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A Primer on Recent Cases Impacting Workers' Compensation Defense

Workers' compensation law has been a leading political and economic issue in Illinois over the past decade. In 2005, the Illinois General Assembly passed and the governor signed into law the Workers' Compensation Reform Act of 2005, which ushered in utilization reviews, medical fee schedules, increased minimum rates for temporary total disability (TTD) and permanent partial disability (PPD), enhanced death benefits, and introduced maintenance and temporary partial disability (TPD) benefits.[1] The Reform Act of 2005 was the first major overhaul of the Act since 1975. A second major amendment to the Act occurred in 2011, which among other things enhanced the 2005 utilization review provisions, capped wage differential awards at five years or age 67, whichever is later, and adopted a new method for establishing permanency based in part on the American Medical Association's (AMA) "Guides to the Evaluation of Permanent Impairment, Sixth Edition."[2]

Following the election of Governor Bruce Rauner, additional reforms were proposed, but not enacted. These proposals included legislation providing that an employer shall not be required to pay TPD benefits to an employee who

has been discharged for cause,[3] modifications for calculating average weekly wage,[4] clarification that a shoulder injury is an injury to an arm and a hip injury is an injury to a leg,[5] redefining who is a traveling employee,[6] and modifications to the causal relationship standard to change employment from being "a" factor to a "major contributing cause" of the workers' injury.[7]

Despite the General Assembly's inability to enact promised reforms in 2016, additional amendments to the Act are expected in the next few years. Some of these reforms will refine prior amendments, while others will tackle new areas or specific appellate court or Illinois Supreme Court decisions. In this past term, the General Assembly considered amendments relating to primary cause and traveling employees, as well as some procedural proposals.[8]

Against an evolving backdrop of legislation and proposals, this Monograph provides an overview of some of the pivotal decisions and trends over the past eighteen months to two years in some of the more significant areas of workers' compensation law. In at least three of the areas—"arising out of," traveling employees, and TTD benefits—the appellate court has seemingly expanded the law to provide more coverage for injuries a casual observer might not think were compensable. In one area, the section 8.1b AMA rating report provision, the court has been called upon to interpret what the General Assembly intended when it passed its 2011 reform legislation. Finally, this Monograph discusses medical cannabis and its potential impact on Illinois workers' compensation claims.

I. Traveling Employees Since *Venture-Newberg*

The general rule is that an injury incurred by an employee while going to or returning from the place of employment does not "arise out of" or "in the course of" employment and is, therefore, not compensable.[9] The underlying rationale for this rule is that the employee's trip to and from work is the result of the employee's own decision as to where to live and the employer ordinarily has no interest in that decision.[10] The courts have developed a separate body of law for employees whose work requires them to travel in some aspect of their employment. According to the case law, a traveling employee is one whose work duties require him to travel away from his employer's premises.[11] When an employee is deemed a traveling employee, an injury sustained by that employee will be compensable as long as the employee is injured while engaging in conduct that was reasonable and foreseeable.[12]

In 2013, the Illinois Supreme Court handed down its decision in *Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Commission*, which held that an employee was not entitled to workers' compensation benefits because he decided to accept a temporary position with the employer at a plant located approximately 200 miles from his home.[13] According to the court, the employer did not direct the claimant to accept the position; he accepted the temporary position with full knowledge of the commute involved. Moreover, the employee made the decision to accept the position and the additional travel and travel risks that it entailed; his course or method of travel was not determined by the demands or exigencies of the job.[14]

A. When does a traveling employee become a traveling employee?

Following *Venture-Newberg*, the appellate court recently decided several cases defining when an employee is working as a traveling employee. In *Mlynarczyk v. Illinois Workers' Compensation Commission*, the claimant was injured while walking from her home to her company provided minivan to return to a jobsite.[15] She worked for a cleaning service

and her job duties included cleaning churches, homes, and offices.[16] The claimant's husband also worked as a driver for the employer and he would occasionally drive other employees to and from job sites.[17] The two did not own a vehicle and used the employer provided van for work and personal use. [18]

On the morning of her accident, the claimant left her home and her husband drove her in the minivan to clean a church.[19] The two finished cleaning the church and drove the minivan to clean two homes, which they finished around 2:30 p.m.[20] While the claimant typically worked each day until 4:00 p.m., there were occasional cancellations.[21] On the day of the accident, the employer informed the claimant there were no other assignments for her, but she should return to the church around 4:30 p.m., if interested, to assist the evening crew.[22] The claimant and her husband agreed to return to the church at 4:30 p.m. and then traveled home in the minivan to eat lunch.[23]

The claimant was not paid for the 90-minute lunch break she took between jobs that day.[24] At 4:00 p.m., the claimant's husband went out to warm the minivan, which was parked in their driveway[25] Shortly thereafter, the claimant left her house to travel to the church.[26] As she walked on a sidewalk leading from the house to the driveway, she slipped and fell.[27] The sidewalk was covered with snow and possibly ice.[28] The claimant had a purse on her shoulder, but was not holding anything in her hands.[29]

Although acknowledging the general rule that injuries sustained while traveling to and from the workplace do not "arise out of" and "in the course of" employment, the arbitrator found the claimant's injury compensable because she was a traveling employee and injured while walking to her employer provided vehicle.[30] The Commission reversed the arbitrator's decision, finding that the claimant had not yet left her personal property at the time of the injury and that she had not been exposed to the hazards of the street or automobile.[31]

The appellate court reversed the Commission and found that the claimant was considered a traveling employee as soon as she left her home.[32] The appellate court reasoned that the claimant did not work at a fixed job site and instead traveled to various locations, qualifying her as a traveling employee once she left her home.[33] The court held that the claimant's walk to the minivan constituted the initial part of her journey to her work assignment and that it was reasonable and foreseeable.[34] Further, the court found that accident occurred on a "public sidewalk," which exposed claimant to the hazards of the street.[35]

In *Pryor v. Illinois Workers' Compensation Commission*, the appellate court considered the traveling employee issue where the claimant was injured while moving a suitcase into his personal vehicle while still at his residence.[36] The claimant worked as a car hauler for his employer and delivered automobiles to various car dealerships.[37] His responsibilities included loading automobiles onto an 18-wheel car-hauling tractor-trailer at the employer's terminal in Belvidere, Illinois, and then driving to dealerships where the vehicles were unloaded.[38] The claimant usually drove his personal vehicle from his home to the employer's terminal in Belvidere.[39]

According to the record, the claimant spent one to two nights per week at a hotel while he was on the road delivering automobiles.[40] He packed a suitcase when he anticipated staying overnight in a hotel while on the road.[41] The employer gave the claimant a list of hotels that he could book for overnight stays.[42] The claimant usually drove to his employer's terminal in his personal vehicle, took his suitcase out of his vehicle, and loaded it into his 18-wheeler.[43]

On July 21, 2008, the claimant woke up at his home.[44] In anticipation of spending that night on the road, he packed a suitcase with a change of clothes and carried it to his personal car.[45] When he opened the car door, he reached down to pick up the suitcase.[46] He then "bent and turned to the back seat of the car" and felt "unbearable" pain throughout his back and legs.[47]

The arbitrator found that the claimant was not a traveling employee and denied the claim.[48] On appeal, the Commission affirmed the arbitrator's decision, concluding that the risk of injury was a personal risk and not sufficiently connected with employment to make the risk peculiar to his work.[49] The Commission relied on the fact that the claimant's "travel for work had not yet begun when the accident occurred."[50] The circuit court affirmed the Commission's decision and the claimant appealed to the appellate court.[51]

The appellate court found that the claimant was not a traveling employee until he reached his employer's premises, which triggered the start of his workday as a delivery driver.[52] The appellate court rejected the claimant's argument that he was a traveling employee from the moment he left his house. The employee had argued it was reasonable and foreseeable that he would load a bag into his car in preparation for the upcoming work trip.[53] The court concluded, however, that the claimant was injured during a regular commute from his home to his employer's premises and that the injury was not compensable.[54] It is important to note in this particular case that the claimant started his trips each day from a fixed job site, unlike the claimant in *Mlynarczyk* who began her trip directly from her home.

B. Convergence of the traveling employee and street risk doctrines.

A third case involving traveling employees helps define the difference in causation standards between a fall by a traveling employee after encountering a neutral risk versus a fall by a non-traveling employee in the same situation. In *Nee v. Illinois Workers' Compensation Commission*, the claimant, a plumbing inspector for the City of Chicago, was injured after tripping on a curb as he was walking back to his car to go to his next assignment.[55] The claimant testified that his work duties required him to travel through the city by car to inspect plumbing in both commercial and residential buildings. He also said he reported to work each day at the filtration plant and received his work assignments, before heading into the field. The claimant contended, and the City admitted, that the claimant was a traveling employee.

The arbitrator and Commission denied the claim, finding the claimant failed to prove he sustained accidental injuries arising out of the employment. On appeal, the appellate court reversed the Commission and remanded the case for further proceedings.

