30th Annual Claims Handling Seminar

FORGE AHEAD
NEW STRATEGIES FOR NEW CHALLENGES

Workers’ Compensation
Thursday, May 28, 2015
Bloomington, Illinois

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May 28, 2015

IN RE: 30th Annual Claims Handling Seminar

Dear Seminar Attendee:

On behalf of the firm, I want to welcome you to our 30th Annual Claims Handling Seminar.

Our attorneys' goal is to prepare materials and presentations which will benefit you in your daily work, whether you are a claims professional, risk manager, corporate counsel or employer.

We ask that you fill out the database update and evaluation form which is with your materials. Your feedback regarding this seminar and your suggestions for future topics are very important to us. We also ask that you provide your e-mail address since we are now distributing publications such as our Quarterly Review of Recent Decisions, Below the Red Line, our workers’ compensation newsletter, and our Governmental Newsletter via e-mail, as well as others listed on the form.

In order to receive Continuing Education verification, be sure to sign the attendance sheet at the registration table both before the session begins and immediately following the conclusion of our sessions this afternoon. Attendance verification certificates will be e-mailed only to those who sign the attendance sheet either at the beginning or the end of the seminar.

Once again, we appreciate your taking the time to join us today, and thank you for your confidence in selecting us as your attorneys.

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WORKERS’ COMPENSATION AGENDA

FORGE AHEAD: NEW STRATEGIES FOR NEW CHALLENGES
THURSDAY, MAY 28, 2015
1:00 - 4:30 P.M.
BLOOMINGTON, ILLINOIS

1:00PM  News from your Receptionist: “OSHA is Holding on Line 1” – How to Handle the Call
Focusing on New OSHA Guidelines
   – Kevin Luther, Rockford & Chicago

1:25PM  A Year in Review: The Most Significant Workers’ Compensation Appellate Decisions of 2014
   and Early 2015
   – Brad Elward, Peoria

1:50PM  Medical Marijuana: A Cloud of Uncertainty Over Employers
   – Bruce Bonds, Urbana

2:15PM  Infectious Diseases: There’s Something Going Around
   – Dan Simmons, Springfield

2:40PM  Break

3:10PM  Undocumented Workers: Benefits Without Borders
   – Dana Hughes, Peoria

3:30PM  Employee Victims of Workplace Violence: New Perspectives on Exposure and Defenses
   – Craig Young, Peoria

3:50PM  “This Just In: AMA is Doing Its Job” – An Update on the Job It’s Doing
   – Toney Tomaso, Urbana & Edwardsville

4:10PM  Closing Medical Rights: The New Frontier of Medicare Set-Asides and Assignments of
   Medical Rights with Today’s Defense Strategies
   – Brad Peterson, Urbana

4:30PM  Cocktails & Hors d’oeuvres
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.
NEWS FROM YOUR RECEPTIONIST: “OSHA IS HOLDING ON LINE 1” – HOW TO HANDLE THE CALL FOCUSING ON NEW OSHA GUIDELINES

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NEWS FROM YOUR RECEPTIONIST: “OSHA IS HOLDING ON LINE 1” – HOW TO HANDLE THE CALL FOCUSING ON NEW OSHA GUIDELINES

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NEWS FROM YOUR RECEPTIONIST: “OSHA IS HOLDING ON LINE 1” – HOW TO HANDLE THE CALL FOCUSING ON NEW OSHA GUIDELINES

I. NEW OSHA RECORD-KEEPING RULE

A. What Am I Required to Report Under the New Rule?

Previously, employers had to report the following to OSHA:

- All work-related fatalities
- Work-related hospitalizations of three or more employees

Starting in 2015, employers will have to report the following to OSHA:

- All work-related fatalities
- All work-related inpatient hospitalizations of one or more employees
- All work-related amputations
- All work-related losses of an eye

B. Who is Covered Under the New Law?

All employers under OSHA jurisdiction must report all work-related fatalities, hospitalizations, amputations, and losses of an eye to OSHA, even employers who are exempt from routinely keeping OSHA injury and illness records due to company size or industry.

An amputation is defined as the traumatic loss of a limb or other external body part. Amputations include a part, such as a limb or appendage, that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; and amputations of body parts that have since been reattached.

C. HowSoon Must I Report a Fatality or Severe Injury or Illness?

Employers must report work-related fatalities within eight hours of finding out about them.

Employers only have to report fatalities that occurred within 30 days of a work-related incident.
For any inpatient hospitalization, amputation, or eye loss, employers must report the incident within 24 hours of learning about it. Employers only have to report an inpatient hospitalization, amputation, or loss of an eye that occurs within 24 hours of a work-related incident.

