LIMITATIONS ON AWARDS FOR REPETITIVE TRAUMA CLAIMS: IS THERE FINALLY LIGHT AT THE END OF THE “CARPAL TUNNEL?”
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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
LIMITATIONS ON AWARDS FOR REPETITIVE TRAUMA CLAIMS: IS THERE FINALLY LIGHT AT THE END OF THE “CARPAL TUNNEL?”

I. NEW AWARD LIMITATIONS FOR REPETITIVE CARPAL TUNNEL SYNDROME

820 ILCS 305/8(e)(a): Effective Date: Accident Occurring on or After June 28, 2011

In accidental injuries involving carpal tunnel syndrome due to repetitive trauma or cumulative trauma, the total number of weeks available for permanency pursuant to section 8(e) is 190 weeks. All other hand injuries are limited to 205 weeks.

For repetitive trauma or cumulative trauma carpal tunnel syndrome claims, permanent partial disability pursuant to section 8(e) shall not exceed 15 percent loss of use of the hand, except for causes shown by clear and convincing evidence. In no event shall the award pursuant to section 8(e) in a repetitive trauma/cumulative trauma carpal tunnel claim exceed 30 percent loss of use of the hand.

II. MEDICAL LITERATURE AND RESEARCH

Many arbitrators and commissioners at the Illinois Workers’ Compensation Commission have for years assumed that there is an undeniable relationship between work-related hand movements and the development of carpal tunnel syndrome. However, there is mounting medical evidence and research which suggests that the work environment may not be an undeniable cause in the development of carpal tunnel syndrome.

Many physicians, as well as arbitrators and commissioners, are very quick to conclude that repetitive or intensive computer keyboard use is a cause of carpal tunnel syndrome. This conclusion has been debunked by a number of medical studies. *Arthritis & Rheumatism*. 2007, 56 (11): 3620-3625. This is a publication of the American College of Rheumatology.

Many studies have examined what risk factors exist in the development of carpal tunnel syndrome. One study in Great Britain showed that risk factors associated with carpal tunnel syndrome were (1) previous wrist fracture, (2) rheumatoid arthritis, (3) osteoarthritis of the wrist and carpus, (4) obesity, (5) diabetes, (6) the use of insulin, (7) the use of sulphonylureas (used to manage type 2 diabetes), Metformin (also used to treat type 2 diabetes), and Thyroxine (used to treat hypothyroidism, which is an underactive thyroid). Interestingly, smoking, hormone-replacement therapy, the combined oral contraceptive pill, and oral corticosteroids were found not to be associated with carpal tunnel syndrome. *Journal of Hand Surgery, Br.* 2004, 29(4): 315-320.

One medical study examined whether or not carpal tunnel syndrome can be considered work related. The study showed that the primary risk factors in the development of carpal tunnel
syndrome are: (1) being a woman of menopausal age, (2) obesity or lack of fitness, (3) diabetes or having a family history of diabetes, (4) osteoarthritis of the carpal metacarpal joint of the thumb, (5) smoking, and (6) lifetime alcohol intake. It concluded that except in cases of work that involve very cold temperatures (possibly in conjunction with load and repetition) such as butchery, the work environment is less likely than demographic- and disease-related variables to cause carpal tunnel syndrome. ANZ Journal of Surgery. 2002, 72(3): 204-209.

Many medical studies have supported a hypothesis that carpal tunnel syndrome causes are multifactorial. A recent study has concluded that factors such as obesity, hypothyroidism, and diabetes are more prevalent in the group of CTS patients that were examined in this study. It was significantly less with carpal tunnel syndrome patients who smoked. Annals of Plastic Surgery. 2002 American Journal of Physical Medicine and Rehabilitation. 48(3): 269-273.

One medical study focused specifically on railroad workers. It concluded that in the population claiming that carpal tunnel syndrome was caused by railroad occupations, there was significant association between carpal tunnel syndrome and body mass index, age, and risk index, but not job classification. American Journal of Physical Medicine and Rehabilitation. 2002, 81(2): 101-107.