According to the appellate court, the Commission erred by failing to review the accident under the appropriate traveling employee standards, which in evaluating "arising out of," asks whether the accident was reasonable and foreseeable. The appellate court concluded that "no reasonable argument can be made that the claimant's conduct in traversing a curb as he walked to his car was neither reasonable nor foreseeable."[56] Moreover, the appellate court applied the so-called "street risk" doctrine to conclude that, "[h]aving been exposed to the risk of traversing a curb to a greater degree than a member of the general public by virtue of his status as a traveling employee at the time of his accident, the injury which the claimant suffered when he tripped over the curb was sustained not only in the course of his employment, it also arose out of his employment with the City."[57] Under that doctrine, "where the street becomes the milieu of the employee's work, he is exposed to all street hazards to a greater degree than the general public."[58]

The interesting aspect of *Nee* is its language concerning trip and falls in a non-traveling employee setting. In that regard, the court stated, "[t]he risk of tripping on a curb is a risk to which the general public is exposed daily."[59] The court stated further:

> Nothing in the record before us suggests that some aspect of the claimant's employment contributed to the risk of traversing a curb. Although there is evidence that the claimant carried a clipboard while performing plumbing inspections, there is no evidence that carrying a clipboard caused, or contributed to, his tripping on the curb. Further, there is nothing in this record to distinguish the curb on which the claimant tripped from any other curb. As noted earlier, although the claimant testified that the curb may have been higher than the sidewalk, he readily admitted that he did not know. We are left then with the question of whether the claimant was exposed to the risk of tripping on a curb more frequently than the general public.[60]

Hopefully this language will serve employers well in future claims that do not involve traveling employees or the street risk doctrine.

C. Control over a traveling employee.

In *United Airlines, Inc. v. Illinois Workers' Compensation Commission*, the appellate court took a close look at the importance of an employer's control over an employee's travel in determining whether an accident is compensable.[61] That case involved a flight attendant who suffered a knee injury on a flight from Denver, Colorado, to LaGuardia Airport in New York.[62] On this flight, the claimant was not working as a flight attendant.[63] Rather, she was traveling from her home in Colorado as a passenger to New York to begin a shift as a flight attendant on a flight originating from JFK Airport the next day.[64]

While traveling to begin her shift, United did not pay her for the time spent travelling from Colorado to New York and did not reimburse her for any travel expenses, meals, or hotel costs for traveling to or staying in New York.[65] The claimant would not earn any wages until her aircraft parted the gate at JFK the following day.[66] Testimony at trial revealed that the claimant had an opportunity to change her base airport from JFK to Denver, but declined.[67] It was the employer's policy to provide free parking at each employee's base airport, but the claimant elected to receive a free parking spot at the Denver airport, instead.[68] Further, the employer provided the claimant with a leisure travel pass that allowed her to fly standby, for free, on any flight with available space.[69] These free flights were available for any purpose, including vacation and commuting to a base airport.[70] The employer did not control the claimant's use of these leisure travel passes, and had no control or preference regarding how she traveled to and from her base airport to report for work.[71]

On the date of the accident, the claimant boarded the plane with her leisure travel pass and wore her flight attendant uniform. Once on board, she used the lavatory to change from her uniform into her regular clothes before the flight departed. A co-worker testified that it was a violation of company policy to wear the flight attendant uniform through security when not boarding a plane for work.[72] When returning to her seat from the lavatory, the claimant caught her foot where the seat row is bolted to the floor and twisted her left knee.[73]

The arbitrator found that the claimant qualified as a traveling employee and awarded benefits under the Act.[74] The arbitrator relied on prior Commission decisions finding that a flight attendant traveling to her work qualified as a traveling employee.[75] It must be noted that the arbitration hearing took place before the *Venture-Newberg* decision was issued.[76] Following the *Venture-Newberg*, the Commission reversed the arbitrator's decision, finding that the claimant was not a traveling employee at the time of her injury.[77] The Commission emphasized that the employer did not derive any benefit from the claimant's decision to live in Colorado and noted that the employer did not tell the claimant where to live, did not compensate her for time or travel expenses during her voluntary commute, and did not provide any preferential

treatment as a commuting employee.[78] The Commission concluded that the claimant's travel was "due to her personal choice only."[79]

On appeal, the circuit court reinstated the arbitrator's decision, finding that the claimant's transportation on the date of the accident was "necessary to the exigencies of her work."[80] The circuit court also focused on the fact that the employer paid for her parking at the airport in Denver and provided her with air travel to her base airport.[81] Based on these facts, it held that the employer preferred the claimant to "take certain modes of transportation" in commuting to work.[82] According to the circuit court, the claimant became a traveling employee when she boarded the flight from Denver to New York.

The appellate court, while also relying on *Venture-Newberg*, reached an opposite conclusion and held that the claimant was not a traveling employee at the time of her accident.[83] The appellate court concluded that the employer had no control over where the claimant chose to live and did not benefit in any way from the claimant's choice to live in Colorado.[84] The appellate court also found the claimant was injured during her commute from her chosen residence, before beginning work.[85] The court concluded that the claimant's "selection of the location of her parking privileges was her personal choice and stemmed from her choice of residence."[86] Further, it found it important that the employer "had no control over what modality of transportation the claimant chose to arrive at JFK Airport or even when she arrived in the New York City area."[87] Finally, the court explained that the travel pass "was not a benefit offered to the claimant because she resided in Colorado while working out of JFK Airport."[88] Instead, it was the claimant's decision to use a leisure travel pass to commute from Colorado to New York.

In this case, the appellate court relied upon the employer's lack of control over the claimant's travel and the lack of benefit to the employer to conclude that she was not a traveling employee at the time of her accident. In conjunction with the risk analysis in the *Pryor* case, Illinois courts have established that there are definite limits for determining when an employee is simply commuting, rather than acting as a traveling employee.

D. Implications from recent rulings.

The implications drawn from *Mlynarzcyk* and *Pryor* are clear–a traveling employee who begins the work day leaving directly from home receives the benefits of the reasonably foreseeable standard as soon as he departs from home to begin his work day. This is precisely what transpired in *Mlynarzcyk*, where the employee was departing her residence to head to a job site to begin her work. On the other hand, where the traveling employee must come into work before beginning his travel, the expanded compensability afforded a traveling employee does not cover the trip to and from work, but rather begins only when the employee departs the workplace. This scenario is depicted in *Pryor*. Finally, as exemplified in *Nee*, when the employee is a traveling employee, an accident sustained encountering an otherwise neutral risk may be found compensable even though not compensable to a non-traveling employee simply because of the lesser reasonably foreseeable standard.

II. "Arising Out Of"

For a workers' compensation claimant to receive benefits for his claimed injuries, he must first show his injuries "arose out of" and "in the course of" his employment. The "in the course of" component is typically easily satisfied, because injuries sustained on an employer's premises or in a place a claimant might reasonably have been while

performing his job duties are found to have incurred "in the course of" the claimant's employment.[89] The "arising out of" element is not always clear so it is frequently litigated. The last few years have been no exception.

For an injury to "arise out of" one's employment, the origin of the injury must be associated with some risk incidental to, or connected with, the claimant's employment thereby creating a causal connection between the claimant's employment and the accidental injury.[90] Where an injury is caused by risk incidental to employment, it is said to "arise out of" employment and, so long as the injury also occurred "in the course of" claimant's employment, it is compensable.[91] However, if an injury occurs due to some risk that is personal to the claimant or neutral in nature, the compensability question cannot be resolved without additional evidence and analysis.

When it is clear that risk leading to injury is not incidental to employment, it is either personal to the claimant or neutral in nature, and not automatically compensable without evidence that claimant's employment contributed to the risk of harm from that activity. For example, if a claimant falls due to a seizure disorder and is injured, the court would likely view the risk of seizure as personal to the claimant and find the injury non-compensable because the claimant's employment did not cause or contribute to her injury. However, if the claimant was standing on a six-foot ladder in her workplace warehouse at the time of her seizure and fell six feet to the ground when she seized, her injuries might be compensable because of the increased risk of harm associated with standing on that ladder. Personal risks, like the one described, do not lead to compensability absent a showing that the claimant's employment increased the risk of injury to the claimant.

Probably the most difficult type case to analyze from an "arising out of" standpoint involves an injury suffered due to a neutral risk, that is, one encountered by all members of the public. A claimant's injury is not compensable unless his employment exposed him to the risk to a greater degree than that which the general public is exposed.[92] A neutral risk analysis requires the court to take either a qualitative or quantitative approach to determining whether the claimant has been exposed to increased risk. A qualitative approach assesses whether something about the claimant's employment has increased the risk of harm from a neutral activity. A quantitative approach examines the frequency with which the claimant encounters the neutral risk as a result of his employment. If the employment increased the risk of harm from a neutral activity or required the claimant to encounter the risk with greater frequency than that of the general public, the court will find the injury compensable.[93]

The typical compensability question in the recent case law, generally, involves analysis of injury due to seemingly common activity. As in all cases, the court must determine whether the risk associated with the common activity is incidental to employment—compensable, personal to the claimant—non-compensable or neutral—possibly compensable. In recent years, the court is trending toward a broader approach of finding compensability where the injury occurs due to common activity.

