PRACTICE IN THE POST COVID ERA
WHAT IF YOU NEED A DEPOSITION
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I - APPLICABLE LAW

820 ILCS 305/16

§ 16. The Commission shall make and publish procedural rules and orders for carrying out **the duties imposed upon it by law and for determining the extent of disability** sustained, which rules and orders shall be deemed prima facie reasonable and valid. The process and procedure before the Commission shall be as simple and summary as reasonably may be.

The Commission upon application of either party **may issue dedimus potestatem** directed to a commissioner, notary public, justice of the peace or any other officer authorized by law to administer oaths, to take the depositions of such witness or witnesses as may be necessary in the judgment of such applicant. Such dedimus potestatem may issue to any of the officers aforesaid in any state or territory of the United States. When the deposition of any witness resident of a foreign country is desired to be taken, the dedimus shall be directed to and the deposition taken before a consul, vice consul or other authorized representative of the government of the United States of America, whose station is in the country where the witness whose deposition is to be taken resides. In countries where the government of the United States has no consul or other diplomatic representative, then depositions in such case shall be taken through the appropriate judicial authority of that country; or where treaties provide for other methods of taking depositions, then the same may be taken as in such treaties provided. The Commission shall have the power to adopt necessary rules to govern the issue of such dedimus potestatem.

Ill Admin. Code tit 50, Section 7030.60 – Depositions

a) Evidence depositions of any witness may be taken, before hearing, only upon stipulation of the parties or upon order, called a dedimus potestatem in Section 16 of the Act, issued by the Arbitrator or Commissioner to whom the case has been assigned **upon application of either party.** Evidence depositions of any witness **may be taken after the hearing begins only upon order of the Arbitrator or Commissioner, for good cause shown**. Except as provided in subsection (f) below, such application shall be in writing and shall contain the following:

1) The reasons for the issuance of the dedimus potestatem clearly and concisely stated.

2) The date upon which the dedimus should be issued and the name and address of the party to whom the dedimus is to be directed.

3) The names and addresses of the witnesses whose depositions are sought to be taken.

4) A statement as to whether the depositions are to be taken by oral or written interrogatories. Such written application shall be made either upon a printed form prescribed and furnished by the Commission or in a similar document prepared by the party applying for the dedimus.

b) The time for taking depositions pursuant to the issuance of the dedimus potestatem shall be on a date set not less than ten (10) days after the issuance of such dedimus potestatem.

c) Notice and Objection

1) Except as provided in subsection (f) below, no dedimus potestatem shall be issued unless a copy of the application, together with all documents required by this rule to be attached to said application, has been served on the opposing party and proof of service of such copy made as provided in 50 Ill. Adm. Code 7020(a), Pre Arbitration.

2) The opposing party may, within five (5) days after the receipt of the copy of the application, file written objections to the issuance of the dedimus potestatem. The Commission shall rule on such objections before the issuance of the dedimus potestatem.

d) Except as provided in subsection (f) below, notice of the issuance of the dedimus potestatem shall be given in sufficient time so that the receipt of such copy of the dedimus potestatem shall not be less than ten (10) days before the date set for the taking of the deposition. If the deposition is to be taken by written interrogatories, such interrogatories shall be filed in triplicate with the application for dedimus potestatem and a copy of such interrogatories shall be attached to the copy of the dedimus potestatem mailed to each party. If cross-interrogatories are desired, the same shall be filed with the Commission, not more than five (5) days after the receipt of the written interrogatories, and the party filing same shall mail a copy thereof within the same period of time to the applicant for dedimus potestatem.

e) **No dedimus potestatem shall be issued** to take the depositions of any medical witnesses:

A) where the party applying for the dedimus potestatem has refused or failed to comply with the provisions of Section 12 of the Act, and

B) **unless he shall have served the other side with a signed report of such medical witness-<u>other than a treating physician</u>-giving his findings and conclusions**.

f) Exceptions

1) Provided, however, where it is shown that by complying with the time requirements prescribed herein, the party seeking the dedimus may be deprived of the evidence sought to be obtained by the deposition, that the Arbitrator or Commissioner to whom a case has been assigned for hearing may, in his discretion:

A) on notice and hearing before trial waive or reduce such requirements, or

B) permit a party to present an oral application of a dedimus potestatem immediately before or during trial and, after due consideration of such application and any objections thereto that may be orally raised by the opposite party, rule upon the application.