D. How Do I Report an Event to OSHA?

Employers have three options for reporting the event:

- By telephone to the nearest OSHA area office during normal business hours
- By telephone to the 24-hour OSHA hotline at 1-800-321-OSHA (6742)
- OSHA is developing a new means of reporting events electronically, which will be available soon at www.osha.gov

E. What Information Do I need to Report?

Employers reporting a fatality, inpatient hospitalization, amputation, or loss of an eye to OSHA must report the following information:

- Establishment name
- Location of the work-related incident
- Time of the work-related incident
- Type of reportable event (i.e., fatality, inpatient hospitalization, amputation, or loss of an eye)
- Number of employees who suffered the event
- Names of the employees who suffered the event
- Contact person and his or her phone number
- Brief description of the work-related incident

Employers do not have to report an event if it:

- Resulted from a motor vehicle accident on a public street or highway. Employers must report the event if it happened in a construction work zone
- Occurred on a commercial or public transportation system (airplane, subway, bus, ferry, streetcar, light rail, train)
• Occurred more than 30 days after the work-related incident in the case of a fatality or more than 24 hours after the work-related incident in the case of an inpatient hospitalization, amputation, or loss of an eye

Employers do not have to report an inpatient hospitalization if it was for diagnostic testing or observation only. An inpatient hospitalization is defined as a formal admission to the inpatient service of a hospital or clinic for care or treatment.

Employers do not have to report an inpatient hospitalization due to a heart attack, if the heart attack resulted from a work-related incident.

F. Where Can I Find More Information?

For more information about the updated reporting requirements, visit OSHA’s webpage on the revised record-keeping rule at www.osha.gov/recordkeeping2014.

II. HANDLING OSHA HOUSE CALLS

A. Who Needs to Know?

• Supervisory personnel
  – Broad term
  – Anybody who supervises anybody

B. Why Supervisors?

• Actions and knowledge of supervisors imputed to the employer
  – Law – vicarious liability

C. OSHA Can Issue a Citation if:

• Employer knew of a violation – or

• With the exercise of reasonable diligence could have known of a non-compliant condition

D. OSHA “Affirmative Defenses”

• Unpreventable employee misconduct
E. **Affirmative Defenses**

- Establish written work rules to ensure safety
- Communicate work safety rules to all employees
- Employee training
- Steps to identify and discover violations
- Enforce the rules
- Means documented discipline
- “Document, document, document”

F. **OSHA’s Top 10 Violations – 2014**

10. Electric – general requirements
9. Machine guarding
8. Ladders
7. Electrical – wiring methods
6. Powered industrial trucks
5. Lockout/tagout
4. Respiratory protection
3. Scaffolding
2. Hazard communication
1. Fall protection – general requirements

G. **Before the OSHA House Call**

- OSHA Poster
- Assign duties to people
• Train as needed and document
• Assess any hazards
• Eliminate any hazards
• Identify possible equipment needed for the visit
• Prior citation review
• Identify and review insurance and other safety audits
• Establish periodic reviews

H. Your Rights
• Inspection to be conducted in a reasonable manner
• During a reasonable time
• Completed within six months

I. You Should
• Cooperate
• Be responsive

J. You Can
• Maintain inspection control

K. Control to the Extent You Can
• Applicable OSHA standards = entire facility – not just accident locations
• Train staff = as to how to speak and deal with OSHA personnel
• Know how to say hello when the house call arrives – think about it
• Who is the point person?

L. No Warning of House Call
• Ask for credentials
• Can call OSHA Area Director
  – should probably always do this

M. Search Warrant Required?
• Can demand one
• Routinely granted
• Gain time?

N. Initial Conference
• Ask for purpose of inspection (writings)
• Establish rules
• Treat inspector professionally
• Notify company owner/officers/counsel
• Trade secret issues?
• Vendors present?

O. Do Not Volunteer Information
• This is what good lawyers say to all clients and witnesses in all situations since the earth was formed

P. Inspection
• Limit area, if possible
• Company representative allowed to attend entire inspection
• Company representative should take notes
  – take down everything said and seen
• Take same photos and videos as the inspector
• Require OSHA person to comply with all safety rules
• Not required to “stage” an event or accident

• Do not destroy evidence

**Q. Tests / Sampling / Monitoring**

• You can require side-by-side sampling or monitoring

**R. Interviews – Superiors (Non-Management)**

• In a conference room

• Can be tape-recorded

• Signed statements

**S. Interviews with Hourly Employees**

• OSHA says – no management present

• Up to employee – they can make a specific request for an employer representative to be present

• Tell employee of this right, and need to tell the truth

**T. Interviews of Management Persons**

• Always have counsel or other manager present

• Fatality – always have counsel present

• No tape-recording

• Signed statement

**U. Inspection**

• Have documents ready (policies, training records, monitoring results, prior safety audits, etc.)

**V. Final Conference**

• Find out what they have noticed and take advice from them for remedies or corrections
• Will not give ruling or penalties

W. **OSHA Citations**

• Written

• Must be issued within six months of the violation

• Penalty proposed

• Certified mail

• Post for three days or until abatement, whichever is longer

X. **Penalties**

• Willful – up to $70,000 per violation

• Repeat – up to $70,000 per violation

• Egregious – up to $70,000 per violation

• Failure to abate - $7,000 per day

Y. **Also Criminal Violations**

• $1,000 to $20,000

• Six months to life (catch your attention?)