A. Risk incidental to employment.

In 2013, the court held that a care-giver, who was reaching for soap while assisting a resident to shower and was injured, was performing an activity incidental to employment and therefore proved a compensable claim.[94] A seemingly common activity like reaching, even reaching for a soap dish, was not a risk peculiar to the claimant's employment but rather one to which members of the public are equally exposed, the employer argued.[95] The court, in rejecting this argument for non-compensable neutral risk, found claimant's job duties required her to assist residents with activities of daily living such as showering and this activity was in furtherance of those duties. The placement of the soap dish was

such that water was running over the soap creating suds on the shower floor and, while hanging onto the resident, the claimant was attempting to move the soap dish when she felt a pop in her neck. The court stressed that the claimant was ensuring the safety of the resident in the shower at the time of the accident, which was a direct connection to her assigned job duties.[96]

More recently, the court in *Bolingbrook Police Department v. Illinois Workers' Compensation Commission,* held that a police officer who was injured lifting his heavy duty bag out of his car at home off hours proved a compensable claim.[97] The employer argued that the claimant's injury did not "arise out of" his employment because he was performing a neutral activity to which the general public is exposed and it did not happen "in the course of" his employment because he was at home and off the clock. The employer further argued the claimant was not required to bring his duty bag home so was he was not performing an activity incidental to employment when he was injured. The employer did, however, require the claimant to keep his duty bag on his person at all times and gave the claimant the option to keep the duty bag home with him on off hours to keep it safe and secure. In handling that duty bag, the claimant officer was performing a task that directly benefited the employer and in doing so suffered an injury. Thus, the court found the activity was incidental to employment.[98]

In the two cases above, the court also found medical causation between the common activities and the claimants' respective conditions of ill being. Both claimants had significant, pre-existing conditions that the court found were aggravated by the work activities. The conditions were such that the claimants had pre-accident treatment; the *Bolingbrook* claimant had even discussed surgery for the affected body part with his treating physician just days before the accident.[99] Importantly, the employers' IME doctor in each case found causation or, at the very least, found that the activity could have produced an increase in pain such that the claimants sought medical treatment. The impact on the accident analysis, had each court found the condition was not caused or aggravated by the common activity, is not clear. One has to wonder, if medical evidence establishes causation, will the court find compensability?

B. Neutral risk.

In *Adcock v. Illinois Workers' Compensation Commission*, the employer prevailed before the Commission in its argument that the act of turning in a chair while performing welding duties at work did not "arise out of" the claimant's employment, but the appellate court reversed.[100] The appellate court held, in a 3-2 decision with special concurrence, the risk of turning in a chair was neutral, but the claimant's employment required him to turn in the chair at least seventy times each workday to weld locks. The employer did not rebut this evidence. Thus, the court found the claimant confronted this neutral risk to a greater degree than that of the general public and found the claim compensable. The majority, in addressing the special concurrence, held that benefits will not be awarded for injuries caused by everyday activities like walking, bending, or turning even if the claimant was ordered to perform those activities as part of his job duties, unless the claimant's job duties required him to perform those duties to a greater degree than the general public.[101]

The two, specially-concurring *Adcock* justices argued the risk associated with turning in a chair to perform welding activities was incidental to the claimant's employment which would make the claim compensable without further analysis.[102] They argued the claimant was performing an activity he might "reasonably be expected to perform" in furtherance of his work duties when he was injured. This language is arguably similar to the test the court will apply to traveling employees: if the claimant is injured performing an activity that is reasonable and foreseeable to the employer, the injury is compensable without additional "arising out of" analysis. The justices argue for the court to continue the

trend of finding common activities performed while working are incidental to employment, regardless of the nature of the activity. Fortunately, in the big picture for employers, the majority rejected this reasoning.

Interestingly in *Adcock,* the medical evidence supported the employer's win below. The treating and independent examining physicians both testified that the claimant's knee injury could have happened from any activity and nothing about his work increased his risk of that injury. The Commission relied on this testimony in denying compensability, but the court did not address it after it reversed on the issue of accident. Accident and causation, while certainly linked together, are separate issues. Compensability does not automatically mean causal connection established by medical evidence.

C. Tips for the practitioner.

The court seems to be inclined, to characterize common activities as incidental to employment, which disposes of any defense argument that an injury is non-compensable as not "arising out of" employment. Defense practitioners should keep the court's reasoning in mind when analyzing the compensability of an injury due to a common activity so as to garner evidence and develop a position, where possible, that the claimant was exposed to a personal risk or one neutral in nature. These categories of risk generally do not lead to compensable injuries without additional evidence by the claimant who bears the burden of proving that his employment increased his risk of harm from injury. Where the claimant can establish that his injury was due to risk incidental to employment, the compensability analysis is concluded in his favor. So, any time a practitioner can develop evidence to support a personal or neutral risk analysis, he will have a better chance at prevailing on the "arising out of" issue.

Establishing a risk is neutral rather than incidental will always hinge on the claimant's job duties. The court is focused on whether the activity is connected to the furtherance of the claimant's job duties. Evidence should be developed, where possible, that the common activity performed was not in furtherance of the claimant's actual duties. This type of evidence can be elicited through the claimant himself with proper documentation at trial. There are risks, however, if the employer's representatives are absent from the trial and claimant can explain away the documentation. Recorded and written statements and accident investigation are the keys to preserving the actual account of what happened to cause claimant's injury, and may require employer involvement at trial. Written and video job duties documentation can be equally important to provide the most accurate description of the claimant's job so as to decipher what activities are truly incidental compared with those that are personal or neutral. The court will rely on this evidence to evaluate credibility and determine whether the claimant's activities truly bore a causal connection to his job.

Pairing a compensability defense with credible medical evidence that the activity did not cause, contribute to, or aggravate the claimant's condition of ill-being should be thoughtfully considered. While the medical evidence will not impact a compensability defense, it may still give the employer the evidence it needs to completely prevail in a case. Even if the claimant suffered an accident that "arose out of" and "in the course of" the claimant's employment, a claimant must still prove that his condition of ill-being is causally connected to that activity. The medical causation inquiry is slightly different than the compensability question.

When an activity that produces injury is a common one, and may be deemed a compensable workplace accident, that common activity may not have caused, contributed to or aggravated the condition of ill being. The credible medical evidence may show that the claimant's condition of ill being was one that could be aggravated by any and all activity or was only temporarily aggravated by the common activity performed at work. While we are not focusing on medical evidence in this article, suffice it say that where injuries are reported due to common activities, some medical evidence

may exist to support a causal connection defense due to pre-existing, longstanding conditions or other co-morbidities. High-dollar exposure cases in particular warrant careful consideration of working up a strong medical causation defense in addition to a compensability defense.

III. Temporary Total Disability (TTD) Benefits

The fundamental purpose of the Workers' Compensation Act is to provide injured workers with financial protection until they can return to the workforce. The Act achieves this goal by requiring the employer to pay for the injured worker's medical treatment and temporary total disability benefits while the worker is convalescing from the work injury. The right to receive these benefits is not absolute; benefits may be suspended or terminated if, as an example, the claimant refuses to submit to medical, surgical, or hospital treatment essential to his recovery, or if the claimant fails to cooperate in good faith with rehabilitation efforts.[103] The test for whether a claimant is entitled to TTD benefits, and specifically the circumstances under which an employer can rightfully suspend or terminate benefits, has evolved over the last few decades. Recently, the Illinois Supreme Court's focus has shifted to factual evidence regarding the claimant's physical condition coupled with his return-to-work status.[104] As the courts have continued to evolve the TTD entitlement test, it begs the question, "What is the current status of the law with respect to TTD benefits?"

Several years have now passed since the Illinois Supreme Court's seminal 2010 decision in *Interstate Scaffolding*,[105] where the court held that an employer's obligation to pay TTD benefits does not cease when the claimant is terminated from his employment due to his own violation of company policy if the employee has not yet reached maximum medical improvement (MMI). In *Interstate Scaffolding*, the employer accommodated the claimant's restrictions with light duty work.[106] While working light duty, however, the claimant was caught vandalizing property with graffiti and terminated for cause. Although the claimant testified he did not believe the graffiti was the cause for his termination, the arbitrator found that respondent's TTD obligations ceased as of the termination date. The case was appealed all the way to the Illinois Supreme Court which said the Workers' Compensation Act does not support an employer's refusal to pay TTD benefits to a claimant who remained injured, but had been terminated for activities unrelated to his injury. The court acknowledged the employer's right to fire the claimant, but completely separated the employment issue of termination from the employer's obligation to pay TTD. The court ultimately held that TTD liability did not cease when a claimant was terminated, regardless of whether or not the termination was for cause, if the injured claimant had not at the time of his termination reached maximum medical improvement.[107]

The *Interstate Scaffolding* court re-iterated the test for TTD entitlement as whether the claimant's condition had stabilized.[108] Although the court acknowledged there are three exceptions to the rule that TTD benefits are owed until the claimant reaches MMI—(1) the claimant refuses to submit to medical, surgical, or hospital treatment essential to his recovery; (2) the claimant refuses to cooperate in good faith with rehabilitation efforts; and (3) the claimant refuses work falling with the physical restrictions prescribed by his physician–none of these applied.[109] As discussed below, employers have been relying on these three exceptions to suspend benefits, which have been met with some resistance by the appellate court.

A. The claimant refused light duty.

In September 2011, the appellate court heard its first case interpreting *Interstate Scaffolding*, that case being *Otto Baum LLC, Inc. v. Illinois Workers' Compensation Comm'n.*[110] After suffering a work-related injury, the claimant was offered and accepted light duty work within his restrictions each time the treating physician released him to do so. Each time, however, the claimant contended he could not perform the work, for one reason or another. Two months after his last refusal, the claimant requested light duty work from the employer, which the employer refused to accommodate based on the claimant's two prior refusals. The court held the employer was not liable for TTD during the periods in which the claimant refused the light duty work, but was liable for the period in which the employer refused to accommodate the light duty restrictions when the claimant asked the employer to do so.[111]

Quoting *Interstate Scaffolding*, the court said "where claimant is capable of returning to the workforce" TTD liability ceases. It went on to note "the Act provides incentives for the injured claimant to strive toward recovery and the goal of returning to gainful employment."[112] The *Otto Baum* court was silent as to the impact and hardship this ruling might have on employers who are arguably expected to hold light duty work positions open for claimants until they choose to accept them.

