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**WORKERS' COMPENSATION ALERT**

**TO: Our Clients and Friends**  
**FROM: Bleakley, Cypher, Parent, Warren & Quinn, P.C.**  
**RE: Development on Issue of Pathologic Aggravation**  
**DATE: July 8, 2013**

We at Bleakley, Cypher, Parent, Warren & Quinn would like to update you regarding a recent decision from the Michigan Compensation Appellate Commission addressing the issue of aggravations of pre-existing conditions.

*Rakestraw v. General Dynamics Land Systems, Inc.* was the 2003 Michigan Supreme Court decision that established the rule of law that a claimant who had a pre-existing condition must show that a work event or activities caused a "medically distinguishable condition" to prove a compensable personal injury. Since the *Rakestraw* decision, subsequent Commission and Supreme Court decisions have clarified that this standard requires proof of a pathologic change that is distinct from the pre-existing condition, and that evidence of symptomatic change is not enough. More recently, the Commission clarified that evidence of inflammation is not a pathologic change under *Rakestraw*. However, the Commission suggested that inflammation could cause other conditions, such as nerve root irritation, which may be a compensable pathologic change.

With this case law background in mind, the Commission in May 2013 decided the case of *Jensen v. Express LLC* (2013 ACO #56), which further addressed work-related inflammation and its insufficiency to serve as evidence of a compensable aggravation under *Rakestraw*. In *Jensen*, the claimant had a pre-existing arthritic condition in her neck, but alleged that it was aggravated by a work slip and fall. The claimant's primary medical witness testified that the claimant had an arthritic neck, and the fall caused subsequent inflammation of the nerve roots, which led to symptoms and the need for surgery. The witness conceded that the reason for the claimant's surgery was because of new symptoms, and that there was likely no new underlying condition that developed as a result of the work fall. Based on the testimony, however, the Magistrate found that the claimant had

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met her *Rakestraw* burden by showing that the work injury caused inflammation and nerve root irritability, which was the new pathology.

However, the Commission reversed the Magistrate's finding of a personal injury on the grounds that it did not meet *Rakestraw*. In doing so, the Commission reiterated its recent decisions regarding inflammation as insufficient to satisfy *Rakestraw*. But it went even further by stating that although it is medically well reasoned to conclude that the work injury caused inflamed nerve roots based on the claimant's symptomatic response, it is a legally inadequate inference because the claimant's medical witness did not objectively identify the presence of inflammation.

On its face, the Commission's decision in *Jensen* is a simple reiteration of *Rakestraw*'s requirements and the already established rule that inflammation is not evidence of a pathologic change. However, it also reflects that the Commission is taking an even more conservative approach to the *Rakestraw* analysis. Previously, it held that inflammation was not a pathologic change under *Rakestraw*, but that it may be sufficient if the inflammation led to a pathologic change in an underlying process, such as nerve root irritation. But in *Jensen*, the court reasoned that evidence of nerve root pathology cannot be inferred from symptoms, but instead must be objectively verified. It does not rule out the possibility that nerve root irritability can be evidence of a pathologic change, but it does demand something more than conclusory testimony that nerve root irritability occurred.

More important than the statement of law made in *Jensen* is that the decision is significant because the Commission was not asked to affirm a denial of benefits (as was the case in the prior Commission decision on inflammation), but was instead reviewing the Magistrate's decision that the claimant met *Rakestraw*'s requirement. Instead of deferring to the testimonial conclusion of the claimant's medical witnesses under its deferential standard of review, the Commission analyzed all of the evidence and testimony and reviewed in detail whether *Rakestraw* was properly applied. After doing so, it reached a conclusion in employer's favor. Therefore, the decision reflects a broader trend regarding the generally employer- and carrier-friendly nature of the Commission, not only on the issue of *Rakestraw* but all other issues, as well.

This Newsletter is meant to highlight a development in the workers' compensation arena. If you would like to discuss in more detail any issue or area of law, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C., directly.