2) Where a dedimus potestatem is issued upon such oral application, the hearing officer shall allow the parties reasonable time to complete the deposition and submit the transcript thereof before closing proofs in the case.

g) When any party takes an evidence deposition, said deposition shall be filed and become part of the record as an exhibit of the party who applied for the dedimus to take the deposition, unless the parties agree otherwise.

h) All objections to questions propounded or answers adduced in the evidence deposition shall be fully explained on the record of said deposition. It shall be the duty of the hearing officer to note his ruling on each objection in the margin of the transcript of said deposition or at a hearing on the record.

Ill. Admin. Code tit. 50, § 7030.60

Amended at 20 Ill. Reg. 4053, effective February 15, 1996

820 ILCS 305/8.1b - Determination of permanent partial disability

§ 8.1b. Determination of permanent partial disability. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury;

and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) **evidence of disability corroborated by the treating medical records.**

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

Ghere Objections and Disclosure

Homebrite Ace Hardware v. Indus. Comm'n, 351 Ill. App. 3d 333, 339, 814 N.E.2d 126, 132 (2004)

The *Ghere* court examined the physician's records and treatment history to determine whether the employer was put on notice regarding the possibility that the physician might provide causation testimony. The court did not set forth a bright-line rule or presumption that undisclosed opinion testimony constitutes surprise. Furthermore, *Ghere* is factually distinguishable because the physician in *Ghere* had never treated the employee's heart condition, whereas Dr. Heffner did treat claimant for his neck problems**. Dr. Heffner's records contain details about his treatment of claimant's neck complaints and therefore the records put employer on notice that Dr. Heffner might testify as to a causal relationship between the neck condition and claimant's work accident.** Indeed, the only contested issue at arbitration was claimant's cervical injury. Employer's suggestion that Dr. Heffner's testimony should have been excluded is not well taken under these facts.
In sum, we conclude that the Commission did not abuse its discretion in admitting Dr. Heffner's causation testimony.

Munoz v. Illinois Workers' Comp. Comm'n, 2014 IL App (3d) 130418WC

> The Commission did not err in overruling the claimant's objection, pursuant to section 12 of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2010))
> and *Ghere v. Industrial Comm'n,* 278 Ill.App.3d 840, 663 N.E.2d 1046 (19 96), to a doctor's testimony where the **claimant's attorney was notified in writing that the doctor would testify as to causation and where his testimony was a natural continuation of the opinion expressed in his report.**

C&B Steel, Corp. v. Illinois Workers' Comp. Comm'n, 2015 IL App (1st) 142176WC-U, ¶ 45

> 45 In this case, the medical records and deposition testimony demonstrate Dr. Brechner treated claimant for a prior neck condition that resulted in surgery, and treated him again following the work accident at issue. However, contrary to the circumstances
> in *Homebrite* and *Kishwaukee,* **Dr. Brechner's November 30, 2011, letter—which was authored 13 months after he last saw claimant—clearly limited his causation opinion to a definite timeframe. In particular, Dr. Brechner noted, "I cannot form an opinion on whether [claimant's] fall on July 19, 2010, has caused ongoing pain or disability" beyond September 3, 2010. Despite the clear limits expressed in his letter, Dr. Brechner subsequently testified that claimant's condition of ill-being on April 24, 2012, was causally connected to the work accident based on his April 20, 2012, examination of claimant. Dr. Brechner's April 20, 2012, examination was not disclosed to the employer at least 48 hours prior to the deposition as required by section 12,** but instead, was sprung on the employer during Dr. Brechner's testimony. Thus, the facts in this case more closely resemble those in *Ghere* where the testimony at issue went well beyond what was included in the medical records provided to the employer.