B. The claimant appeared to be working.

In *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, the court found that a restricted claimant that "helped" in her family business was still entitled to TTD benefits because the employer lacked evidence the claimant's condition had stabilized or she had reached MMI.[113] The claimant, while recovering from a compensable shoulder injury, was caught on surveillance working in the flower shop owned by her daughters. She helped at the shop three days per week answering phones, running deliveries or watching her grandchildren, and did not earn income. In finding claimant entitled to TTD during this time, the court held that the mere fact that she was "helping" at the flower shop did not prove that her condition had stabilized such that she was no longer temporarily totally disabled from work.[114] Based on *Interstate Scaffolding*, the appellate court observed that the claimant had not been released to return to work by her treating physician and was actively treating during the disputed period of TTD (the period in which she was helping at the shop). The court also found that the claimant's presence at the flower shop was simply occasional assistance to her daughters and did not constitute a return to work that would alleviate the employer's TTD obligation.[115]

Of interest, the *Sunny Hill* court did not make reference to whether the employer submitted the surveillance video to a medical professional to obtain an opinion that the claimant was capable of returning to work so it is unclear what impact, if any, medical evidence would have on the court' decision to award TTD. The decision mentioned the claimant's treating physician's opinions, but was otherwise silent as to any others. Further, the *Sunny Hill* court was silent as to whether the surveillance footage captured the claimant performing any activities outside of her restrictions and how this factor might impact her ability to return to work or reach MMI. Generally, credible medical evidence that a claimant is at MMI or can return to work based at least partially on surveillance will bolster an employer's decision to terminate TTD.

C. The claimant was discharged for cause.

In *Matuszczak v. Illinois Workers' Compensation Commission*, the court extended the employer's TTD liability past the claimant's termination date where a claimant on light duty was caught stealing and fired pursuant to company policy.[116] The claimant admitted that he knew at the time he took the cigarettes, that stealing was a criminal offense and that it would result in his termination. He also acknowledged that but for the act of stealing the cigarettes, he would have remained in that light duty position. The employer argued the claimant's actions were a constructive refusal of light duty work that terminates the employer's obligation to pay TTD under one of the three exceptions in *Interstate Scaffolding* The court rejected the employer's argument and found the employer liable for TTD after the termination because the claimant had not reached MMI.

> We do not believe the *Interstate Scaffolding* court was proscribing all use of discretion in cases involving employment termination; rather, as stated previously, we believe the court was rejecting an analysis of the propriety of the discharge and rejecting an automatic suspension or termination of [TTD] benefits in cases involving employment termination.[117]

The appellate court found that the circumstances of *Matuszczak* were the same as those presented in *Interstate Scaffolding*. The employer argued that the Commission was free to exercise its discretion on a factual basis to determine whether the claimant's decisions/actions that led to termination were the equivalent of refusing to work within his physical restrictions and, thus, a valid basis for suspending or terminating TTD benefits under the exception provided in *Interstate Scaffolding*. The employer focused on the claimant's knowledge of the consequences of his actions—the claimant in *Matuszczak* knew his actions would result in termination while the claimant in *Interstate Scaffolding* denied his actions caused his termination. The appellate court refused to place any importance on the *Matuszczak* claimant's knowledge because of the at-will state of employment. The court stressed that the employer's obligation to pay TTD will not cease when a claimant is discharged for cause, unless the claimant's condition has stabilized or reached MMI.[118]

While the appellate court in *Matuzsczak* failed to find any dissimilarity with the fact pattern in *Interstate Scaffolding*, they did not close the door entirely to termination of TTD benefits. In fact, the *Matuszczak* court stated, "Just as the facts of *Interstate Scaffolding* did not amount to a refusal of light duty work, the facts here also fail to present such a situation."[119] Had the court applied a manifest weight of the evidence standard, the court would have given deference to the Commission's findings that the claimant had voluntarily refused work within his restrictions by engaging in an act that he knew could result in his termination and loss of light duty employment. Instead, the appellate court applied a *de novo* standard, choosing to examine whether the Commission even had discretion to look at the termination when evaluating whether the claimant was entitled to TTD benefits following his termination. By doing so, and concluding the Commission lacked discretion, the court eliminated any deference entitled to be given the Commission as the determiner of fact. Applying the *de novo* standard of review used in *Matuzsczak*, the appellate court limited the Commission's consideration of the issue in future cases to a very limited set of facts; *i.e.,* facts where the claimant actually denies any offers of light duty work.

D. The claimant retired.

In *Sharwarko v. Illinois Workers' Compensation Commission*, the court examined whether a claimant who had voluntarily retired following a work injury was entitled to TTD benefits when his employer could have accommodated the work restrictions but for the retirement. The claimant was a water and sewer inspector for the Village of Oak Lawn who sustained a right arm injury while replacing a water meter on a property owned by his employer.[120] Before obtaining a light duty release, the claimant accepted a voluntary early retirement package offered by the employer. The Village continued to pay for related medical treatment after the claimant's retirement through his release at maximum medical improvement, but denied payment of TTD benefits due to claimant's voluntary retirement.[121]

In upholding the employer's denial of TTD, the appellate court held the voluntary retirement of the claimant was equivalent to refusing the accommodated work the employer had made available, and, as a consequence, he was not entitled to temporary total disability benefits, pursuant to the third exception to TTD liability articulated in *Interstate Scaffolding*.[122] The court emphasized that the stated purpose of the Act is to compensate a claimant for lost earnings resulting from work-related injuries, and when a claimant chooses to remove himself from the workforce, his lost earnings are the result of a volitional act, not his work-related injuries, which relieves the employer's responsibility for paying TTD under *Interstate Scaffolding.*[123]

E. The claimant had contractual rights to benefits.

In *Cesario v. Illinois Workers' Compensation Commission*, the court held the claimant's collective bargaining agreement superseded the Workers' Compensation Act where the claimant exercised his contractual option to refuse light duty work, and found the employer liable for TTD until the claimant's condition stabilized.[124] The applicable collective bargaining agreement provided the claimant the right to decline light duty or temporary administrative duty positions unless voluntarily agreed to by the claimant and the employer with notice of the assignment to the union.[125] Further, the light duty assignment could not not last more than 45 calendar days without approval from the employer, union president, or their designees.[126] The claimant satisfied the 45-day period, but when he refused to continue the light duty assignment, the employer terminated his TTD benefits, relying on the exception laid out in *Interstate Scaffolding* that TTD benefits may be suspended or terminated if the claimant refuses an offer of work falling within the physical restrictions prescribed by his doctor.[127]

The appellate court applied a *de novo* standard of review, as the question presented was one involving matters of statutory and contract construction. It held to the extent the Act conflicts with the terms of the claimant's collective bargaining agreement, the collective bargaining agreement controls. It further noted that the Act itself does not require a claimant to accept an offer of employment within his restrictions, but is just a factor when determining whether the employee has stabilized.[128] Moreover, according to the appellate court, under *Interstate Scaffolding* the proper focus of the TTD analysis must be on whether the employee's condition has stabilized or reached MMI. Finding the claimant's condition had not yet stabilized, coupled with his contractual right to refuse light duty, the court found the employer liable for TTD benefits.

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IV. Section 8.1b — AMA Rating Report

A. Section 8.1b.

The determination of permanent partial disabilities for workplace accidents occurring after September 1, 2011, is governed by section 8.1b of the Act, which became effective on June 28, 2011.[129] Section 8.1b(a) requires a licensed physician to prepare a permanent partial disability impairment report setting out the level of the claimant's impairment in writing.[130] The report must "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."[131] Section 8.1b(a) requires the physician to use "[t]he most current edition of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment' . . . in determining the level of impairment."[132]

In determining the level of a claimant's permanent partial disability, section 8.1b(b) directs the Commission to consider: "(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."[133]

B. Recent judicial interpretations.

To date, one appellate court decision has been published interpreting section 8.1b, and a second decision is pending from the appellate court. First, in *Continental Tire of the Americas v. Illinois Workers' Compensation Commission*, the appellate court rejected the employer's argument that a "zero impairment" AMA rating meant that disability must be zero as a matter of law.[134] Although speaking in dicta, the appellate court said "[t]he statute does not require the claimant to submit a written physician's report."[135] Rather, "[i]t only requires that the Commission, in determining the level of the claimant's permanent partial disability, consider a report that complies with subsection (a), regardless of which party submitted it."[136] According to the appellate court, "nothing within the statutory language of section 8.1b requires the Commission to automatically adopt Dr. Brown's reported level of impairment merely because the parties submitted only one subsection (a) report."[137] To the contrary, the court explained, "the Commission is obligated to weigh all of the factors listed within section 8.1b(b) and make a factual finding with respect to the level of the injured worker's permanent partial disability with no single factor being the sole determinant of disability."[138]

The second case, *Corn Belt Energy v. Illinois Workers' Compensation Commission*, was released in late June 2016 and in a 4-1 decision held that section 8.1b did not require the submission of an AMA impairment rating report in order to establish permanency.[139] In that case, the issues before the appellate court included whether the AMA rating report must be offered by the claimant as part of the petitioner's burden of proof and production, the consequences of a failure to present a report, and the extent of explanation required of the Commission when it discusses the various factors set forth in subsection b of section 8.1b. Although the majority concluded that no report was required under the section, it did make it clear that the Commission, when rendering a decision awarding permanency, must articulate the relevance and weight of any factors used in addition to the level of impairment as reported by the physician and do so in writing.[140] A third case, *Central Grocers v. Illinois Workers' Compensation Commission*, presents nearly identical facts as *Corn*

Belt Energy and was argued before the appellate court on June 15, 2016.[141] No decision has yet been issued on that case.

