



ILLINOIS STATE BAR ASSOCIATION

# WORKERS' COMPENSATION LAW

*The newsletter of the Illinois State Bar Association's Section on Workers' Compensation Law*

## Pre-trial discovery: Is it available for workers' compensation claims?

By Arnold G. Rubin

The Second District Appellate Court addressed the issue as to whether a claimant in a workers' compensation claim could obtain a surveillance videotape from an employer prior to commencing the Industrial Commission proceeding through an equitable bill of discovery filed in the Circuit Court of DuPage County. In *Walton v. Illinois Bell Telephone Company*, 353 Ill.App.3d 555, 818 N.E.2d 1242 (2nd Dist. 2004), the appellate court held the claimant was not entitled to a bill of discovery.

Claimant had filed a workers' compensation claim against his employer, Illinois Bell Telephone Company. Prior to beginning the arbitration hearing, evidence depositions were to be taken of the employer's medical expert and claimant's treating physician. The employer's medical expert had examined claimant and determined that he was disabled from work and in need of surgery. However, after a surveillance videotape was provided to the employer's expert, the physician revised his earlier opinion and concluded that claimant's injury was not disabling. At this point, claimant determined that he needed access to the videotape in order to prepare for the evidence deposition testimony of the treating physician and the cross-examination of the employer's medical expert.

The claimant's attorney contended that there was no mechanism for obtaining the videotape within the workers' compensation proceeding. It was requested that the circuit court enter an order requiring the employer to produce the videotape, as well as any statements from witnesses to the accident and other "investigative materials."

The employer filed a motion to dismiss the equitable bill of discovery. The circuit

court entered an order denying the underlying bill of discovery and also denying a summary judgment motion filed by claimant's attorney.

The appellate court determined that the circuit court ruled as a matter of law that a party to a workers' compensation proceeding may not use an equitable bill of discovery to expand the scope of discovery available under the Commission's procedural rules. The appellate court determined that equitable relief can certainly be applicable to a judicial proceeding. However, the court pointed out that different considerations apply where there is an administrative proceeding pending before an administrative agency. The appellate court then determined that equitable relief is not available where an existing administrative procedure created by statute is an adequate remedy that assures full protection of claimant's due process rights and offers complete relief.

The appellate court explained that the Industrial Commission has the statutory authority to make and publish procedural rules. An examination of the Industrial Commission rules disclosed to the appellate court that there was no provision for pre-trial discovery. The appellate court further explained that the claimant was attempting to circumvent the Commission's procedural rules in order to obtain general discovery through auxiliary judicial proceedings. The appellate court pointed out that allowing a claimant to circumvent the Commission's procedural rules could substantially undermine the objective of the general assembly in the Industrial Commission. The appellate court also explained that the claimant did not contend that the Act, and that the Industrial Com-

mission's procedural rules failed to provide an adequate remedy for workplace injuries. There was no allegation that the lack of discovery under the Commission's procedural rules would deprive him of due process of law. Nor was there an allegation by claimant that the videotape was needed to make a "prima facie" case for recovery under the Act. The court left open the issue as to whether a bill of discovery would be available in such circumstances.

A dilemma was clearly presented to claimant's attorney in the *Walton* case. A decision was apparently made to take evidence depositions prior to beginning the testimony of the lay witnesses in the claim. It is most likely that claimant's treating physician would have testified first by evidence deposition. Obviously, the actual surveillance videotape would not have been available for review by the treating physician. There may have been references to the subject matter of the videotape in the reports of the employer's examining doctor. However, that is not clear from the decision of the appellate court. Assuming that the videotape surveillance was not discussed in the reports of the employer's medical expert, then had claimant taken the evidence deposition of the treating physician, there would have been no references to this surveillance videotape available for consideration by the treating doctor. Claimant's attorney also asserted that he needed the videotape in order to prepare for cross-examination of Respondent's medical expert.

An argument that could have been made by claimant's attorney, if the videotape was not disclosed prior to the cross-examination of the employer's medical expert, was that the employer could not ask any questions

of the medical expert on that issue because the failure to disclose the videotape violated the holding of the appellate court in *Ghere v. Industrial Commission*, 278 Ill.App.3d 840,663 N.E.2d 1046 (1996). It is unclear as to whether *Ghere* would have been applicable to this situation. However, it is certainly an argument that could have been made by claimant's attorney.

If claimant was unable to obtain the videotape and proceeded with the evidence deposition with the employer's medical ex-

pert, then following the taking of the deposition of employer's medical expert and reviewing the videotape, claimant could then have used the videotape to take a second evidence deposition of claimant's treating physician.

There is also a question as to whether a proper foundation would be laid for the videotape in a pre-arbitration hearing evidence deposition.

As can be seen by the potential scenarios as set forth above, the failure of the employer

to provide a videotape to claimant may result in an excessive delay in the completion of the arbitration hearing. The time delay, especially in a §19(b) proceeding, would obviously work to claimant's detriment. The *Walton* case clearly suggests that both parties should work together to resolve these types of evidentiary disputes. The assistance of the arbitrator should be employed in these instances. ■

THIS ARTICLE ORIGINALLY APPEARED IN  
THE ILLINOIS STATE BAR ASSOCIATION'S  
*WORKERS' COMPENSATION LAW* NEWSLETTER, VOL. 42 #3, MARCH 2005.  
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