The risk factors for the development of carpal tunnel syndrome in women has been studied. There were findings of a higher risk of women with diabetes and myxoedema (severe hypothyroidism where the deficiency reduces cellular metabolism, which affects mental, physical, and cardiac health), but these contributed in only a small proportion of all cases in women. There was no link with psychologic problems or nonmusculoskeletal pain complaints. The increased incidence of carpal tunnel syndrome in women may be partly due to hormonal factors but is also related to an underlying propensity to musculoskeletal problems and their higher overall frequency in women. American Journal of Epidemiology. 2000, 151(6): 566-574.

III. RECENT REPEITIVE TRAUMA ARBITRATION DECISIONS

A. Repetitive Trauma – Typing/Keyboarding – Carpal Tunnel Syndrome – Denied (June 2011)

The petitioner was a 65-year-old executive assistant/secretary who alleged that repetitive work duties, including typing/keyboarding, caused bilateral carpal tunnel syndrome. The petitioner previously had a right wrist fracture. Dr. J. Pomerance examined the petitioner, as well as the petitioner’s work duties, and concluded that the petitioner’s condition was not related to her work activities. The arbitrator found specifically that the opinion of Dr. Pomerance was persuasive and determined that the petitioner failed to prove that she sustained accidental injuries resulting from her repetitive work duties. Compensation was denied. 09 WC 7899, 09 WC 7900 (June 15, 2011).
**B. Repetitive Trauma – Carpal Tunnel Syndrome for Factory Worker Denied (March 2011)**

The petitioner was a 51-year-old male who testified that he never had either right- or left-hand problems or numbness in the past before he started working for the respondent. He worked in a warehouse and testified that his work duties varied and required him to use his hands all day, including using a utility knife, lifting up items, and driving a fork truck. EMG testing revealed severe carpal tunnel syndrome on the left hand.

The petitioner's treating physician testified that based on the petitioner's description of work duties, there was causal connection between the petitioner's carpal tunnel syndrome and his work duties. The respondent retained a section 12 orthopedic specialist who reviewed videotapes of the petitioner's work activities, as well as a complete set of all medical records and surveillance. The respondent's examiner, pursuant to section 12, concluded that the petitioner's work duties did not demonstrate activities that would lead to the development of carpal tunnel syndrome.

The arbitrator found that there was insufficient evidence introduced to support the petitioner's claim that work duties were a causative factor resulting in the petitioner's carpal tunnel syndrome. He specifically found that there was insufficient evidence to support a claim that a repetitive gripping maneuver required in the operation of a forklift was a causative factor in the carpal tunnel syndrome. 00 WC 59926 (Apr. 1, 2011).

**C. Repetitive Trauma – Factory Worker Low Back Claim Denied (1987)**

The petitioner was a mold maker who worked for the respondent for several years. On the date of the alleged accident, the petitioner worked from 3:30 p.m. until 12:30 a.m. At that time, the petitioner complained to his supervisor of back pain, and he was allowed to go home. The petitioner testified that his work duties that day required him to lift 75 to 100 pounds every 12 minutes.

Approximately three days after the occurrence, testimony was introduced which established that the petitioner helped a friend, who happened to be his supervisor, lift and move a desk. This desk was approximately 100 pounds and was awkward to carry.

After the incident of moving the desk outside of work, the petitioner did report to work and claimed that after a few hours his back “gave out” on him.

At arbitration, the arbitrator found that the petitioner's low back claim followed repetitive heavy lifting. The Workers' Compensation Commission reversed the arbitrator's decision. The Workers' Compensation Commission denial was reversed. However, on appeal, the appellate court reinstated the WCC finding of no causal connection.
The petitioner's attorney argued on appeal that there was no medical evidence whatsoever which tied the alleged intervening incident to the petitioner's disability, referring to the desk-carrying incident. The appellate court noted that the burden of establishing the elements of a claim is on the employee, not the employer. Furthermore, the appellate court noted that where the parties choose not to offer medical evidence on the issue of causal connection, the Workers' Compensation Commission is not precluded from finding against the petitioner. In essence, it stated that medical testimony in this circumstance is not necessarily required to either establish or disprove causation and disability.