C. Depositions and tips for the practitioner.

Depending upon the appellate court's decision in *Corn Belt Energy*, AMA ratings could become a much more prevalent part of our practice. Assuming the Court does not establish that these rating reports are automatically admissible, depositions of AMA rating physicians could also become much more common. There are simple factors to consider in both taking and defending these depositions.

For the party presenting the AMA rating, the deposition should be used to show that the rating physician did a thorough job and complied with the very detailed recommendations contained in the 6th Edition to the Guides to the Evaluation of Permanent Impairment. For the opposing party, the deposition of an AMA rating physician will focus on whether the physician complied with the procedure for calculating an impairment rating and whether the resulting report is in the correct format.

As an initial matter, the deposition of an AMA rating physician should focus on whether the physician is qualified to prepare the report. Section 8.1(b) of the Act requires that an AMA rating report be prepared by a physician licensed to practice medicine in all of its branches. The AMA guidelines do permit impairment evaluations from "medical doctors who are qualified in allopathic or osteopathic medicine or chiropractic medicine." There remains some question as to whether a chiropractor is licensed to practice medicine "in all of its branches." To this point, there have not been any Commission or court decisions providing guidance in this regard. Further, while the Act requires that the examiner be a "physician" to perform the rating, the examiner need not be certified to perform the rating.

The Guides dictate the use of a three-step process for preparing a rating report. Specifically, the Guides require a clinical evaluation, an analysis of the findings, and a discussion of how the impairment rating was calculated. An AMA rating report should include each of these three sections, and the content of each section can form the basis of both direct and cross examination in a deposition.

V. Procedural Issues Impacting Workers' Compensation

Several significant procedural questions have been addressed by the appellate court over the past two years. Two of these rulings concern timeframes for action, while the third addressed the timeliness of raising a *Kotecki* defense in civil litigation.

A. Modification of awards.

In *Weaver v. Illinois Workers' Compensation Commission*, the Illinois Appellate Court Fourth District, Workers' Compensation Commission Division, addressed the issue of when the statutory 30-month period to file a section 19(h) petition to modify a permanency award due to a change in the claimant's condition begins to run following an award for permanency.[142] Section 19(h) of the Act allows either the employee or employer to request that an award for permanency be reviewed by the Commission on the grounds that the disability of the employee has subsequently recurred, increased, diminished or ended.[143] Such requests must be made within 30 months of a final award. On January 22, 2009, the

arbitrator awarded the claimant permanent partial disability benefits in the amount of 50 percent loss of use of the person as a whole.[144] On February 23, 2010, the Commission affirmed and adopted the arbitrator's decision.[145] On January 13, 2011, the circuit court, on judicial review, remanded the matter back to the Commission for further consideration.[146] On June 30, 2011, the Commission issued its decision on remand and vacated its original decision.[147] The Commission found the claimant permanently and totally disabled and awarded benefits to the claimant for the remainder of his life.[148] On June 11, 2012, the circuit court confirmed the Commission's decision on remand.[149]

On September 25, 2013, the appellate court found that the Commission's original finding that the claimant was permanently disabled to the extent of 50 percent loss of use of the person as a whole was not against the manifest weight of the evidence and that the circuit court erred in remanding the Commission's original decision.[150] The appellate court then vacated the circuit court's June 11, 2012, decision; vacated the Commission's June 30, 2011, decision on remand; reversed the circuit court's January 13, 2011, decision setting aside the Commission's original decision; and reinstated the Commission's original February 23, 2010, decision.[151]

On November 6, 2013, the claimant filed a petition for review under section 19(h). The employer filed a motion to dismiss the petition, arguing that it was filed beyond the 30-month period allowed under the Act.[152] The Commission subsequently granted the employer's motion to dismiss, "finding that it was untimely because it was filed more than 30 months after the Commission's original decision affirming the arbitrator's award."[153] The Commission held that the 30-month period to file a section 19(h) petition was not tolled by judicial review.[154] The appellate court agreed with the Commission's decision to dismiss the section 19(h) petition.[155] The appellate court expressed that the "purpose of section 19(h) is to set a period of time in which the Commission may consider whether a disability has recurred, increased, diminished, or ended."[156] The 30-month time "period for filing a section 19(h) petition runs from the date of filing of the Commission's decision, and judicial review of the Commission's decision does not toll the 30-month period."[157]

Thus, the appellate court held that the 30-month time period to file a section 19(h) petition began on the date of the Commission's original February 23, 2010, decision and was not affected by the subsequent appeals process that resulted in certain decisions being vacated and reinstated.[158] The appellate court solidified that section 19(h) petitions must be filed within 30 months of the original Commission decision even if the underlying Commission decision is appealed. Section 19(h) petitions that are filed after the 30-month time period should be dismissed based on a lack of jurisdiction.[159]

B. Which provision governs re-filings following dismissal?

In *Farrar v. Illinois Workers' Compensation Commission*, the Illinois Appellate Court First District, Workers' Compensation Commission Division, ruled on whether the time limitation for refiling a workers' compensation claim following dismissal for want of prosecution is governed by section 13-217 of the Code of Civil Procedure (the Code) or by Commission Rule 9020.90(a).[160] Section 13-217 allows a party to re-file an action within one year after the action has been dismissed for want of prosecution, regardless of whether the statute of limitations has expired during the pendency of the original filed action, while Commission Rule 9020.90(a) states as follows:

> Where a cause has been dismissed from the arbitration call for want of prosecution, the parties shall have 60 days from receipt of the dismissal order to file a petition for reinstatement of the cause onto the arbitration call.[161]

In *Farrar*, the claimant waited over 11 months after her original claim was dismissed for want of prosecution to file a new claim for the same accident.[162] When she filed this new claim, the statute of limitations on her claim had expired.[163] The claimant argued that section 13-217 allowed her one year to refile her claim even though the statute of limitations had expired.[164] The employer filed a motion to dismiss the new claim, arguing it was untimely under the Act's statute of limitations which the arbitrator granted[165] The court, in upholding the order dismissing the new filing, initially pointed out the General Assembly granted the Commission the authority to "make and publish procedural rules and orders" governing the litigation of claims before it so that the process and procedure before it "shall be as simple and summary as reasonably may be."[166] While the Code may apply in the workers' compensation arena under some circumstances, when the Act or the Commission's rules regulate a procedural area or topic; the Act or Commission rules apply and not the Code.[167] Thus, the appellate court held that Commission Rule 9020.90(a) governs the reinstatement of claims that have been dismissed for want of prosecution.[168] Since the claimant had not refiled her claim within sixty days, the dismissal was proper.

C. *Kotecki* set-off timely raised post trial.

The appellate court recently issued a decision on whether the *Kotecki* doctrine must be raised affirmatively by the employer during trial as an affirmative defense. The so-called "*Kotecki* doctrine" comes from the 1991 Illinois Supreme Court decision holding that an employer's maximum liability for contribution in the third-party context is limited to the amount of the workers' compensation claim.[169]

In *Burhmester v. Steve Spiess Construction, Inc*., the court found that *Kotecki* automatically applies to offset the employer's liability in contribution claims unless the employer has contractually waived the protections and, thus, does not need to be affirmativly proven with evidence by the employer at trial.[170] Here, the injured construction worker filed a workers' compensation claim against his employer and then sued other contractors civilly. When the employer was brought in on a contribution claim by one of the defendants, the employer answered the complaint and included an affirmative defense asserting that any contribution that may be recovered against it would be limited to the amount paid or payable in the workers' compensation case pursuant to the *Kotecki* doctrine.[171] Following trial, the defendant seeking contribution from the employer argued the employer failed to offer evidence to support its affirmative defense. In finding this was not fatal to the employer's assertion of the defense, the court reasoned that *Kotecki* is more in the nature of a set-off than an affirmative defense and applies as a matter of law.[172] The court found no reason for the amount of *Kotecki* protection to go before the jury and said it could be appropriately handled in a post-trial motion.[173]

VI. Medical Cannabis

The Compassionate Use of Medical Cannabis Pilot Program Act (the Illinois Compassionate Use Act) makes legal the purchase and possession of cannabis for medicinal use by registered qualifying patients.[174] A qualifying patient is defined as a person who has been diagnosed by a physician as having one of the thirty-nine debilitating medical conditions identified within the Illinois Compassionate Use Act.[175] The primary purpose of the Illinois Compassionate Use Act is to protect registered qualifying patients and their physicians from criminal prosecution and property forfeiture for patient use of cannabis. However, the Illinois Compassionate Use Act has created a number of issues for employers when employees seek to become registered qualifying patients.[176]

With regard to the Workers' Compensation Act, the predominant issue currently appears to be whether medical cannabis should be "covered," meaning whether employers and their insurers are required to reimburse injured employees for medical cannabis. A secondary issue related to medical cannabis is how to address impairment when considering liability.