City of Chicago - Dep't of Aviation v. Illinois Workers' Comp., 2015 IL App (1st) 131856WC-U, ¶¶ 48-49

> ¶ 48 The employer also argues that the deposition was inadmissible surprise medical testimony in violation of our holding
> in *Ghere v. Industrial Comm'n,* 278 Ill.App.3d 840 (1996). Specifically, the employer maintains that the claimant did not provide a complete set of Dr. Buvanendran's treatment records prior to the deposition. The employer's argument fails in two respects. First, it is well settled that there is no discovery in workers' compensation and thus neither party is under an obligation to provide medical records to the other. *Boyd Electric v. Illinois Workers' Compensation Comm'n,* 403 Ill.App.3d 256, 259 (2010). Second**,**

opinions of treating physicians are not subject to *Ghere* where the records in the employer's possession are sufficient to put the employer on notice that the treating physician will have an opinion as to causation. *Homebright Ace Hardware v. Industrial Comm'n,* 351 Ill.App.3d 333, 339 (2004).

¶ 49 Simply put, **the employer is responsible for obtaining whatever medical records it deems necessary by use of subpoenas served directly upon the medical provider.** Commission Rule 7110.70(c) provides that "the employer shall have the initial responsibility to promptly seek the desired information for those providers of medical, hospital and surgical services of which the employer has knowledge." Here, the record indicates that the employer issued a subpoena to Dr. Buvanendran but failed to take steps to enforce the subpoena. The employer cannot claim that it was surprised by Dr. Buvanendran's opinion testimony when it: (1) had in its possession Dr. Buvanendran's treatment notes for all but the last three appointments; and (2) had issued a subpoena for the notes from those last three appointments but failed to take steps to enforce the subpoena. Given this record, it cannot be said that the Commission's admission of Dr. Buvanendran's deposition violated the principles articulated in *Ghere.*

II - DEP PREPARATION

Initial Considerations

(a) Purposes for the deposition.

1 Evaluate the witness.

2 Obtain facts and information and explore opinions.

3 Commit witness to a specific version of events.

(b) Defense perspective-

Why is plaintiff taking the deposition of the doctor?

Is doctor qualified to give opinions on the relevant medical issues in the case?

Can doctor testify that certain medical complaints are not related to the claim and state that bills for treatment for that condition are also unrelated?

Can doctor testify to facts and opinions that would assist my expert in formulating beneficial opinions as to other medical issues beyond this doctor's expertise?

Can this doctor help me to prove facts that are detrimental to other side's expert opinions?

(c) Three kinds of questions.

Past.

Present.

Future.

(d) Steps to initial preparation.

Review facts – know the medicine and record.

Identify issues (**Arising out of, course and scope, damages, pre-existing conditions).**

Prepare a road map.

Focus on goal rather than specific questions.

Review disclosures from other side to determine expected testimony.

Determine whether all records have been produced prior to deposition.

Identify all potential legal objections to doctor's testimony:

Last date of treatment too long ago to support and opinion on prognosis currently;

Opinion is outside area of expertise and would rely on specialist in area- lacks foundation;

Is this doctor giving opinions as a retained expert?

Ghere v. Industrial Comm'n, 278 Ill.App.3d 840, 663 N.E.2d 1046 (1996),

II - ISSUE IDENTIFICATION

Arising out of and in the course and scope

Exacerbation or aggravation

Weight and credibility

Conflicting opinions or testimony

Plaintiff's improvement and effort

Effectiveness of treatment provided

Are there other and better witnesses to address the issues discussed

Are the injuries discussed by this witness in dispute in this case

Stay focused on true issues in dispute or defense

III - RULES FOR DEPOSITION

For the deponent

Yes or no.

No gestures, head shakes, or nod.

Make sure you understand the question.

Stop the questioner if you don't understand the question.

If a question is answered, it will be assumed that it is understood.

Listen carefully to the questions.

Do not answer until the question is complete.

For the Attorneys

Be aware of appropriate objections

Form
Foundation
Not timely disclosed
Hearsay
Irrelevant
Prior consistent statement
Learn the exceptions to the objections

Is the other side bullying you? The witness? Making inappropriate comments during the deposition? Asking inappropriate questions?

