 10th grade students for both the Ohio Graduation Test and for life beyond high school. Due to the success of this program, it has been expanded to include mentoring 11th and 12th grade students with assistance with college choices, applications, and financial aid planning. This coming fall, Mr. Neumeyer may once again be found mentoring students in the Cleveland and East Cleveland city high schools. Congratulations to Ryan on this wonderful achievement!

### Upcoming Speaking Engagements

- Attorney Carol Strassman will be moderating the annual Advanced Workers' Compensation Medical-Legal Seminar at the Cleveland Metropolitan Bar Association on December 2. Attorney Brian Brittain will be presenting a VSSR and OSHA update at the seminar.
- Attorney Lynn Schonberg will be speaking on the topic of "Recent Developments in Ohio Employment Law and Responding to EEOC and State Agency Charges" at an Advanced Employment Law Seminar presented by the National Business Institute on December 7 in Cleveland.

# LABOR: Ohio Prevailing Wage Law Changes

by Nick A. Nyulak

It has been more than a decade since the legislature has made any changes to Ohio's Prevailing Wage Law, a law that requires the payment of union scale wages and benefits on public construction projects. Given the need to bolster job creation in the state, coupled with the monumental challenge of closing a nearly eight billion dollar budget hole inherited from the previous administration, Governor Kasich wisely sought to overhaul Ohio's archaic prevailing wage laws. The end result was various changes to when prevailing wage laws apply to a project, how the prevailing wage is determined, as well as changes to the way prevailing wage laws are enforced against contractors and subcontractors.

The amendments significantly change when prevailing wage laws apply to a public project. Projects undertaken by a port authority were removed from prevailing wage requirements altogether. Also eliminated was section 4115.032 of the Ohio Revised Code, which applied prevailing wage requirements to private construction projects that were subject to various bonds issued by public authorities to finance private investment in the state, most notably, industrial revenue bonds. The legislature also made clear to school boards and to the Ohio School Facilities Commission that both lack authority to apply prevailing wage requirements to school construction projects. Various school boards and the Ohio Schools Facility Commission have recently attempted to apply prevailing wage requirements to school projects even though such projects were removed from prevailing wage requirements by the legislature in 1997.

The legislature also increased the prevailing wage thresholds on new construction projects for public authorities. The increases in the thresholds will be implemented gradually over the next several years. When the cost of construction is below the threshold set, prevailing wage requirements do not apply to a public project. Beginning September 29, 2011, the prevailing wage threshold for new

construction projects will increase to \$125,000. On September 29, 2012, the threshold will move to \$200,000, and on September 29, 2013 the threshold will reach its maximum, at \$250,000. The threshold for renovations, alterations and repairs was also increased to \$38,000 beginning on September 29, 2011. On September 29, 2012, the threshold will be \$60,000, and will reach its maximum of \$75,000 on September 29, 2013. The current thresholds for new construction, currently \$78,258, and for renovations, \$23,477, will remain the same for all road construction projects, with inflationary adjustments being made by the



Ohio Department of Commerce every two years.

The legislature also modified how the prevailing wage rate is determined in the state. Currently, the Ohio Department of Commerce simply adopts the wage rates and fringe benefit packages negotiated by labor organizations as the "prevailing wage rate" in any given Ohio locality. However, questions have been raised as to whether labor organizations have been providing the Ohio Department of Commerce with all of the agreements negotiated that may contain special or different rates. Thus, in order to protect Ohio's taxpayers from fraud, and taking into consideration that Ohio taxpayers are mandated to pay a rate negotiated by third parties, labor organizations are now required to submit any and all collective bargaining agreements and/or understandings they have to the Ohio Department of Commerce. The Department of Commerce will then

determine the prevailing wage rates from all of the agreements submitted. Labor organizations submitting agreements must also certify under the penalty of law that they have submitted all of the agreements in the applicable locality to ensure any special rates or exemptions negotiated by any labor organization are taken into consideration and equally applied to public works projects paid for by Ohio taxpayers.

Finally, the legislature made changes to the way prevailing wage laws are enforced against contractors who work on public projects. It is not a violation of prevailing

wage laws for a contractor to be out of ratio by two or fewer apprentices for not more than two days in any thirty day period. Since apprentices are paid significantly less than journeymen, contractors are required under the law to maintain a specific ratio of apprentices to journeyman on a given jobsite to protect the competitive bidding process. Also, in response to a recent decision by the Supreme Court of Ohio, any contractor that has a subcontractor that violates prevailing wage laws is still liable for any underpayments

made by the subcontractor, but the contractor is no longer liable for the 100% penalties if the contractor made a "good faith effort" to ensure the subcontractor's compliance with the law. The legislature also added a much needed "*de minimis* rule" for inadvertent underpayments that may occur to employees on a public project. Thus, if a contractor is found to have underpaid any employee \$1,000 or less in wages, and makes full restitution to the employee, the contractor is not subject to any further action under the prevailing wage law's enforcement mechanisms.

