

Workers' Compensation Report

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Illinois Chamber of Commerce Releases Report on Judicial Activism in Workers' Compensation Rulings

In October 2013, the Illinois Chamber of Commerce released a 74-page report entitled, *The Impact of Judicial Activism in Illinois* ("the Chamber's report"). Illinois Chamber of Commerce, *The Impact of Judicial Activism in Illinois: Workers' Compensation Rulings from the Employers Perspective* (2013) [hereinafter Report]. This comprehensive report, which analyzes a number of recent decisions of the Illinois Supreme Court and Appellate Court, Workers' Compensation Commission Division, is a "must read" for all Illinois insurance defense attorneys and claims professionals.

The purpose of the report is to "educate Illinois businesses and policymakers as to the extent and effect of expansive and liberal interpretation of the Act by the judiciary, which goes unchecked by the legislature." Report, *supra*, at 6. Although the report attacks "judicial activism," it is careful to note that "[n]othing in this report should be construed as suggesting the Illinois judiciary as acting in a nefarious manner or to call into question the intellectual competence, ability or qualifications of the individual jurists." *Id.*

The Chamber's report highlights the problems with the Illinois Workers' Compensation system in several respects. It addresses the costs to Illinois business, the competitive disadvantage to businesses in other states, and the continued expansion of employer liability and workers' compensation due to numerous appellate court decisions.

The report "highlights important Illinois court decisions that have expanded employer liability and contribute to Illinois' reputation for having a costly workers' compensation system." *Id.* The report points out that Illinois has the fourth highest premiums of the 50 states and that Illinois employers now pay \$10.10 more in workers' compensation costs for \$1,000 in salary than employers in Florida, and \$12.30 more than employers in Texas. *Id.* at 4. An Illinois employer with 100 employees and an average per capita payroll of \$50,000 pays \$50,500 more annually in workers' compensation insurance premium costs than an employer in Florida, and \$61,500 more than a Texas employer. *Id.* The report states that "premium rates are not only higher in Illinois, the rates increased in Illinois over the past eight years, while premium costs in neighboring states during the same period decreased." Report, *supra*, at 4. The report asserts that the high cost of workers' compensation in Illinois is due at least, in part, to judicial activism and interpreting the Illinois Workers' Compensation Act "with the clear objective of expanding compensability of workers' compensation claims." *Id.* at 7.

The report provides a detailed analysis of 19 appellate and supreme court cases handed down over the past 10 years that have substantially expanded Illinois employers' workers' compensation liability. *Id.* at 61. It is

noted that 11 of those decisions have been handed down within the past five years. *Id.* at 61. A critical analysis of these decisions is set forth in the report. It includes subject matters such as traveling employees, permanency awards, mental-mental injuries, employee discharge, TTD benefits, violation of workplace safety rules, repetitive trauma, pre-existing conditions, and intervening occurrences.

The report is particularly critical of the Illinois standard for causation in workers' compensation. The Illinois Workers' Compensation Act, 820 ILCS 305/1, *et seq.*, is silent as to a specific standard for causation. Illinois courts have established a "low threshold for causation" in Illinois workers' compensation cases, essentially permitting recovery for a work accident so long as the employment is "a cause" of a claimant's condition of ill-being. *Tower Auto. v. Ill. Workers' Comp. Comm'n*, 407 Ill. App. 3d 427, 434 (1st Dist. 2011). As the courts often state, "it need not be the sole or primary cause, so long as employment is a cause of the claimant's condition." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003); Report, *supra*, at 20. The report argues that this low standard for causation is "deeply entrenched in the Illinois workers' compensation law." Report, *supra*, at 20. The chamber states that strengthening the causation standard is crucial to reining in the escalating workers' compensation costs. *Id.* at 21. As we know, a causation standard was added to the Illinois Workers' Compensation Act in the 2011 amendments via 820 ILCS 305/1(d). Unfortunately, the amendment is worded loosely and did not set forth a higher standard of causation than previously employed by Illinois courts. Indeed, Section 1(d) merely states that an "employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment." 820 ILCS 305/1(d).

The Chamber's report notes that several states require a much stronger showing of causation by requiring that employment be the "major, primary, prevailing, predominate or even proximate cause of the injury." Report, *supra*, at 20. It is noted that even Attorney General Lisa Madigan argued in April of 2012 that her office experienced difficulty in defending claims submitted by state employees at the Menard Correctional Institution due to the Illinois "low causation" standard. Lisa Madigan's April 2012 report to the General Assembly pointed out that it was "extremely difficult, if not impossible, for the state to obtain critical independent medical testimony concluding that a correctional officer's work at Menard Correctional Center could not have even slightly aggravated the carpal or cubital tunnel syndrome." *Id.* at 21.

The report acknowledges that the Illinois Workers' Compensation Act is remedial in nature and as such, Illinois courts have construed the statute liberally in favor of injured workers. The report concludes that further legislative action is necessary in order to rein in a "prolific level of judicial activism in Illinois workers' compensation jurisprudence." Report, *supra*, at 62. The Chamber of Commerce outlines several legislative priorities for 2014. *Id.* at 63. Those include:

- Require an elevated standard of causal connection;
- Redefine traveling employees so employers are not held responsible for injuries sustained while employees engage in personal activities; and
- Allow an employer credit for injuries to the person as a whole.

Although reasonable minds may differ as to whether "judicial activism" is a fair characterization of the Illinois Court's handling of workers' compensation matters, a review of the report leads one to an inescapable conclusion. Illinois remains at a significant competitive disadvantage to several other states with regard to workers' compensation costs. A key element to those increased costs is Illinois' low causation standard and the compensability of claims where employment is merely a cause of injury, regardless how *de minimus*.

About the Author

Bradford J. Peterson is a partner in the Urbana office of *Heyl, Royster, Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability, and insurance coverage issues. In recent years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims, "Medicare, Workers' Compensation and Set Aside Trusts," *Southern Illinois Law Journal* (2002).

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