The appellate court noted that the sequence of events supports the Workers’ Compensation Commission findings that the petitioner’s condition was not causally related in light of the fact that the petitioner helped move a 100- to 200-pound desk up 12 stairs allegedly after his accident. The appellate court noted that the petitioner’s delay in seeing a doctor until after the desk-lifting incident supports a reasonable inference that the desk-lifting incident activities, rather than lifting loads at work, caused the low back condition.

It was noted that the petitioner relied entirely on his own testimony that his back “started hurting” at work. While uncorroborated evidence of an injured worker may be sufficient to support a work accident, in this particular situation the petitioner’s testimony was insufficient. The testimony really merely recited a complaint by the petitioner to his supervisor, who allowed the petitioner to go home after nine hours of work.

The appellate court felt that the Workers’ Compensation Commission was on solid footing in accepting the lifting incident as a reasonable alternative explanation for the petitioner’s injuries, as opposed to repetitive work duties. *Heston v. Illinois Industrial Comm’n*, 164 Ill. App. 3d 178, 517 N.E.2d 632, 115 Ill. Dec. 221 (5th Dist. 1987).

**D. Repetitive Trauma – Neck Injury Denied (November 2011)**

The petitioner was an operator working first shift for the respondent. The petitioner testified that as an operator, she was to utilize a sonic hoist. The petitioner testified that the sonic hoist control kept going upwards, and because the petitioner was short, she was required to repetitively pull down the sonic hoist. She testified that at one point, the sonic hoist control went up from her workstation, and when she had to grab it and pull it down, she heard various snaps and pops in the base of her neck and shoulder.

The petitioner did seek medical treatment on the day of the occurrence, but there was no notation in the medical records of a work-related injury. It was also discovered that a week prior to the occurrence, the petitioner was complaining of right shoulder pain and pain in the back/neck.

The petitioner relied upon the opinions of her treating neurosurgeon, who performed neck surgery. The treating physician at deposition testified that because of the petitioner's history and description of work duties, he felt that the neck condition was related to work duties as well.
as the neck surgery. When asked to describe how the “mechanics” of the petitioner’s restriction could cause injury to the neck, the treating physician stated that he could not make this explanation. When asked again about the “mechanics” and the basis of his causal-connection opinion, he offered the following:

A. I don’t know enough about the physics. One can almost say the forensics, the force being applied on a particular vector to then be able to say biomechanically how that then exactly translates into either a disc herniation or into a compression of a nerve root. I really don’t have any training in that regard.

On further cross-examination, the treating physician was asked the following question and provided the following answer:

Q. You’ve told us on direct examination when you were asked about the mechanics involved in what she says happened on July 15, 2008, that you do not have an opinion as to how those mechanics could result in a [herniated] disc at the C6-C7 level on the right side; is that correct?

A. A disc herniation; that’s correct.

The treating physician further stated that his opinion that the petitioner’s condition was work related was solely based on the history given to his physician’s assistant by the petitioner that the petitioner had no symptoms prior to the day of the occurrence. Evidence was introduced, however, showing that the petitioner had similar symptoms in her right shoulder/neck prior to the occurrence.

The treating neurosurgeon was also asked about the specific surgical findings. He admitted that all of the herniated discs in the neck (three levels) could have existed prior to the occurrence and that the surgical findings demonstrated significant pre-existing disease and processes which existed prior to the accident.

The respondent offered a report from a neurosurgeon who reviewed all medical records, as well as a DVD of the petitioner’s work duties, including the sonic lift operation. The examining neurosurgeon for the respondent concluded that the petitioner did not sustain any injury on the day as alleged, whether of a traumatic or repetitive-trauma nature. He concluded that the forces involved, as seen on the video of the workplace, were trivial and would not cause a traumatic injury. He noted that no repetitive motion-type injury was sustained. He noted that the surgery was consistent with individuals with degenerative disc – osteophytes, fragmented discs, fissures in the annulus and ligaments, hypertrophic ligament, and central and foraminal stenosis. He concluded that what may or may not have occurred on the day of the occurrence did not “aggravate, accelerate, or exacerbate the underlying conditions.” He concluded that the petitioner’s work duties were not a contributing factor to her symptoms or to her medical treatment. 08 WC 037509 (Nov. 17, 2011).
E. Repetitive Trauma – Factory Worker – Neck Denied (March 2011)

The petitioner started working for the employer in 2002. He was a warehouse worker, which required him to locate items, lift items, and operate pallet jacks, forklifts, and a high lift.