Z. **Options After Citation**

• Pay in full

• Require informal settlement conference

• Notice of contest – federal (15 days)

• Formal settlement conference/negotiations

• Hearing – evidence and witnesses

AA. **Hearings**

• OSHA Review Commission
• Written complaint and answer
• Federal court style discovery
• Administrative law judge (issues written opinion)

BB. **Appeal After Hearing**
• Review Commission – three members
Kevin J. Luther
- Partner

Kevin concentrates his practice in the areas of workers' compensation, employment and labor law, and employer liability. He supervises the Workers' Compensation and Employment & Labor Practices in the firm's Rockford and Chicago offices. He is the immediate past chair of the firm's statewide workers' compensation practice group.

Kevin has represented numerous employers before the Illinois Human Rights Commission and has arbitrated hundreds of workers' compensation claims in many Illinois Industrial Commission venues. He has also tried numerous liability cases to jury verdict.

In the area of labor law, Kevin has represented employers in collective bargaining agreement negotiation and preparation, union grievances and arbitrations, and NLRB proceedings.

Kevin has authored a law review article on Illinois employment law and he is a co-author of "Illinois Workers' Compensation Law, 2014-2015 Edition," published by West. The book provides a comprehensive, up-to-date assessment of workers' compensation law in Illinois. Kevin also frequently speaks to industry and legal professional groups.

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 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
- "Recent Appellate Court Decisions" Illinois Chamber Of Commerce 7th Annual Workers' Compensation and Safety Conference (2014)
- "Utilization Review and Section 8 Medical Bill Issues" Heyl Royster 29th Annual Claims Handling Seminar (2014)
“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)

Professional Recognition
- Martindale-Hubbell AV Preeminent
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Named to the Illinois Super Lawyers list (2013-2015). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Associations
- Winnebago County Bar Association
- 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

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 Doctor, Washington University School of Law, 1984
- Bachelor of Arts-Economics and Mathematics, Blackburn University, 1981

Learn more about our speakers at www.heylroyster.com
A YEAR IN REVIEW: THE MOST SIGNIFICANT WORKERS’ COMPENSATION APPELLATE DECISIONS OF 2014 AND EARLY 2015

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A YEAR IN REVIEW: THE MOST SIGNIFICANT WORKERS’ COMPENSATION APPELLATE DECISIONS OF 2014 AND EARLY 2015

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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.
A YEAR IN REVIEW: THE MOST SIGNIFICANT WORKERS’ COMPENSATION APPELLATE DECISIONS OF 2014 AND EARLY 2015

The past 12-15 months have seen a number of decisions from the Appellate Court, Workers’ Compensation Commission Division, and one case from the Illinois Supreme Court. The following pages provide a short overview of the more significant appellate court decisions interpreting workers’ compensation laws.

I. “ ARISING OUT OF”

A. Trip and Fall on Curb Compensable Under Street Risk and Traveling Employee Doctrines

*Nee v. Illinois Workers’ Compensation Comm’n*, 2015 IL App (1st) 132609WC – In *Nee*, 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. The claimant testified that his work duties required him to travel through the city by car to inspect the 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.” *Nee*, 2015 IL App (1st) 132609WC, ¶ 20. 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.” *Id.* at ¶ 28. 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.” *Id.* ¶ 26.

The only beneficial 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.” *Id.* 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.

*Id.* ¶ 25.

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

**B. Traveling Employee’s Claim Denied Because Traveling Aspect Had Yet to Begin**

*Pryor v. Illinois Workers’ Compensation Comm’n*, 2015 IL App (2d) 130874WC – The claimant worked as a car hauler and his job responsibilities included loading automobiles onto an 18-wheel car-hauling truck at the employer’s terminal in Belvidere, Illinois, driving the truck to various dealerships, and unloading the cars at those dealerships. The employer’s general work included delivering new automobiles to various car dealerships for Chrysler. One to two nights per week, the claimant spent the night at a hotel while he was on the road delivering cars to dealerships. The claimant usually drove his personal vehicle from his home to the employer’s Belvidere terminal and back.

On the date of the injury, the claimant arose at 4 a.m. to get ready for work, planning to drive to the Belvidere terminal that morning to “start [his] work.” “Because he anticipated being out of town overnight for work that evening, [he] packed a suitcase with a change of clothes and other items for the trip. The claimant carried the packed suitcase to his personal car, opened the car door, reached down to pick up the suitcase, and ‘bent and turned to the back seat of the car.’ At that moment, [he] felt an ‘unbearable’ pain through his back and down his legs which caused him to drop to his knees.” *Pryor*, 2015 IL App (2d) 130874WC, ¶ 7.

