



## ***Man Bites Dog continued from page 1***

IBEW illegally steered work to employees who engaged in union organizing, to the disadvantage of those who did not.

Nor did the NLRB stop at declaring such favoritism illegal. The NLRB also found that

the union had engaged in a host of illegal practices, including returning “stripped” employees out of referral order to newly organized contractors. The NLRB decision orders the union to pay back-pay to every member who was disadvantaged by the discriminatory referral process. As charges were first filed

with the NLRB as early as 1994, the amount owed by the union could be very substantial, particularly with the accrual of interest.

*Labor concerns or questions? Alan Ross and David Farkas are standing by.*

## **EMPLOYMENT: EPILEPSY IN THE WORKPLACE**

By Lynn Schonberg

**I**llness and disease are an unfortunate fact of human life. Employers today are very much aware of this fact, and often seek legal counsel when illnesses and special situations arise. Epilepsy is an example of a disease that employers are often concerned about. “Isn’t an epileptic employee dangerous to others?” we often hear. “Are we allowed to inquire if someone is so afflicted?”

On July 28, 2004, the Equal Employment Opportunity Commission issued a release setting forth guidance on issues involving epilepsy, answering these and other questions. Their release explains (1) when an employer may ask an applicant about his epilepsy; (2) what type of reasonable accommodations employees with epilepsy may need; (3) when epilepsy is considered a “disability” under the ADA; and (4) how an employer should handle safety concerns about epilepsy.

According to the EEOC, epilepsy is a disability when it substantially limits one or more major life activities of the employee, either presently or in the past, or if the employer regards the employee as being substantially limited because of the epilepsy. An employer may not ask an applicant for information, including a straight-out question of whether or not the applicant has epilepsy, before a job offer is made. After an offer, but before employment begins, the employer may ask and require a medical exam, as long as the employer does so of all applicants. The employer may only ask about epilepsy if it has reason to believe that the condition would affect the employee’s ability to perform the job, or that he would pose a risk of substantial harm to others.

The EEOC does not publish an exhaustive list of accommodations that must be made for an

epileptic employee. However, some of the possible reasonable accommodations include: (A) leave for treatment, or leave to adjust medication; (B) a private area to rest after a seizure; (C) a rubber mat or carpet to cushion a fall; (D) breaks to take medication; (E) adjustment to work schedules; or (F) the possibility of working from home.

Concerning safety, the EEOC advises that the employer should evaluate each individual based on his knowledge, skills, experience, and experience with the disease. The employer should determine whether the epilepsy poses significant risk of harm to the individual or others, and whether that risk can be diminished with a reasonable accommodation.

*EEOC questions can arise in a variety of different contexts. Contact Lynn Schonberg, Dave Andrews, or Jerry Cline for more information.*

## **WORKERS’ COMPENSATION: MERGERS & ACQUISITIONS AND THE IMPACT ON WORKERS’ COMPENSATION**

By Lauri Cochran

**M**any companies acquire other businesses, or are themselves sold, during the last quarter of the year. In all the work involved in such a transaction, it seems as though Workers’ Compensation issues do not receive the attention they deserve.

In most cases, if one company is combined with another company, the Bureau of Workers’ Compensation can do what is called a “total experience transfer.” That means that the purchasing company will inherit the experience of the company being purchased. If a company is being purchased, without a combination into another company, the Bureau can still assess the purchased compa-

ny’s experience to the new owner. As you can imagine, this can be good or bad, depending on the experience of the company being acquired.

Many are under the impression, incorrectly, that if there is an asset-only purchase agreement, the purchaser is free from inheriting any damaging experience or past-due BWC assessments. Nothing could be further from the truth. Unfortunately, the BWC’s position on any merger or acquisition is “past experience is indicative of future performance” and will therefore assess past claims history. As such, if your company is being sold to another entity and your company is in a group rat-

ing program, it’s important to advise your third party administrator as that purchase may have an impact on the group rate.

These are very significant considerations in any merger, acquisition or sale. Therefore, it is a good business practice to involve your third party administrator or representative at the beginning of such a transaction.

*This guest article was written by Lauri Cochran, an actuary with the TPA firm of Comprehensive Risk Management, Inc. If any questions arise on this topic within your organization, please feel free to contact Brian Brittain.*

## WORKERS' COMPENSATION: BENEFITS CALCULATION TO CHANGE FOR SEASONAL WORKERS

By Jerry P. Cline

The Ohio Supreme Court recently closed a substantial loophole in workers' compensation law regarding the calculation of benefits to seasonal workers. As most employers know, the Bureau of Workers' Compensation bases much of its benefits package on an injured worker's earnings prior to injury. The average weekly wage, or AWW, is the key component to this calculation. To determine the AWW, the Bureau simply totals up the wages earned in the 52 weeks prior to injury, and divides by 52. This number, the AWW, is then used to calculate temporary total disability benefits, permanent partial disability benefits and just about every other benefit pertaining to lost wages. If the injured worker is "involuntarily unemployed," those weeks of unemployment are excluded from the calculation.

It is therefore significant that before the recent decision, seasonal worker wage calculations *excluded* months not worked due to seasonal layoffs. In effect, a seasonal worker's AWW was artificially inflated because it reflected only the months worked and not the months that they may have chosen not to work due to the seasonal nature of the job.