The petitioner testified that in the years 2006 and 2007, he was required to operate a high lift, which would require him to look up in the air as the lift would retrieve and place items on shelves high above the floor. He testified that he would spend four hours per day on the high lift and some days as many as 10-12 hours per shift.

The petitioner testified that when he placed the pallets and items on the top, second, and third-from-the-top shelf, he would have to bend his neck so that he was looking straight up. The petitioner testified that as he would do his job and look up, he began to notice tingling in his hands and arms.

The petitioner received medical treatment that included testing, and eventually he underwent neck surgery. The petitioner underwent an anterior cervical discectomy and fusion at the C4-5, C5-6, and C6-7 levels.

The petitioner introduced the medical records of the treating neurosurgeon, which stated that the petitioner noticed the symptoms at work, but there was no specific opinion stating that the condition was related to work duties. Instead, the petitioner relied on a section 12 evaluator who frequently testifies in workers’ compensation claims throughout Illinois on behalf of petitioners. This physician concluded that the petitioner’s neck injury was related to work. However, at evidence deposition, the petitioner’s IME physician conceded that the petitioner’s neck condition was pre-existing and that merely looking up and stacking items at work was simply “symptom” producing events.

The respondent offered two opinions from section 12 physicians who opined that the petitioner’s cervical/neck condition and surgery were not a result of any work-related accident, including any work associated with repetitive trauma. Significant evidence was introduced discounting the petitioner’s description of the number of times that he was required to look up while operating the high lift. 12 IWCC 0435, 07 WC 16699, 07 WC 14398 (Mar. 25, 2011).

F. Repetitive Trauma – Factory Worker – Low Back Denied (November 2011)

The petitioner was a 41-year-old female who claimed that while working on a shipping dock, she noticed pain in her low back. She did not report any incident on the accident date which was alleged, and the respondent introduced the risk control manager, who testified that the respondent’s work rules and policies required that an accident be reported immediately.

All medical records subpoenaed were introduced. Those records showed inconsistent histories. At times, the petitioner would state to the medical providers that she had low back pain as a result of work duties, and in other portions it was noted that an “injury was denied.” There were
some notations that the petitioner stated, “Initially claims began at work – later stated began at home.”

The arbitrator found that the petitioner’s low back condition was not related to work duties. 08 WC 19928 (Nov. 29, 2011).

G. Repetitive Trauma – Factory Worker – Right Shoulder Denied (October 2011)

The petitioner alleged that repetitive work duties caused her right shoulder injury, which manifested itself on a certain date. The petitioner worked in a factory setting as an assembler. She described her job in great detail during the hearing and stated that during the course of her work duties, she began to develop right shoulder pain.

The respondent offered into evidence a group of DVDs showing work activities done in the assembly line by the respondent. In addition, the respondent offered a written job description.

The treating physician’s records suggested that the petitioner complained of right shoulder pain due to overuse and repetitive activity of the shoulder. The respondent did have a section 12 examination by an orthopedic surgeon who specialized in shoulder surgery. This physician examined the petitioner on one occasion and also reviewed the petitioner’s work duties. He testified that he did not believe the petitioner’s work duties caused any injury and did not believe that the work duties were consistent with developing impingement syndrome.

The respondent also introduced a DVD of the petitioner’s work duties. The petitioner admitted that the DVD depicted the petitioner’s work duties, but she claimed that the “pace” on the DVDs was not fast enough. On cross-examination of the petitioner’s section 12 examiner at deposition, the petitioner’s examining physician conceded that the activities demonstrated on the DVD of the respondent “did not detail work activities that would be unduly stressing to the shoulders or upper extremities.” The petitioner’s examining physician also conceded that the MRI film showed findings that were consistent with long-standing degenerative conditions of the right shoulder and that it was a “fair statement” to conclude that “there was no visual evidence of any aggravation due to work duties that you can point to in either shoulder.” 07 WC 38872, 07 WC 38873 (Oct. 11, 2011).