The arbitrator and Commission denied the claim, finding that the claimant had failed to prove that he sustained an accident that arose out of and in the course of his employment. The arbitrator concluded, and the Commission affirmed, that the claimant “would be considered a traveling employee from when he arrives at [the employer’s] terminal, loads his vehicle, delivers his vehicles to a destination, and returns to the terminal.” However, the Commission found that “lifting an overnight bag is not sufficient to put [the claimant] in the course of his employment.” *Id.* ¶ 12.
On appeal, the appellate court affirmed. Although acknowledging the validity of the traveling employee doctrine, the court concluded that the claimant had not yet entered the role of a traveling employee and was merely traveling to work when the accident occurred. According to the court, “[a]n injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, i.e., during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee’s home to the employer’s premises. Otherwise, every employee who commutes from his home to a fixed workplace owned or controlled by his employer on a daily basis would be deemed a ‘traveling employee,’ and the exception for traveling employees would swallow the rule barring recovery for injuries incurred while traveling to and from work.” Id. ¶ 22.

The appellate court said, “[e]ven assuming that the claimant had ‘left home’ at the time of his injury, (which is not entirely clear), he was preparing to begin his regular commute to his employer’s premises at that time. Unlike the claimants in *Mlynarczyk* and *Complete Vending Services,* the court said, “the claimant in this case did not drive to his various work locations directly from his home; rather, he was required to drive to the employer’s Belvidere facility first, load an 18-wheeler truck with cars located at the employer’s facility, and then drive the truck to various dealerships from there.” Id. ¶ 29. Thus, the court observed, “when he drove to the Belvidere terminal, he was not making a brief and unnecessary stop at his employer’s premises that was directly en route to his ultimate work destination (as was the claimant in *Complete Vending Services*). Rather, he was making a regular commute to a fixed jobsite as a necessary precondition to any subsequent work-related travel.” Id.

Moreover, unlike the claimants in *Mlynarczyk* and *Complete Vending Services,* “the claimant’s trip to the Belvidere facility was not part of a continuous trip from his home to a jobsite away from the employer’s premises. Rather, the claimant was injured during a regular commute from his home to his employer’s premises, before he embarked upon a work trip away from his employer’s premises.” Id.

**C. Injuries From Employment-Related Risks do not Require an “Increased Risk” Analysis to Determine Whether “Arising Out Of” the Employment**

*Young v. Illinois Workers’ Compensation Comm’n, 2014 IL App (4th) 130392WC* – The claimant’s left shoulder injury, suffered while he was reaching into a deep box at work to retrieve a part, was found non-compensable. According to the Commission majority, the mere act of reaching down for an item did not increase the claimant’s risk of injury beyond what he would experience as a normal activity of daily life. In other words, the majority determined that the claimant was not exposed to a greater risk than the general public.

The appellate court reversed and remanded the case for further proceedings, concluding that the injury was due to an employment-related risk, and thus the increased risk analysis is not necessary. According to the court, “when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a
greater degree than the general public.” Young, 2014 IL App (4th) 130392WC, ¶ 23. The court continued, “[a] neutral risk has no employment-related characteristics. Where a risk is distinctly associated with the claimant’s employment, it is not a neutral risk. Under the facts presented, the risk to which claimant was exposed had employment-related characteristics. He was performing acts the employer might reasonably have expected him to perform incident to his assigned duties and, as a result, his injury arose out of his work for the employer.” Id.

D. Trip and Fall at Public Entrance Compensable Where Employee Entrance Closed

Brais v. Illinois Workers’ Compensation Comm’n, 2014 IL App (3d) 120820WC – The claimant fell and broke her wrist when the heel of her shoe caught a defect in the sidewalk leading to the public entrance of her employer’s premises. The claimant was returning from a work-related meeting at a nearby building. The employee-only entrance was locked upon her return which required her to use the public entrance. At trial, the claimant described the sidewalk as full of cracks and gravel and it was not level. The employer did not dispute the claimant’s allegations regarding the sidewalk, but argued that the claimant was not exposed to a greater risk than that experienced by the general public in using this public entrance. The arbitrator, Commission, and circuit court agreed and denied claimant compensation based on her failure to prove that her accidental injuries arose out of her employment.

The claimant appealed all the way to the appellate court, arguing that her employment exposed her to a greater degree than that exposed by the general public because she was required to traverse a defective sidewalk in order to re-enter the building through the only available entrance, thereby bringing her injury within the “arising out of” component of accident. The appellate court agreed with the claimant, citing Bommarito v. Industrial Comm’n, 82 Ill. 2d 191 (1980). In Bommarito, the court observed that when an injury occurs “in an area which is the sole or usual route to the employer’s premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment.” (Emphasis added) Bommarito, 82 Ill. 2d at 195. Here, the public entrance was the only one claimant could use at the time she was injured. It was the sole route to the employer’s premises. The claimant testified, and the employer did not dispute, that the defective nature of the sidewalk – namely the gravel and cracks – contributed to the claimant’s fall. Therefore, the claimant’s injury did arise out of her employment.

