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## Workers' Compensation Alert

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### Combating Fraud: The Commission's Use of Continuing Jurisdiction

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The Tenth District Court of Appeals recently held that it is not an abuse of discretion for the Industrial Commission to exercise continuing jurisdiction over a workers' compensation claim based on fraud and new and changed circumstances, even if the injured worker did not initiate the filing of the workers' compensation claim.

In *Cowley v. Indus. Comm.*, 10th Dist., No. 11AP-4, 2011-Ohio-6663, the claimant, a nurse's aide, allegedly sustained a work-related injury to her right shoulder when a patient fell on top of her. The first report of injury was completed by the employer and was not signed by the claimant. The claim was allowed for right rotator cuff strain. In receiving medical treatment under the claim, claimant was seen by several physicians and told each that she never had any problems with her shoulder prior to her work-related injury.

Claimant sought an additional allowance of reflex sympathetic dystrophy, which was disallowed by both the district and staff hearing officers. Claimant appealed the disallowance into court. During the discovery process, the employer obtained medical records indicating years of problems with the right shoulder prior to the work-related injury. Claimant voluntarily dismissed her claim.

Based on the new medical records, the employer filed a C-86 requesting that the Commission exercise its continuing jurisdiction because claimant's right to participate had been fraudulently obtained and new and changed circumstances were present. A staff hearing officer disallowed the claim and ordered recoupment of all medical and compensation payments due to fraud and new and changed circumstances. When claimant's request for reconsideration by the Industrial Commission was denied, she commenced a mandamus action in Tenth District Court of Appeals.

The court held that the Commission did not abuse its discretion in finding fraud given the claimant's ongoing concealment of her preexisting shoulder conditions when she sought and received compensation and benefits for her shoulder-related claim. Claimant had a duty to disclose her preexisting shoulder condition. Additionally, the Commission properly exercised continuing jurisdiction because there were new and changed circumstances. While the medical records predated the injury, they could not have been discovered with due diligence because of the claimant's concealment. The court also held that it was not an abuse of discretion for the Commission to refer the matter to a staff hearing officer and not a district hearing officer because the issue was not whether the claim should

be allowed, but whether the claim was procured by fraud. Claimant had notice, appeared with counsel, and testified. She was not deprived of her due process rights.

This case is an example of how Commission orders are not necessarily final. An employer can file a C-86 requesting that the Commission invoke continuing jurisdiction under R.C. 4123.52 and make a modification or a change with respect to a former order if there is the presence of: (1) new and changed circumstances; (2) fraud; (3) clear mistake of fact; (4) clear mistake of law; or (5) error by an inferior tribunal.

If you have questions about continuing jurisdiction, or any other workers' compensation or labor and employment law issue, please contact a member of Eastman & Smith Ltd.'s Labor and Employment Law Section at 419-241-6000 or visit our website at [www.eastmansmith.com](http://www.eastmansmith.com).

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