H. Repetitive Trauma – Factory Worker – Fibromyalgia and Severe Depression Denied (April 2008)

The petitioner was a female employee for the respondent which operated a warehouse. The petitioner estimated that she would walk approximately seven-ten miles per day on a concrete surface in performing her work. She alleged repetitive-trauma injuries to multiple parts of her body, including her legs, back, neck, and upper extremities.
The petitioner had a significant medical history, and these records were introduced into evidence by the respondent at the time of arbitration. The petitioner did present a rheumatologist who is board certified in internal medicine. He testified the petitioner’s most serious problems were “fibromyalgia and severe depression.” This treating physician opined that the petitioner’s condition was work related, but at evidence deposition he conceded that he lacked any knowledge of the petitioner’s extensive past medical history concerning her physical and psychological conditions prior to her employment with the respondent. He based his opinions solely upon an understanding that the petitioner’s past medical history documented no problems before she worked for the respondent in its warehouse.

The arbitrator found that the petitioner’s causal connection opinion from this physician was based on inaccurate and incomplete historical information, and therefore his opinion was not persuasive. The arbitrator noted that unlike the treating physician, the respondent’s evaluating physician reviewed and considered the petitioner’s significant past medical treatment and condition prior to her alleged accidents and employment with the respondent. The respondent’s evaluating physician concluded that the petitioner’s work environment did not cause the petitioner’s conditions. The arbitrator found the opinions of the respondent’s evaluating physician to be credible and persuasive. 01 WC 10117, 04 WC 02187, 08 IWCC 0459 (Jan. 4, 2006).

I. Recent Media Coverage of Carpal Tunnel Syndrome Claims

Workers’ comp claims at Menard are being denied after arbitrator switch

By George Pawlaczyk and Beth Hundsdorfer
Belleville News-Democrat (April 2012).

A strategy of presenting old arguments to new arbitrators has resulted in a rarity at workers’ compensation hearing sites in Southern Illinois – a string of denials for repetitive trauma claims filed by guards and other employees of the Menard Correctional Center.

According to Illinois Attorney General Lisa Madigan’s office, seven new claims made by current or former prison employees, including five retirees, recently were denied by arbitrators reassigned to the downstate hearing sites.

Previously, these kinds of cases were primarily heard and nearly always approved by John Dibble and Andrew Nalefski, who were among eight arbitrators removed in 2011 following a series of investigative reports in the Belleville News-Democrat.

The newspaper reported that at least 230 Menard employees, with the bulk of them being guards, received tax-paid settlements ranging from $20,000 to $80,000 after surgery for injuries they claimed were caused by turning keys and operating cell locking mechanisms. The payouts totaled about $10 million. Nearly all the claimants returned to work.
Dibble declined to comment. Nalefski could not be reached for comment.

“What these decisions show is that the new arbitrators are looking very closely at our arguments and the evidence we’re presenting, compelling petitioners to present contrary evidence to overcome these defenses,” said Natalie Bauer, a spokeswoman for Madigan.

“These are the same arguments we made previously before arbitrators Dibble and Nalefski – and lost – but before the new arbitrators, they’re being found as valid. With the new arbitrators in place, we’re seeing very different results on behalf of the state and the taxpayers.”

The News-Democrat confirmed the rulings in the seven cases, which have been appealed to the nine-member Workers’ Compensation Commission in Chicago. The commission previously upheld repetitive trauma cases involving Menard guards.

Fairview Heights attorney Tom Rich was the lawyer for all seven cases denied by the new arbitrators, and also represented most of the Menard repetitive trauma claims that have been filed since Jan. 1, 2008. He could not be reached Wednesday.

The main reason given by three new arbitrators for denying the seven Menard claims is that the petitioners should have been aware at least three years before filing a claim that their symptoms of numbness and tingling, typical of carpal tunnel syndrome, and pain sometimes associated with cubital tunnel syndrome of the elbow, were caused by their jobs. By not filing until more than three years after they said their symptoms began, their claims could be denied.

“They are turning back the ‘tunnels of Illinois,’” said Chicago attorney Gene Keefe, a longtime critic of Illinois’ workers’ compensation system.