The appellate court, applying a de novo standard of review, reversed the circuit court’s ruling and remanded the claim to the Commission for an award consistent with a finding in favor of the claimant on the element of accident. The court found that the facts were undisputed and subject to one inference and one inference alone, that the claimant’s injury arose out of her employment. The employer offered no evidence that the claimant’s condition was not causally connected to the accidental injury.

The employer in Brais argued that the instant case was distinguishable from Bommarito and more akin to the Caterpillar case, in which the claimant was denied compensation for accidental
injuries because he failed to prove that his injuries arose of his employment. In *Caterpillar*, the claimant fell in the parking lot of his employer when he tripped over a curb. No evidence was introduced to suggest the curb was defective or that the condition of the curb contributed to the claimant’s injuries. *Caterpillar Tractor Co. v. Industrial Comm’n*, 129 Ill. 2d 52, 56-57.

Perhaps if the claimant in *Brais* had not fallen due to some defect the result may have been different. Further, if the claimant would have been able to enter the premises through either the employee entrance or public entrance, arguably the result may have been different, as the claimant would not have been able to argue that the route was the sole or her usual route. The *Brais* case illustrates the very fact-specific nature of the arising out of element of accident. An early and thorough investigation is needed in all claims, and especially those which hinge on the mechanism of injury.

II. TOTAL TEMPORARY DISABILITY BENEFITS

A. *Interstate Scaffolding* Applies to Termination for Cause and Continues Obligation to Pay Benefits

*Matuszczak v. Illinois Workers’ Compensation Comm’n*, 2014 IL App (2d) 130532WC – The claimant’s injuries were found compensable and benefits were awarded by the arbitrator, including total temporary disability (TTD) benefits. The Commission affirmed the findings, but terminated TTD benefits as of the date the claimant was terminated from employment for having committed a work-place theft. According to the record, at the time he was terminated, the claimant prepared a handwritten statement acknowledging he stole cigarettes from the employer a week prior (but after the work accident) and that he understood stealing was a crime that could result in his termination from work.

The appellate court reversed the Commission’s findings on TTD benefits, holding that under the Illinois Supreme Court’s ruling in *Interstate Scaffolding*, the sole question was whether the claimant had reached maximum medical improvement. The fact that the claimant had been terminated, even for cause, was irrelevant, and could not serve to end the employer’s obligation to pay TTD benefits. The appellate court further held that the Commission erred in concluding that the voluntary act of theft, knowing that he might be terminated, was a refusal to perform light-duty work, which he was doing at the time of the theft.

III. STATUTES OF LIMITATIONS FOR REPETITIVE TRAUMA

A. Section 6(d)’s Three-Year Statute of Limitations Does Not Bar the Presentation of Work Activity Evidence Beyond Three Years Prior to Alleged Accident or Manifestation Date

*PPG Industries v. Illinois Workers’ Compensation Comm’n*, 2014 IL App (4th) 130698WC – The claimant alleged repetitive trauma injuries to her left shoulder as a result of her work in a glass
factory for over 38 years. The arbitrator found the claim compensable and awarded benefits and
the Commission affirmed, with minor modifications. On review to the circuit court, the
Commission’s decision was set aside and the case ordered remanded for further consideration,
but with instructions for the Commission to disregard all evidence of possible injury and work
activities that took place more than three years prior to the manifestation date. According to the
circuit court, the three-year statute of limitations mean the Commission could not consider any
events that occurred more than three years prior to the manifestation.

The circuit court then certified the following question to the appellate court under Supreme
Court Rule 308(a):

Does section 6(d) of the *** Act, which sets forth a three[-]year statute of
limitations for the filing of worker’s [sic] compensation claims, act as a bar to the
presentation of evidence of work activities that took place more than three years
prior to the date of accident, or manifestation date, of a repetitive[-]trauma
injury?


According to the appellate court, section 6(d) is merely a statute of limitations and the question
of whether prior exposures might be considered as part of the repetitive trauma claim involved
questions of admissibility of evidence, which it concluded were not before it, nor were they
raised before the Commission. The court observed that a repetitive-trauma injury is one which
“has been shown to be caused by the performance of the claimant’s job and has developed
gradually over a period of time, without requiring complete dysfunction.” Id. ¶ 19. As such, the
appellate court answered the certified question in the negative, and reversed the circuit court’s
order.

IV. ENTITLEMENT TO PERMANENCY BENEFITS

A. A Claimant Must Affirmatively Waive Rights to a Wage Differential Award

Lenhart v. Illinois Workers’ Compensation Comm’n, 2015 IL App (3d) 130743WC – The arbitrator
found the claimant’s accident compensable and awarded him person-as-a-whole permanent
partial disability benefits for injuries to his lower back. The claimant appealed to the Commission
seeking permanent total disability benefits based on an odd lot theory, which were denied
based on video surveillance evidence showing he was capable of some work, albeit not his
former employment. Of interest, the employer argued against the PTD finding, contending that
the claimant was, alternatively, entitled to a wage differential. The Commission affirmed the
award of 75 percent of a person.