A. Coverage and the exclusionary provision.

The Illinois Workers' Compensation Commission has not specifically addressed the issue of coverage, and until 2016, even the Illinois Compassionate Use Act remained silent on insurance.[177] Effective January 1, 2016, the Illinois Compassionate Use Act now provides what is often referred to as an "exclusionary provision," which provides:

> Nothing in the Act may be construed to require a government medical assistance program, employer, property and casualty insurer, or private health insurer to reimburse a person for costs associated with the medical use of cannabis.[178]

Other states with similar (but not identical) language have struggled with how this language should be applied in the context of workers' compensation claims. While some states have held medical cannabis is a reasonable and necessary medical treatment for workplace injuries and the employer or its insurer is responsible for reimbursement, other states have declined to follow suit.

1. California: *Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company.*

In a recent California case, *Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company*, the claimant, a lawyer, sustained an injury to his low back, right elbow, and heart while working for Farmers Insurance.[179] He sought reimbursement from Liberty Mutual Insurance Company, the third party administrator (TPA), for medical cannabis, which was recommended by his physician for chronic pain.[180] Relying on the agreed medical examiner's opinion that this treatment was reasonable and necessary as provided under California's workers' compensation law, the judge awarded reimbursement to the claimant for the medical cannabis.[181]

The employer filed a petition for reconsideration and the California Workers' Compensation Appeals Board (WCAB) panel reversed and remanded the case back to the workers' compensation judge.[182] In its decision, the panel noted both parties and the judge failed to consider the following language in the state's medical cannabis law: "Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana."[183]

On remand, the workers' compensation judge ruled that a workers' compensation carrier is not a "health care service plan" and again ordered the TPA to reimburse the claimant for the cost of his medical cannabis.[184] The judge did not analyze whether a workers' compensation carrier was a "health insurance provider," and consequently, the employer sought reconsideration yet again.[185] The WCAB ordered the workers' compensation judge to address the question of whether a workers' compensation carrier falls under the definition of a "health insurance provider" as well and whether there was any rational basis to treat occupational and non-occupational insurers differently with regard to reimbursement for medical cannabis.[186] The case is still pending.

2. Iowa: *McKinney v. Labor Ready and ESIS Inc.*

In Iowa, where cannabis is not legal for any purpose, a deputy workers' compensation commissioner found the cost of medical cannabis was compensable and ordered it reimbursed to a claimant who was injured in Iowa, but later moved to Oregon where medical cannabis is legal. In *McKinney v. Labor Ready and ESIS Inc.*, the claimant sustained a left fibula fracture and crush injury to the tibial plafond when she was run over by a forklift truck.[187] She was subsequently diagnosed with complex regional pain syndrome.[188] She testified she had received a variety of pain management treatments without relief, and sought this alternative medical care which was recommended by an authorized treating physician in Oregon.[189]

The commissioner noted that medical cannabis is not readily available in Iowa, but that sections 124.205(7) and 124.206(7) of Iowa's Uniform Controlled Substances Act do offer controlled substance exclusions for cannabis "used for medicinal purposes pursuant to rules of the board of pharmacy examiners."[190] Since the claimant was now a resident of Oregon, a medical cannabis state, and the treatment recommendation was from an authorized physician licensed in Oregon, the commissioner ruled the medical cannabis was reasonable and necessary.[191]

Notably, Oregon's medical cannabis law provides that nothing in the medical cannabis law requires "[a] governmental medical assistant program or private health insurer to reimburse a person for costs associated with medical use of marijuana . . . ."[192] The analysis of whether a workers' compensation carrier is considered a "private health insurer" was not considered by the commissioner.

3. Maine: *Noll v. LePage Bakeries, Inc.* and *Bourgoin v. Twin Rivers Paper Company*.

The Maine Workers' Compensation Board has addressed the issue of coverage in two cases. In *Noll v. LePage Bakeries, Inc.*, the claimant was employed as a delivery driver and sustained a back injury while making deliveries.[193] He sought reimbursement from his employer for a medical evaluation for the purpose of obtaining a medical cannabis certificate, medical cannabis, and a vaporizer for treatment.[194] The self-insured employer argued these medical expenses should not be covered under the state's workers' compensation law for two reasons: (1) cannabis is a controlled substance under federal law and the employer should not be "complicit in a violation of federal law and subject to the risks of prosecution;"[195] and (2) the state's medical cannabis statute stated that the law "may not be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana."[196]

The administrative law judge handling this case denied the claimant's petition seeking reimbursement for these medical expenses and sided with the employer. The judge specifically held that Maine's medical cannabis law applies to shield a workers' compensation insurer from liability for expenses related to the use of medical cannabis because the insurer qualifies as a "private health insurer."[197] The claimant had not met his burden of demonstrating otherwise.

The claimant subsequently moved for further findings of fact and conclusions of law on the issue of whether the employer, as a self-insured entity, can be defined as any kind of "private health insurer." The judge ultimately reversed the prior decision and found that since the Bureau of Insurance Regulations define workers' compensation insurance as "casualty" rather than "health," the employer could not be considered a "private health insurer" within the meaning of

exclusionary provision.[198] Based on this reasoning, no workers' compensation insurers would be considered "private health insurers," regardless of self-insured status, and therefore could not be shielded from paying for medical cannabis.[199]

In a different Maine case, which is currently pending before the Workers' Compensation Board Appellate Division, the administrative law judge ruled the cost of medical cannabis was compensable. In *Bourgoin v. Twin Rivers Paper Company*, the employer again argued cannabis was an illegal drug under federal law and that it should be protected by the exclusionary provision in the state's medical cannabis law.[200] The judge dismissed the federal classification argument, noting medical cannabis is "authorized by state law and tolerated by federal law enforcement," and ruled that workers' compensation insurers "are not private health insurers so the [exclusionary] statute does not apply."[201]

These cases may provide some insight in to how Illinois arbitrators, commissioners, and the courts may interpret and apply the exclusionary provision in the Illinois Compassionate Use Act when determining liability. In contrast to the statutes discussed in this article, Illinois' exclusionary provision includes employers and casualty insurers amongst those who do not have to reimburse individuals for medical cannabis.[202] The addition of these parties to the exclusionary provision will likely benefit Illinois employers and workers' compensation insurers who want to avoid liability for medical cannabis in workers' compensation claims. Whether it is smart decision, nonetheless, to cover medical cannabis, should be assessed on a case by case basis.

B. Impairment and liability.

For workers' compensation cases, section 11 of the Act (amended in 2011), states that "[n]o compensation shall be payable if (i) the employee's intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment."[203] Section 11 provides that admissible evidence of the concentration of (1) alcohol, (2) cannabis as defined in the Cannabis Control Act,[204] (3) a controlled substance listed in the Illinois Controlled Substances Act,[205] or (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act[206] in the employee's blood, breath, or urine at the time the employee incurred the accidental injury "shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries."[207]

Concerning cannabis, "[i]f at the time of the accidental injuries, . . . there is any evidence of impairment due to the unlawful or unauthorized use of (1) cannabis as defined in the Cannabis Control Act,[208] (2) a controlled substance listed in the Illinois Controlled Substances Act,[209] or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act[210] or if the employee refuses to submit to testing of blood, breath, or urine, then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury."[211] In that event, the employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries.

There are two specific types of accidental injuries that are most likely to be impacted by medical cannabis—injuries while driving and injuries while operating equipment. Unsurprisingly, Colorado, a state with over 100,000 active medical cannabis patients, has reported an increase in driving under the influence of cannabis cases and fatal motor vehicle crashes with cannabis-only drivers. Presently there are approximately 5,600 registered qualifying patients in Illinois. This number is expected to continue to increase in the coming months, especially in the event the Illinois General Assembly or the Illinois Department of Public Health (IDPH) adds more debilitating medical conditions to the Illinois Compassionate Use

Act. As Illinois sees more medical cannabis patients, attorneys can expect more claims involving drivers impaired or under the influence of cannabis within the state.

Proving impairment for registered qualifying patients, though, will be an issue. Medical cannabis products in Illinois have varying amounts of the delta-9 tetrahydrocannabinol (THC) in them, where THC is what is commonly considered to cause the "high" or euphoric effect in users.[212] For those that consume medical cannabis products with THC, any "high" is likely limited to about two hours, according to the National Highway Traffic Safety Administration (NHTSA), although Carboxy-THC (an inactive metabolite of THC) may stay in one's system for as long as 30 days.[213] Under these circumstances, positive testing for impairment or even evidence of physical impairment may be difficult to obtain.

Despite the fact that THC metabolizes differently than alcohol, some states have tried to address the impairment issue by setting a legal limit similar to the blood alcohol content limit set for alcohol. For example, Washington, Montana, and Colorado have set the legal limit for THC in a driver's system at 5 ng/ML of blood, while Nevada's and Ohio's legal limits are 2 ng/ML and Pennsylvania's legal limit is 1 ng/ML.[214] In other words, if the driver's THC levels measure at or more than the legal limit, the driver is legally presumed to be impaired in that state.

A study published last year by Forensic Science International found that 9 out of 21 cannabis users tested above 5 ng/ML for THC 24 hours after consumption, while 2 of those 21 subjects still tested at 5 ng/ML for THC 5 days after consumption. As more studies on cannabis and impairment are completed, state laws that set a legal limit such as those laws in Washington, Montana, and others may be susceptible to challenges similar to that in *Montgomery v. Harris*.