To put this into perspective, consider a seasonal construction worker who earns \$500 per week and works 35 weeks out of the year. He has been laid off from December 1st until March 31st (17 weeks) every year for the past five years. During the lay-off periods, the construction worker has expressed no interest in obtaining temporary employment until rehire on April 1st. Now assume the same worker gets hurt on the job on November 30th and remains out of work indefinitely. The Bureau must assess the AWW for the 52 weeks prior to injury, but our worker was laid off for 17 of those 52 weeks. Hitherto, the Bureau would have excluded the 17 weeks the injured work-

er was laid off and divided the total **by only 35 weeks**. The worker would actually have earned \$17,500 for the year in question (\$500 x 35 weeks) for a true AWW of **\$336.54**, but the Bureau would have excluded the 17 lay-off weeks and divided \$17,500 by only 35 weeks for an AWW of **\$500**. Thus, injured workers matching this description were receiving windfalls of **33% more** than they were entitled to.

However, in *Baker Concrete Construction*, the Court ruled that when calculating AWW for seasonal employees, the number of weeks used in the calculation turns on whether the claimant's unemployment (weeks of \$0 income or income derived from unemployment benefits) was a "lifestyle choice." To determine a lifestyle choice, the Industrial Commission should look to the intent of the injured worker as well as to the words, actions or patterns established by the injured worker both before and during the claim.

As the Supreme Court stated, "if seasonal unemployment springs from a lifestyle choice, then those weeks of unemployment are not beyond a claimant's control and omitting those weeks from the AWW contradicts both the statute and the case law." Therefore, if it can be shown that an injured worker's repeated unemployment from his seasonal occupation is a *lifestyle choice*, employers can include those weeks of \$0 income in the AWW calculation, thereby reducing the AWW average and the risk assessed to the employer's workers' compensation insurance experience.

*Jerry and the Workers' Compensation unit are always looking for ways to help you save on your bottom line. They can be reached at any time for assistance with all your questions and concerns.*

## self-insured [corner]

The Workers' Compensation Resource Network is an association for self-insured employers in Ohio. The purpose of the association is to provide a unique forum, opportunity and resource for the educational benefit of self-insured employers.

The Resource Network dialogues ideas, resources and information with member peers by identifying and addressing issues with which self-insured employers are faced. This includes engaging in dialogue focused on outcomes that enhance self-insured administration. Some topics thus far covered include the development and maintenance of a transitional work program, ergonomics, the importance of written job descriptions, the economic impact of business failures on self-insured employers, and medically managing claims for self-insured employers.

If you are a self-insured company, consider becoming a member of the Workers' Compensation Resource Network. Members pay no additional cost for two representatives from your company to attend regularly scheduled seminars and meetings.

Call Megan Geist at (216) 447-1551 ext.165 for additional information and membership details.

## EMPLOYMENT LAW BREAKFAST BRIEFINGS

*Presented by Lynn Schonberg & David Andrews,  
in conjunction with Jane Plank of HR Department Unlimited*

**Location:** 6000 Freedom Square Drive, Independence  
In the Ground Floor Amphitheatre

**Time:** 8:30 a.m. to 10:30 a.m.

**Registration:** Please contact Melody at (216) 447-1551 for information, or register online at [www.rbslaw.com](http://www.rbslaw.com).  
(No cost to RB&S clients and HRDU Members)

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### *December 16, 2004 – HR Legal Update – What’s Next for Employers?*

What will the Courts, Congress and the General Assembly come up with next? We don't know for sure, but we can guarantee there will be significant changes and new issues to confront employers. This year-end review will bring you up to date on all the employment law related changes of 2004.

## HUMAN RESOURCES

*Presented by Jane Plank of HR Department Unlimited*

**Location:** 6000 Freedom Square Drive, Independence  
In the Ground Floor Amphitheatre

**Time:** 8:30 a.m. to 10:30 a.m.

**Registration:** Please contact Jane at (330) 414-2220 for more information, or email her at [HRDU@aol.com](mailto:HRDU@aol.com).  
(No cost to RB&S clients and HRDU Members)

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### *October 14, 2004 – Overview of Front Line Supervision*

This class covers what front line supervisors need to know and do including a brief review of the legal components, employee relations, joining the management team and performing supervisory duties.

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### *November 11, 2004 – Effective Communication Systems*

Turnover data shows that ineffective communication often causes employees to leave their jobs and to be unhappy at work. This class will be a discussion on a variety of systems and techniques for improving communication at work.

## ABC, NORTHERN OHIO CHAPTER SEMINARS

ABC conducts an ongoing series of safety training for employers, including the popular OSHA 10-Hour and OSHA 30-Hour classes. All training participants must register one week in advance with Jennifer at (440) 717-0389.

**Location:** All training will be held at the NOC-ABC Training Center, 9255 Market Place West,  
Broadview Heights, Ohio 44147.

ABC also offers apprenticeship and training for a variety of crafts. Cleveland-area courses offered for the 2004-2005 year include carpentry, HVAC, electrical, painting and plumbing.

Many of these programs and more are offered at a special discounted rate for ABC members.  
Please call Jennifer for more information.

### **NEW!!! – SAFETY COURSES ARE NOW AVAILABLE ONLINE THROUGH ABC!!!**

Employees can take the course from any computer – at work, home, or the library.  
This can result in significant savings to companies, in both time and travel costs!

One of the strongest indicators of a strong and stable law firm is periodic growth. It is with great pride then that RB&S is pleased to announce the addition of two new associates, Danielle D. Swanda and Meredith L. Ullman.

Danielle, a graduate of the University of Akron School of Law, is an associate who focuses her practice on workers' compensation defense and trial practice. Prior to joining the firm, Danielle focused her practice in the areas of toxic tort, product liability and general corporate defense.

Meredith, like Danielle, also focuses her practice on the defense of workers' compensation matters. Before joining the firm, Meredith, who graduated from Case Western Reserve School of Law cum laude, practiced in the areas of labor and employment law, representing employers in both the public and private sector.

We are sure you will enjoy working with them as much as we do!

ROSS,  
BRITTAIN  
&  
SCHONBERG  
CO., L.P.A.

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