On appeal the appellate court reversed, finding that the claimant had presented sufficient
evidence of a wage differential award, and remanded the case for further consideration. The
The appellate court noted there is a preference for wage differential awards, and that the law, according to *Gallianetti v. Industrial Comm’n*, 315 Ill. App. 3d 721, 727 (3d Dist. 2000), provides that “the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity.” *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 43.

The court further held that the claimant could obtain the wage differential, even though he did not specifically request it at arbitration. The court said that the Commission did not consider a wage differential award under section 8(d)(1), but instead awarded PPD benefits under section 8(d)(2). “When the record establishes that an employee has suffered an impairment of earning capacity, section 8(d)(2) comes into play only when the employee elects to waive his right to recover under *** subparagraph 1.” *Id.* ¶ 48 (emphasis added); 820 ILCS 305/8(d)(2) (West 2012); *Gallianetti*, 315 Ill. App. 3d at 729. According to the court, “[n]othing in the record suggests that the claimant explicitly elected to waive his right to recover a wage differential award under section 8(d)(1).” *Lenhart*, 2015 IL App (3d) 130743WC, ¶ 48. The claimant made no election concerning PPD benefits because he sought PTD benefits. “The Commission should not consider the claimant’s request for PTD to be an election with respect to unrequested PPD benefits, particularly when the employer itself asked the Commission to grant a wage differential award and when the record supports a wage differential award.” *Id.* ¶ 49.

V. MISCELLANEOUS

A. Refusal to Treat and Choice of Physicians

*Bob Red Remodeling, Inc. v. Illinois Workers’ Compensation Comm’n*, 2014 IL App (1st) 130974WC – Before the ball dropped on 2014, the Appellate Court, Workers’ Compensation Commission Division, handed down its decision in *Bob Red Remodeling, Inc*, which upheld the Commission’s finding that (1) the claimant was permanently and totally disabled; (2) the course of treatment chosen by the claimant was not unreasonable so as to constitute refusal to submit to medical treatment; and (3) a physician who provided emergency services was not a physician chosen by the claimant for purposes of the two-doctor rule.

The claimant fell from a rooftop while performing his job duties for Bob Red Remodeling. He was transported by ambulance to a local emergency department and admitted to the hospital due to serious injuries. During the course of his stay in the hospital, claimant underwent a left craniotomy by Dr. Leonard Kranzler. He was discharged from the hospital approximately ten days later. Following discharge, the claimant had two follow-up appointments with Dr. Kranzler related to the craniotomy. The claimant also sought care from Dr. Gourineni. At the request of his attorney, the claimant was examined by Dr. Forys, a board certified physician in internal medicine. Finally, the respondent had the claimant examined by Dr. Felise Zollman, a neurologist from Northwestern, pursuant to Section 12. Drs. Forys and Zollman each prescribed a different course of medical treatment; ultimately claimant followed Dr. Forys’ recommendations, for which the employer refused to pay. The employer did offer to authorize the course of care

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recommended by Dr. Zollman, but the claimant refused. The primary issues in the case became whether the claimant exercised a choice of physician to receive post-discharge care with Dr. Kranzler, whether the claimant refused to submit to medical care by rejecting the employer’s offer to pay for treatment consistent with Dr. Zollman’s recommendations, and whether the claimant was permanently and totally disabled.

The Commission found that Dr. Kranzler provided emergency services and that the two follow-up services he provided were directly related to the emergency services. Therefore, Dr. Kranzler did not constitute a choice of a medical provider for purposes of section 8(a) of the Act.

The Commission further found that the claimant’s chosen course of treatment did not constitute refusal to submit to medical care. The claimant did not follow the employer’s expert specialist Dr. Zollman’s treatment recommendations and instead followed the internist’s recommendations. The appellate court held that “the question is not which course of treatment was superior, it is whether claimant’s behavior was reasonable under the circumstances.” The appellate court held that the claimant’s behavior was reasonable even though Dr. Zollman’s recommended course of treatment was supported by other doctors involved in his treatment.

The Commission held that the claimant was permanently and totally disabled based on both the medical evidence and an odd-lot theory. In affirming the Commission, the appellate court focused on the odd-lot theory. Under the odd-lot theory, a claimant may establish that he is permanently and totally disabled by showing either a diligent but unsuccessful job search or that his age, training, experience, education, and condition prevent him from obtaining stable and continuous employment. *Westin Hotel v. Industrial Comm’n*, 372 Ill. App. 3d 527, 544 (1st Dist. 2007). In affirming the Commission’s decision, the appellate court relied on the Commission’s finding that (1) the claimant was never offered a job of any sort after the accident, (2) that a certified rehabilitation counselor testified that a stable labor market did not exist for the claimant, and (3) a functional capacity evaluation performed one month prior to hearing indicated that the claimant was functioning below sedentary level. The appellate court affirmed the Commission’s decision with respect to all three of these issues.