In the hundreds of previous Menard cases, the so-called “accident” or “manifestation” date was almost always considered to be the day when a physician examined a claimant and determined that the injury was work-related. Under Illinois’ causation law, a claim can be approved if there is only the possibility that work conditions could have aggravated an existing condition.

At least two of the seven cases were denied based partly on the arbitrator’s finding that the medical claims were inconsistent. A former prison clerk, who waited until almost three years after she retired to get a medical test and later testified that her carpal tunnel got worse in retirement, was denied.

A former guard, promoted to food supervisor who still works at the prison in Chester, was denied when an arbitrator discounted the written opinions of two physicians.

Frank A. Sommario, a Chicago attorney and vice president of the Workers’ Compensation Lawyers Association Ltd., whose members represent plaintiffs and respondents, said the lawyers for the attorney general who represent the taxpayers should have tried harder on the earlier cases.
“Had they done IMEs (independent medical exams) or had they defended these claims in a dutiful way instead of just wasting taxpayers’ money, then we wouldn’t be in this predicament,” he said. Sommario said by IME he meant an examination conducted for a case involving a single claimant.

Bauer, the spokeswoman for Madigan, said the attorney general’s office did support and utilize at least two overall studies of the Menard prison, which showed that the duties of a guard did not cause carpal or cubital tunnel syndrome. She said they have regularly been used to defend individual cases.

“As we have always done, we will continue to vigorously defend the state in these cases,” she said.

However, one of the independent investigations, conducted by Missouri hand surgeon Dr. Anthony Sudekum in March 2011 at the prison, has actually been used by plaintiffs’ attorneys. While Sudekum reported that the duties of a Menard guard were performed at a “leisurely and unhurried pace,” and did not cause repetitive trauma, he concluded that this kind of work could “possibly aggravate” an existing condition. Under Illinois law, aggravation can be enough for a claim.

Sommario disagreed with the new arbitrators’ interpretation of when the three-year filing period begins.

“In repetitive trauma cases, the manifestation date is usually the date the doctor advises the petitioner his diagnosis is related to the work activities,” he said, “I believe there is case law on this.”

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- Partner

Kevin has spent his entire legal career at Heyl Royster, beginning in 1984 in the Peoria office. He has practiced in the Rockford office since it opened in 1985. He supervises the workers’ compensation, employment law, and employer liability practice groups in the firm’s Rockford and Chicago offices. He is the immediate past chair of the firm’s statewide workers’ compensation practice group.

Kevin concentrates his practice in the areas of workers’ compensation, employment law, and employer liability.

He has represented numerous employers before the Illinois Human Rights Commission and has arbitrated hundreds of workers’ compensation claims. He has also tried numerous liability cases to jury verdict.


He has also authored a law review article on Illinois employment law. Kevin is a frequent speaker to industry and legal professional groups.

Kevin is a member of the Winnebago County Bar Association in its workers’ compensation and trial sections. He is a member of the State Bar of Wisconsin, Illinois State Bar Association, and the American Bar Association, and has actively participated in sections relevant to his practice areas. He is a member of the Illinois Association of Defense Trial Counsel, formerly on the Board of Directors.

**Significant Cases**

**Publications**

**Public Speaking**
- “A Program on the Extent to Which Employers May Monitor/Restrict Employees”
  St. Mary’s Occupational Health & Wellness (2012)
- “Workers’ Compensation, HIPAA and Employment Retaliatory Discharge Issues”
  St. Mary’s Occupational Health & Wellness (2011)
- “Workers’ Comp Reform - What Does it Mean to You?”
  Williams Manny (2011)
- “Workers’ Compensation Case Law Update”
  Winnebago County Bar Association (2011)

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- Illinois State Bar Association
- State Bar of Wisconsin
- American Bar Association
- Illinois Association of Defense Trial Counsel

**Court Admissions**
- State Courts of Illinois and Wisconsin
- United States District Court, Northern and Central Districts of Illinois
- United States Court of Appeals, Seventh Circuit

**Education**
- Juris Doctorate, Washington University School of Law, 1984
- Bachelor of Arts-Economics and Mathematics (Summa Cum Laude), Blackburn University, 1981

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