In order to address a rash of recent prevailing wage litigation, the legislature also increased the waiting period for interested parties to file lawsuits, allowing the Ohio Department of Commerce more time to complete administrative investigations. The waiting period for interested parties was increased from sixty days to one hundred and twenty days,

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## LABOR: Ohio Prevailing Wage Law Changes (CONTINUED)

with an automatic ninety-day extension that can be taken at the discretion of the Director of the Department of Commerce. Administrative investigations could now last up to two hundred and ten days without the threat of a lawsuit from an interested party.

Further, all interested party prevailing wage complaints filed with the Ohio Department of Commerce must be on the Department's

complaint form, must identify a specific contractor and a specific violation, and the interested party must attach evidence to support the violation alleged. If not, the Department of Commerce does not have to investigate the administrative complaint. Further, administrative prevailing wage complaints may only be filed against a successful bidder on a public project if the unsuccessful bidder, or the interested

party to which the unsuccessful bidder is a member, had submitted a bid on the same contract for the project.

*This article is only meant to be a summation of some of the changes to Ohio's Prevailing Wage Law. If you have any specific questions or would like more detailed information, please do hesitate to call Alan Ross or Nick Nykulak.*

## WORKERS' COMPENSATION: Supreme Court of Ohio Expands Retaliatory Discharge Protection for Injured Workers

by Chad A. Fine



In the *Sutton* decision, the Supreme Court of Ohio recently addressed the issue of whether Ohio law should allow an action for retaliatory discharge when an injured worker's employment is terminated *after* suffering an injury, but *before* a workers' compensation claim is actually filed.

By way of background, the Ohio Revised Code prohibits an employer from retaliating against an employee that has filed or pursued a workers' compensation claim. However, the Code only provides a remedy to an injured employee who files a workers' compensation claim *prior* to the employer engaging in the alleged retaliatory conduct. In *Sutton*, the employer fired the injured employee within one hour of reporting his injury to the president of the company, but *prior* to his filing or pursuing a workers' compensation claim. The company president did not give the injured employee a reason for the firing; however, the injured employee was told that the termination of his employment was not because of ethics, job performance, or because he had violated a company policy.

Essentially, a "gap" exists in the Code. Ohio law does not expressly prohibit

the termination of an injured worker's employment prior to the filing of a workers' compensation claim. However, the Court held that Ohio law expresses a clear public policy against retaliatory discharge of an employee after an injury is sustained in the course of employment but prior to the filing of a workers' compensation claim. The Court held that the state legislature did not intend to leave a gap in protection during which time an employer is permitted to retaliate against injured employees who might file a workers' compensation claim.

Furthermore, the Court noted its belief that the General Assembly did not intend to create "a footrace, the winner being determined by what event occurs first—the firing of the employee or the filing of the claim with the bureau." Therefore, the Court recognized a common-law tort claim for wrongful discharge in violation of public policy when an injured employee suffers retaliatory employment action after injury on the job but before the employee files a workers' compensation claim or institutes or pursues a workers' compensation proceeding.

The Court did qualify its decision, as follows:

Because a discharge could be for reasons other than those related to workers' compensation, such as a reasonable suspicion that the injury was not job related, or a disregard by the employee for the employer's safety rules, or an immediate need for a replacement employee, no presumption of retaliation arises from the fact that an employee is discharged soon

after an injury. Rather, the retaliatory nature of the discharge and its nexus with workers' compensation must be established by a preponderance of the evidence. To establish the overriding justification element, the injured employee must prove that his employer lacked an overriding business justification for firing him.

In other words, the timing of a termination in proximity with the suffering of an industrial injury does not create any "presumption" of retaliation.

The *Sutton* decision does contain one favorable aspect for Ohio employers. Attorneys for injured employees have traditionally used the public policy wrongful discharge tort cause of action endorsed by *Sutton* to seek compensatory and punitive damages, as the remedies available under the Code are limited to the traditional equitable remedies of reinstatement and back pay. In *Sutton*, the Court held that any action alleging a public policy wrongful discharge based on the workers' compensation statute would be limited to remedies available under the Code.

***Please do not hesitate to contact Chad Fine or any of the workers' compensation attorneys at RBS with questions or concerns regarding the Sutton decision. More importantly, to avoid a potential retaliatory discharge lawsuit, it is imperative that you contact the workers' compensation and employment law attorneys at RBS prior to terminating an injured employee.***

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

by Carol D. Strassman

# FAQs

**Q: We have previously discussed obtaining witness statements concerning a new workers' compensation claim, but what else do we need to obtain to defend a contested claim?**

A: To briefly reiterate, incident reports from both the injured worker and his supervisor, in addition to all witness statements, should be obtained as soon as possible after the alleged incident. Remember to separate the witnesses while they complete their statements. Remember to also obtain statements from witnesses identified by the injured worker, even though they may say that they did not actually see anything.