In evaluating your cases involving emergency services, it is important to analyze whether an emergency physician’s subsequent follow-up treatment is related to the initial emergency services. If the follow-up treatment is “extended beyond reasonable limits,” an argument can be made that the claimant had to exercise one of his choices to undergo that treatment. Further, the appellate court established that the standard of review for “refusal of treatment” is whether the claimant’s behavior was “reasonable under the circumstances.” If the claimant’s refusal to go down a path of treatment can be justified as reasonable under the circumstances, even if it defies a superior course of treatment, the claimant’s choice will be upheld. Employers should still consider offering to authorize the course of treatment recommended by an IME doctor when appropriate. The employer still can and should, depending on the circumstances, challenge the reasonableness and necessity of the treating physician’s recommendations by other available means.
Brad concentrates his work in appellate practice and has a significant sub-concentration in workers’ compensation appeals. He has been with the firm since 1991 and became a partner in 1999. Brad handles all aspects of civil appeals, ranging from preparation of initial appeal documents through the drafting of appellate briefs and oral arguments. Brad handles workers’ compensation cases before the Workers’ Compensation Commission, the circuit court, and the Appellate Court, Workers’ Compensation Commission Division. Brad focuses much of his workers’ compensation practice on understanding and handling complex jurisdictional issues, both at the circuit court and appellate court level. Brad’s extensive experience in handling judicial reviews of Workers’ Compensation Commission decisions has given him statewide recognition. He has also tried several cases, including jury trials.

Brad has authored more than 300 appellate briefs and argued more than 200 appellate court cases, resulting in more than 86 published decisions, and numerous unpublished appellate court orders. He has appeared before every Illinois Appellate Court District, the Missouri Appellate Court, the Seventh Circuit Court of Appeals and has significant experience handling interlocutory appeals, in particular those under Supreme Court Rules 306 and 308. He has authored several amicus curiae briefs before the Illinois Supreme Court on behalf of the Association of Illinois Defense Trial Counsel. His most recent amici were filed in Fennell v. Illinois Central R.R. Co., 2012 IL 113812, involving interstate forum non conveniens, and Folta v. Ferro Engineering, No. 118070, involving the workers’ compensation exclusive remedy provision and asbestos claims.


Brad writes frequently on procedural issues affecting appeals and workers’ compensation. He has taught courses on workers’ compensation law for Illinois Central College and has lectured on appellate practice before the Illinois State Bar, Peoria County Bar, Illinois Institute for Continuing Legal Education, and Southern Illinois University School of Law. He is the current editor-in-chief of the firm’s workers’ compensation newsletter, published monthly, and is the 2015-2016 Editor-in-Chief of the Illinois Association of Defense Trial Counsel Quarterly.

Brad is also a member of the drone law practice group, which advises clients on issues relating to drone operations. He has worked as a military aviation writer for over 17 years and has written and published 10 books and over 35 articles on naval aviation and military related topics. He has served as a media consultant for a major aerospace company on a large maritime patrol aircraft proposal and is internationally known as a historical expert on various aircraft programs. Brad has also spoken at the Naval Aviation Museum in Pensacola on military aircraft-related topics.

**Significant Cases**

- **Hartney Fuel Oil Company, et al. v. Hamer, et al.**, 2013 IL 115130 - Suit was filed by a retail sales taxpayer against our client, The Regional Transportation Authority (RTA), the Illinois Department of Revenue, and a Cook County municipality contending that the assessment of back sales taxes of $20+ million was incorrect. Ultimately, the RTA’s position was upheld in the Illinois Supreme Court. While the taxpayer was not required to pay back taxes pursuant to the Taxpayer Bill of Rights, the Illinois Supreme Court invalidated existing regulations in adopting a “multi-factor test” as argued for by the RTA, a decision which had statewide application to sales tax sourcing favoring governmental entities such as our client.

- **Glass v. DOT Transportation, Inc.**, 912 N.E.2d 762 (1st Dist. 2009) - In the forum non conveniens setting, deference may be given to the selection of forum by a representative
plaintiff, who is also a beneficiary under the Wrongful Death Act.

- **Rosewood Care Center, Inc. v. Caterpillar, Inc.**, 226 Ill. 2d 559 (2007) - Illinois does not recognize a preexisting debt rule when interpreting the statute of frauds, but rather applies a “main purpose” or “leading object” rule, which states that when the main purpose or leading object of the promisor/surety is to subserve or advance its own pecuniary or business interest, the promise does not fall within the statute of frauds.

- **Radosevich v. Industrial Comm’n**, 367 Ill. App. 3d 769 (4th Dist. 2006) - Section 19(i) interest runs from date of award; Section 2-1303 interest commences only when circuit court enters judgment on award under Section 19(g).