In the Arizona case of *Montgomery v. Harris*, a driver was charged with DUI where the driver tested positive for Carboxy-THC (or THC-COOH) and Arizona's law prohibited driving while any drug "metabolite" is in a person's body.[215] There, the state's own expert witness testified that:

> (1) marijuana has "many, many metabolites," (2) Hydroxy-THC and Carboxy-THC are the two major marijuana metabolites, (3) although it is possible to test for Hydroxy-THC in the blood, the Arizona Department of Public Safety chooses not to do so because Hydroxy-THC does not "exist in the blood for very long" and is quickly converted to Carboxy-THC, (4) Carboxy-THC is inactive and does not cause impairment, and (5) Carboxy-THC can remain in a person's body for as many as twenty-eight to thirty days after the ingestion of marijuana.[216]

Criticizing the state's position, the Arizona Supreme Court called it "absurd" that the Arizona law could potentially cause a medical cannabis patient to be prosecuted for driving with THC-COOH in his or her system given that it remains in a driver's system as many as 28-30 days after ingestion.[217] The court noted Arizona's DUI law is intended to prevent and punish impaired driving, but "unlike alcohol, there is no generally applicable concentration that can be identified as an indicator for [cannabis]."[218] Ultimately, the court ruled that the presence of a non-impairing metabolite was not enough to consider someone driving while impaired and ordered the charge be dismissed.[219]

In conclusion, much debate continues as to what is the appropriate legal limit for cannabis in a driver's system, what THC metabolite may be relied on in testing impairment, and moreover, whether setting a legal limit for cannabis similar to alcohol is appropriate at all. The law is rapidly developing as to cannabis and impairment, which creates even more uncertainty for attorneys who are undoubtedly faced with a future of increased claims involving a driver with cannabis in his or her system. The only solution is for counsel to stay abreast of this rapidly developing area of law or consult with co-counsel knowledgeable on the matter.

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VII. Closing Thoughts

Hopefully, this Monograph has provided an overview of the more significant workers' compensation cases of the past eighteen months and helps provide some perspective on the issues faced by the workers' compensation bar. These cases should help provide a backdrop as the General Assembly considers again the need for workers' compensation reform in Illinois. As is apparent from even a cursory reading of this Monograph, the vast majority of decisions rendered in the workers' compensation arena are from the Illinois Appellate Court, Workers' Compensation Commission Division. One of the proposals tendered in 2016 called for the elimination of the two justice statement of importance, imposed by Supreme Court Rule 315(a), as a pre-cursor for filing a petition for leave to appeal with the Illinois Supreme Court.[220] Adoption of this amendment would permit an aggrieved party to request permissive appeal from the court directly without the need for two appellate court justices to issue a statement that the case presents a significant issue warranting supreme court consideration. This change in the law would hopefully provide more opportunity for the parties to reach the Illinois Supreme Court.

(Endnotes)

1 P.A. 94-227, 94th Gen. Assemb. (Ill. 2005).

2 P.A. 97-18, 97th Gen. Assemb. (Ill. 2011); Robert D. Rondirielli, *Guides to the Evaluation of Permanent Impairment* (6th ed. Am. Med. Ass'n 2008).

3 S.B. 771, 99th Gen. Assemb. (Ill. 2015); S.B. 1284, 99th Gen. Assemb. (Ill. 2015); H.B. 2420, 99th Gen. Assemb. (Ill. 2015).

4 S.B. 769, 99th Gen. Assemb. (Ill. 2015).

5 S.B. 1283, 99th Gen. Assemb. (Ill. 2015).

6 S.B. 770, 99th Gen. Assemb. (Ill. 2015); H.B. 2418, 99th Gen. Assemb. (Ill. 2015).

7 S.B. 772, 99th Gen. Assemb. (Ill. 2015).

8 S.B. 2942, 99th Gen. Assemb. (Ill. 2016); S.B. 3043, 99th Gen. Assemb. (Ill. 2016); S.B. 2556, 99th Gen. Assemb. (Ill. 2016); H.B. 6428, 99th Gen. Assemb. (Ill. 2016); H.B. 4300, 99th Gen. Assemb. (Ill. 2016); H.B. 5751, 99th Gen. Assemb. (Ill. 2016); H.B. 5925, 99th Gen. Assemb. (Ill. 2016); H.B. 6416, 99th Gen. Assemb. (Ill. 2016); H.B. 6575, 99th Gen. Assemb. (Ill. 2016).

9 *Commonwealth Edison Co. v. Indus. Comm'n*, 86 Ill. 2d 534, 537 (1981).

10 *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43 (1965).

11 *Kertis v. Ill. Workers' Comp. Comm'n*, 2013 IL App (2d) 120252WC, ¶ 16.

12 *Robinson v. Indus. Comm'n*, 96 Ill. 2d 87, 92 (1983).

13 *Venture-Newberg-Perini, Stone & Webster v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728.

14 *Venture-Newberg-Perini, Stone & Webster*, 2013 IL 115728, ¶¶ 31, 32.

15 *Mlynarczyk v. Ill. Workers' Comp. Comm'n*, 2013 IL App (3d) 120411WC, ¶ 6.

16 *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 3.

17 *Id.*

18 *Id.* ¶ 4.

[19] *Id.* ¶ 5.

[20] *Id.*

[21] *Id.*

[22] *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 5.

[23] *Id.*

[24] *Id.* ¶ 6.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 6.

[29] *Id.*

[30] *Id.* ¶ 9.

[31] *Id.* ¶ 10.

[32] *Id.* ¶ 16.

[33] *Id.* ¶¶ 16, 19.

[34] *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 19.

[35] *Id.* ¶ 20.

[36] *Pryor v. Ill. Workers' Comp. Comm'n*, 2015 IL App (2d) 130874WC, ¶ 7.

[37] *Pryor*, 2015 IL App (2d) 130874WC, ¶ 5.

[38] *Id.*

[39] *Id.*

[40] *Id.* ¶ 6.

[41] *Id.*

[42] *Id.*

[43] *Pryor*, 2015 IL App (2d) 130874WC, ¶ 6.

[44] *Id.* ¶ 7.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* ¶ 12.

[49] *Pryor*, 2015 IL App (2d) 130874WC, ¶ 15.

[50] *Id.*

[51] *Id.* ¶ 16.

[52] *Id.* ¶ 29.

[53] *Id.* ¶ 28.

[54] *Id.* ¶ 29.

[55] *Nee v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 132609WC.

[56] *Nee*, 2015 IL App (1st) 132609WC, ¶ 20.

[57] *Id.* ¶ 28.

[58] *Id.* ¶ 26.

[59] *Id.*

[60] *Id.* ¶ 25.

[61] *United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2016 Ill App (1st) 151693WC.

[62] *United Airlines, Inc.*, 2016 Ill App (1st) 151693WC, ¶ 1.

[63] *Id.*

[64] *Id.* ¶ 2.

[65] *Id.* ¶ 4.

[66] *Id.*

[67] *Id.* ¶ 5.

[68] *United Airlines, Inc.*, 2016 Ill App (1st) 151693WC, ¶ 6.

[69] *Id.* ¶ 8.

[70] *Id.* ¶¶ 8-9.

[71] *Id.* ¶ 9.

[72] *Id.* ¶ 7.

[73] *Id.* ¶ 10.

[74] *United Airlines, Inc.*, 2016 Ill App (1st) 151693WC, ¶ 13.

[75] *Id.*

[76] *Id.* ¶ 14.

[77] *Id.*

[78] *Id.* ¶ 15.

[79] *Id.*

[80] *United Airlines, Inc.*, 2016 Ill App (1st) 151693WC, ¶ 15.

[81] *Id.*

[82] *Id.*

[83] *Id.* ¶ 19.

[84] *Id.* ¶ 25.

[85] *Id.* ¶¶ 27-28.

[86] *United Airlines, Inc.*, 2016 Ill App (1st) 151693WC, ¶¶ 27-28.

[87] *Id.* ¶ 31.

[88] *Id.* ¶ 32.

[89] *Met. Water Reclam. Dist. of Greater Chi. v. Ill. Workers' Comp. Comm'n,* 407 Ill. App. 3d 1010, 1013-14 (1st Dist. 2011).

[90] *Caterpillar Tractor Co. v. Indus. Comm'n,* 129 Ill. 2d 52, 58 (1989).

[91] *Met. Water Reclam. Dist. of Greater Chi.*, 407 Ill. App. 3d at 1013-14.

[92] *Caterpillar Tractor Co.,* 129 Ill. 2d at 58.

[93] *Village of Villa Park v. Ill. Workers' Comp. Comm'n,* 2013 IL App (2d) 130038WC, ¶ 19.

[94] *Autumn Accolade v. Ill. Workers' Comp. Comm'n,* 2013 IL App (3d) 120588WC, ¶ 15.

[95] *Autumn Accolade,* 2013 IL App (3d) 120588WC, ¶ 15.

[96] *Id.*

[97] *Bolingbrook Police Dept. v. Ill. Workers' Comp. Comm'n,* 2015 IL App (3d) 130869WC, ¶ 55.

[98] *Id.*

[99] *Id*. ¶ 13.

[100] *Adcock v. Ill. Workers' Comp. Comm'n,* 2015 IL App (2d) 130884WC, ¶¶ 43-44.

[101] *Adcock*, 2015 IL App (2d) 130884WC, ¶ 44.