In addition to the factual issues surrounding an alleged mechanism of injury, the primary driving force behind a claim is the medical documentation. The medical records pertaining to treatment must be obtained and reviewed as soon as possible. Employers should work with their legal representative or third-party administrator (TPA) to secure signed medical releases and a list of medical providers. The medical records should be requested as soon as possible. In addition, employers should keep up to date with the medical documentation filed online by the injured worker or his medical providers, through "ICON," on the Industrial Commission of Ohio's website. Very often,

employers and their counsel are not copied on documentation which has been filed online.

Another important issue is whether the injured worker has a pre-existing condition or prior injury which involves the same body parts that were allegedly injured. Employers are entitled to medical records pre-dating the injury if the treatment involved the same body parts. If an injured worker has a prior claim involving the same body parts, then the prior claim can be requested as a reference file for the allowance hearing. This is true even if the prior claim is with a different employer. Once the prior claim is referenced, all documents in that file can be accessed online, through "ICON."

Once all medical documentation is received, an informed decision

can be made as to defense strategy going forward. Again, this should be discussed with your legal representative or TPA. There will undoubtedly be times when it is determined that a claim is valid and will not be contested. As always, this will be decided on a claim-by-claim basis. Securing all relevant medical documentation in a timely manner, as soon as an employer has notification of an alleged claim, is crucial to defending the same.

*Please feel free to contact Carol Strassman or any of the experienced workers' compensation attorneys at RBS with questions concerning the procurement of relevant medical documentation. Also, please feel free to submit your workers' compensation questions to RBS so Carol can address them in future issues of our Newsletter.*



## WORKERS' COMPENSATION: Supreme Court of Ohio Differentiates Between "Injury" and "Causation"

by Meredith L. Ullman

For years, the question of whether or not an injured worker may change the theory of his case at trial has remained unanswered. Appellate courts in Ohio have been split on the issue. On July 7, the Supreme Court of Ohio issued the *Starkey* decision, and finally provided a definitive answer to this question. The Court decided that an injured worker *may* change his theory of causation at trial – regardless of whether or not it was alleged administratively. Practically speaking, this means that an injured worker may allege all throughout the administrative process that his injury occurred by way of direct causation, and then, at trial, claim that his injury arose by way of a substantial aggravation.

In *Starkey*, the injured worker alleged before the Industrial Commission of Ohio that he suffered from degenerative osteoarthritis of the left hip by way of direct causation and his claim was administratively allowed for that condition. The employer appealed the allowance to the court of common pleas. While deposing the injured worker's expert (and treating) physician, the physician stated that the injured worker suffered from an *aggravation of pre-existing* left hip degenerative osteoarthritis. The employer moved for dismissal at the close of the injured worker's case, asserting that the injured worker had failed to allege the aggravation administratively. The trial court agreed with the employer and entered judgment in favor of employer.

The court of appeals reversed the trial court's decision and the matter was appealed to the Supreme Court of Ohio. The Court held that an injured worker may change the specific theory of causation at trial *so long as it is the same medical condition*. In essence, the Court stated that the theory of

causation does not define the injury and that causation is *different* from the actual condition.

So what does this mean for employers, and how will employers defend cases when they do not know what theory of causation the injured worker will pursue? Most likely, this means that more money and time will need to be invested in the discovery process. Written discovery such as interrogatories and document requests will need to be fine-tuned to draw out and "lock-in" the injured worker's theory of causation. Expert discovery depositions may also become more common, but at the expense of the party requesting the deposition (generally the employer). Finally, errant injured workers who fail to supply their expert narrative reports will most likely be under much more pressure from employers to do so.

While this may seem daunting and unfair, from a practical standpoint, the treatment records received administratively and through early discovery should clue in the employer as to the theory of causation. Should the injured worker's expert then change his opinion regarding causation for the first time at trial, the expert's credibility will be questioned. Good defense counsel should be able to demonstrate the expert's inadequacies should the expert "flip-flop" his opinion.

Last, but certainly not least, what does this ruling mean in terms of duplicate administrative requests before the Industrial Commission of Ohio? Based upon the Court's rationale in *Starkey*,

is an injured worker precluded from administratively pursuing two different theories of causation, at different times? Simply put, is an injured worker precluded from alleging arthritis through direct causation, adjudicating the condition administratively and losing, failing to appeal the matter into court, and then alleging arthritis by way of substantial aggravation for a "second bite at the apple" before the Industrial Commission of Ohio? Based upon the Court's rationale in *Starkey*, it seems like an injured worker would be precluded from two bites at the apple. If the Court believes a theory of



causation does not define the condition and the conditions are truly the same, an injured worker *should* be precluded from alleging the same condition, under different theories of causation, at different times. This scenario represents a clear legal standard referred to as *res judicata*, which bars the same matter from being raised a second time once a final decision has been reached.

***Please do not hesitate to contact Meredith Ullman or any of the experienced workers' compensation attorneys at RBS with questions regarding the Starkey decision, or with any concerns regarding workers' compensation litigation.***