It is not appropriate to instruct the witness to not answer the question under most circumstances- usually only to preserve a privilege or enforce a Court Order.

It is appropriate to stop the deposition and move for a protective order to stop the inappropriate behavior/ questioning when necessary.

IV - TESTIMONY

Identify witness.

Identify the witness. Name, address, occupation, location.

Qualifications.

Education.

College, medical school.

Residency.

Fellowships.

Other Post-Graduate or Doctoral work.

Board Certification. Hospital Affiliations.

Teaching Responsibilities.

Publications and research.

Organizations.

The current practice or specialty.

Clinic.

Hospitals

Limited area of practice.

V - FOUNDATION AND COMPETENCY

Rule of Evidence 702 – Issues Regarding Competency.

> A witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule of Evidence 803 – Foundation for self-authentication and hearsay exception.

> (6) Records or regularly conducted activity. A memorandum, report, record, or data compilation in any form, of acts, events, conditions, opinions, or diagnosis made at or near the time by, or from information transmitted by, a person with knowledge is kept in the course of a regularly-conducted business activity, and if it was the regular practice of that business activity to make the memorandum..."

Rule of Evidence 902 – Self authentication.

> (11) Certified records of regularly conducted activity. The original or a duplicate of a record of regularly-conducted activity that would be admissible under Rule 803(6)...made at or near the time...kept in the regular course...kept as a regular practice.

Treatment of the Petitioner (Pre-Accident),

Primary Care Physician.

Pre-occurrence medical knowledge of Plaintiff.

Post-accident referral.

Availability of prior health records and health history.

Treatment Of Petitioner (Accident).

First contact

History of incident

History of complaints

Pre-existing conditions related to complaints

Emergency or medical care from other sources

History of Occurrence

Purpose and value of history

Description of accident

Description of injury

Accident Facts Included or Considered by deponent

Description of injury

Subjective v. Objective

Body mechanics

Seatbelts, safety equipment, or guards.

Importance and necessity of history – most important element of care.

Reliability of patient.

Physical examination

- Purpose for examination
- Describe examination in full.
- Each test – Purpose and Result
- Objective and Subjective information from each test.
- Correlate results of examination with history.

Differential diagnosis.

- Possible diagnoses that would explain complaints and objective findings.

Objective tests.

- Labs
- MRI
- X-Rays
- Sonograms
- NCV
- EKG

Diagnosis

- Definition and explanation. Describe nature of injury and mechanics for the trier of fact.
- Supporting history
- Supporting clinical examination
- Supporting test results

Supporting medical records or past medical history

Supporting literature or authority

Care and treatment. Subsequent visits.

Ongoing treatment with doctor.

Pain medication

Physical therapy

Exercises

Chiropractic

Anti-inflammatory medications

Braces, supports, crutches

Surgical procedures available

Surgical procedures recommended

Surgery

Description

Goal

Risks

Complications

Invasive trauma associated with surgery

Anesthesia

Results, residuals, sequela, scars

Compliance or non-compliance of patient

Reliable

Credible

Consistency

Reasonableness of claimant's decision to avoid or undergo Surgery. See notes to IPI 33.01.

Prognosis

Permanent disability

Partial disability

Loss of a normal life

Pain

Suffering

Disability

Relevant jury instructions

Future treatment

Future degeneration

Post-traumatic arthritis

Adjacent segment disease

Therapy

Medication

Likelihood of improvement

Likelihood of deterioration

Bills

Familiarity

Reasonable

Necessary

Personal knowledge

Hospital

Physician

PT and ancillary treatment

Future costs, duration, and reasonable necessity.

Causation.

To a reasonable degree of medical certainty

More probably true than not.

Opinion based on history, exam, tests, responses, to treatment = Treatment success can lead to conclusion.

Other potential causes

305/8.1b. Determination of permanent partial disability

Pain; proximate cause: Injury.

Disability. Loss of a normal life. Work restrictions.

Lifestyle changes.

Daily activities.

Future medical.