[102] *Id.*

[103] 820 ILCS 305/8(d); *Hartlein v. Ill. Power Co.*, 151 Ill. 2d 142, 166 (1992); *Hayden v. Indus. Comm'n*, 214 Ill. App. 3d 749 (1st Dist. 1991).

[104] *Interstate Scaffolding v. Ill. Workers' Comp. Comm'n*, 236 Ill. 2d 132 (2010).

[105] *Interstate Scaffolding*, 236 Ill. 2d at 149.

[106] *Id*. at 137-38.

[107] *Id*. at 146.

[108] *Id*. at 146-47.

[109] *Id*.

[110] *Otto Baum LLC, Inc. v. Ill. Workers' Comp. Comm'n*, 2011 IL App (4th) 100959WC.

[111] *Otto Baum*, 2011 IL App (4th) 100959WC, ¶ 14.

[112] *Id*.

[113] *Sunny Hill of Will Cnty. v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC.

[114] *Sunny Hill*, 2014 IL App (3d) 130028WC, ¶ 27.

[115] *Id*.

[116] *Matuszczak v. Ill. Workers' Comp. Comm'n*, 2014 IL App (2d) 130532WC.

[117] *Matuszczak*, 2014 IL App (2d) 130532WC ¶ 8.

[118] *Id*. ¶ 20.

[119] *Id*. ¶ 25.

[120] *Sharwarko v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 131733WC.

[121] *Sharwarko*, 2015 IL App (1st) 1317733WC, ¶ 18.

[122] *Id*. ¶ 43.

[123] *Id*. ¶ 47.

[124] *Cesario v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 131705WC-U.

[125] *Cesario*, 2014 IL App (1st) 131705WC-U, ¶ 6.

126 *Id.* ¶ 8.

127 *Id.*

128 *Id.* ¶ 15.

129 P.A. 97-18, § 15, 97th Gen. Assemb. (Ill. 2011).

130 820 ILCS 305/8.1b(a).

131 *Id.*

132 *Id.*

133 *Id.* § 8.1b(b).

134 *Cont'l Tire of the Americas, LLC v. Ill. Workers' Comp. Comm'n*, 2015 IL App (5th) 140445WC.

135 *Cont'l Tire of the Americas*, 2015 IL App (5th) 140445WC, ¶ 17.

136 *Id.*

137 *Id.* ¶ 18.

138 *Id.*

139 *Corn Belt Energy Corp. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (3d) 150311WC.

140 *Corn Belt Energy Corp.*, 2016 IL App (3d) 150311WC, ¶¶ 49, 52.

141 *Cent. Grocers v. Ill. Workers' Comp. Comm'n*, No. 3-15-0557WC (Ill. App. Ct. Workers' Comp. Div. argued June 15, 2016). Given the decision in *Corn Belt Energy*, it is presumed the appellate court will reach the same conclusion in this case, as the issues concerning section 8.1b were identical.

142 *Weaver v. Ill. Workers' Comp. Comm'n*, 2016 IL App (4th) 150152WC.

143 820 ILCS 305/19(h).

144 *Weaver*, 2016 IL App (4th) 150152WC, ¶ 3.

145 *Id.* ¶ 4.

146 *Id.* ¶ 5.

147 *Id.* ¶ 6.

148 *Id.*

149 *Id.*

150 *Weaver*, 2016 IL App (4th) 150152WC, ¶ 7.

151 *Id.*

152 *Id.* ¶ 8.

153 *Id.* ¶ 10.

154 *Id.*

155 *Id.* ¶ 24.

156 *Id.* ¶ 13 (citing *Cuneo Press, Inc. v. Indus. Comm'n.*, 51 Ill. 2d 548, 549 (1972)).

157 *Id.* ¶ 15 (citing *Cuneo Press, Inc.*, 51 Ill. 2d at 549).

158 *Id.* ¶ 23.

159 As of the time of writing, a petition for rehearing has been filed with the appellate court, but not ruled upon.

[160] *Farrar v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 143129WC, ¶ 1.

[161] ILL. ADMIN. CODE tit. 50, § 9020.90(a) (1982).

[162] *Farrar*, 2016 IL App (1st) 143129WC, ¶ 2.

[163] *Id.*

[164] *Id.*

[165] *Id.* ¶ 3.

[166] *Id.* ¶ 12; 820 ILCS 305/16.

[167] *Farrar*, 2016 IL App (1st) 143129WC, ¶ 12 (citing *Preston v. Indus. Comm'n*, 332 Ill. App. 3d 708, 712 (3d Dist. 2002)).

[168] *Farrar*, 2016 IL App (1st) 143129WC, ¶ 13.

[169] *Kotecki . Cyclops Welding Corp.*, 146 Ill. 2d 155 (1991).

[170] *Burhmester v. Steve Spiess Constr., Inc*. 2016 IL App (3d) 140794, ¶ 4.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] 410 ILCS 130/1.

[175] 410 ILCS 130/10.

[176] See 410 ILCS 130; P.A. 99-0031, 99th Gen. Assemb. (Ill. 2016).

[177] 410 ILCS 130/40(d).

[178] 820 ILCS 305/11.

[179] *Cockrell v. Farmers Ins. Group./Liberty Mut. Ins.*, Nos. ADJ2584271, ADJ504565, 2015 Cal. Wrk. Comp. P.D. LEXIS 95, ¶ 1, (Cal. Workers' Comp. Appeal Bd. July 18, 2014).

[180] *Cockrell*, 2015 Cal. Wrk. Comp. P.D. LEXIS 95, ¶ 1.

[181] *Id.* ¶ 3.

[182] *Cockrell,* 2012 Cal. Wrk. Comp. P.D. LEXIS 456.

[183] *Cockrell v. Farmers Ins.; Liberty Mut. Ins. Co.*, Nos. ADJ2584271, ADJ504565, 2015 WL 1577995, at *1-2 (Cal. Workers' Comp. Appeal Bd. Mar. 13, 2015).

[184] *Id.* at *2.

[185] *Id.*

[186] *Id.* at *2-3.

[187] *McKinney v. Labor Ready and ESIS, Inc.*, No. 5005302, 2002 WL 32125774, * 1 (Iowa Workers' Comp. Comm'n Nov. 14, 2002).

[188] *McKinney*, 2002 WL 32125774, at *1.

[189] *Id.*

[190] *Id.* at *3.

[191] *Id.*

[192] Oregon Medical Marijuana Act, OR. REV. STAT. 475B.413(1) (2016).

[193] *Noll v. LePage Bakeries, Inc.*, No. 12-003547B, 2015 ME Wrk Comp. LEXIS 145, ¶ 1, (Me. Work. Comp. Bd. Sept. 18, 2015).

[194] *Noll*, 2015 ME Wrk Comp. LEXIS 145, ¶ 3.

[195] *Id*. ¶¶ 4, 10.

[196] *Id*. ¶¶ 10, 12.

[197] *Id*. ¶ 15.

[198] *Id.*

[199] *Id.*

[200] *Bourgoin v. Fraser Paper Ltd. & Sedgwick Claims Mgmt.*, No. 89-01-36-55, 2015 WL 1811598, (Me.Work. Comp Bd. Mar. 16, 2015).

[201] *Bourgoin*, 2015 WL 1811598; *See* Nelson J. Larkins, et al., *Maine Workers' Compensation Board Rules on Compensability of Medical Marijuana; Apellate Division to Ultimately Rule on the Issue Following Recent Oral Argument,* PRETI FLAHERTY (Feb. 11, 2016), *available* at http://www.preti.com/publications/maine-workers-compensation-board-rules-on-compensability-of-medical-marijuana-appellate-division-to-ultimately-rule-on-the-issue-following-recent-oral-argument/.

[202] 410 ILCS 130/40(d).

[203] 820 ILCS 305/11.

[204] 720 ILCS 550/1.

[205] 720 ILCS 570/100.

[206] 720 ILCS 690/0.01.

[207] 820 ILCS 305/11.

[208] 720 ILCS 550/1; 720 ILCS 550/1.

[209] 720 ILCS 570/100.

[210] 720 ILCS 690/0.01.

[211] 820 ILCS 305/11.

[212] HEALTH CANADA, *Information for Health Care Professionals, Cannabis (marihuana, marijuana) and the cannabinoids*, p. 11 (2013), http://www.hc-sc.gc.ca/dhp-mps/alt_formats/pdf/marihuana/med/infoprof-eng.pdf.

[213] *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *Drugs and Human Performance Fact Sheets: Cannabis/Marijuana*, (Apr. 2014), *available at* http://www.nhtsa.gov/people/injury/research/job185drugs/cannabis.htm; *see also* Paul L. Cary, *The Marijuana Detection Window: Determining the Length of Time Cannabinoids will Remain Detectable in Urine Following Smoking*, NAT'L DRUG COUNSEL INST. (2006), http://www.ndci.org/sites/default/files/ndci/THC_Detection_Window_0.pdf.

[214] *Drug-Impaired Driving Laws,* GOVERNORS HIGHWAY SAFETY ASSOC. (June 2016), *available at* http://www.ghsa.org/html/stateinfo/laws/dre_perse_laws.html.

[215] *Montgomery v. Harris*, 234 Ariz. 343 (2014).

[216] *Montgomery*, 234 Ariz. at 343-44.

[217] *Id*. at 346.

[218] *Id*. at 347.

[219] *Id*. at 347-48.

[220] S.B. 2942, 99th Gen. Assemb. (Ill. 2016).

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