- **S & H Floorcovering, Inc. v. Workers’ Compensation Comm’n**, 373 Ill. App. 3d 259 (4th Dist. 2007) - Court signaled intent to give deference to arbitrator’s fact-findings where Commission references reverses arbitrator’s conclusions without the Commission having received any new evidence.

**Publications**

- “A Nunc Pro Tunc Order Cannot Be Used To Impart Rule 304(a) Language To A Prior Final, But Not Appealable, Order Where There Is No Indication Such A Finding Was Made When The Original Order Was Entered,” *The Brief* (2014)

**Public Speaking**

- “Workers’ Compensation Appeals to the Commission, Circuit and Appellate Court” Winnebego County Bar Association (2011)
- “Recent Changes and Developments in Illinois Workers’ Compensation Appeals/Recent Cases” IDC Fall Seminar (2011)

**Professional Recognition**

- Named to the Illinois Super Lawyers list (2008-2015). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.
- Selected as a Leading Lawyer in Illinois in the area of Civil Appellate Law. Only five percent of lawyers in the state are named as Leading Lawyers.

**Professional Associations**

- Appellate Lawyers Association (President, 2013-2014; Director 1997-99; Rules Chairman, 1999-2001; Rules Committee, 2005-06; event coordinator; past moot court competition judge)
- Peoria County Bar Association (Chair, CLE Committee, 2013-2014)
- Illinois Association of Defense Trial Counsel (IDC Quarterly Executive Editor)

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- State Courts of Illinois
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- Juris Doctor, Southern Illinois University *(magna cum laude)*, 1989
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MEDICAL MARIJUANA: A CLOUD OF UNCERTAINTY OVER EMPLOYERS

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MEDICAL MARIJUANA: A CLOUD OF UNCERTAINTY OVER EMPLOYERS

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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.
The Illinois Compassionate Use of Medical Cannabis Pilot Program Act, Public Act 098-0122 (Act), went into effect on January 1, 2014. The Act, now codified at 410 ILCS 130, allows registered users to use cannabis for medical purposes for four years. On January 1, 2018, the pilot program is scheduled to be repealed unless there is legislative intervention to keep it in place. The Act places Illinois among more than twenty states that have similar statutes allowing cannabis to be used for medical purposes despite federal law prohibiting the use of cannabis. The Act includes an explanation that approximately 99 out of every 100 cannabis arrests in the U.S. are made under state law, rather than under federal law. Further, the federal government has not been active in enforcing its cannabis law against registered users in states allowing its use.

Importantly, the National Council on Compensation Insurance, Inc. highlighted medical cannabis as one of the top emerging workers’ compensation issues to watch in 2014. While medical cannabis has been off to a slow start in Illinois, it remains an important issue for employers in 2015. The Act offers limited guidance on the effect medical cannabis will have on workers’ compensation claims.

I. ILLINOIS MEDICAL CANNABIS USE HIGHLY REGULATED

Illinois has one of the most stringent set of rules governing the implementation of medical cannabis in the country. While some states allow cannabis to treat broad conditions such as pain, Illinois requires patients to have their doctors certify they have one of over thirty-five debilitating conditions. Among the listed debilitating conditions that are commonly seen in workers’ compensation claims are:

- Muscular dystrophy;
- Spinal cord injury;
- Traumatic brain injury and post-concussion syndrome;
- Regional Pain Syndromes Type I;
- Reflex Sympathetic Dystrophy; and
- Residual limb pain.

In addition, epilepsy has been added to this list since the Act was first passed (P.A. 98-0775). Further, the Act includes any other debilitating medical condition or its treatment that is added by the Department of Public Health. Any citizen may petition the Department of Public Health to add debilitating conditions or treatments to the list. In May 2015, the Department of Public Health is holding a public hearing to review 14 medical conditions suggested by the public in petitions. Some of the conditions that will be reviewed include migraines, post-traumatic stress, and anxiety. The list will continue to grow, as it already has over the past year.
Individuals diagnosed with one of the required debilitating medical conditions who seek the use of medical cannabis must obtain "written certification." Written certification is defined as a document dated and signed by a physician stating that in the physician's professional opinion the patient is likely to receive therapeutic or palliative benefits from the medical use of cannabis to treat or alleviate the patient's debilitating medical condition or associated symptoms. The physician must specify the condition and document that the physician is treating the patient for that condition. Patients must also apply for and obtain a registry identification card in order to be eligible for medical cannabis. On July 15, 2014, the Illinois Joint Committee on Administrative Rules (JCAR) approved a complex set of rules for the medical cannabis pilot program from the Departments of Agriculture, Financial and Professional Regulation, Public Health, and Revenue. To date, approximately 2,000 approved medical marijuana patients have paid to register for the program. This number is expected to grow significantly once medical marijuana becomes available. The registry identification card, along with the written certification, will allow the patient to obtain medical cannabis as soon as it becomes available. Due to unexpected delays, businesses are not expected to begin selling medical marijuana until the end of 2015.

The Act specifies several categories of employees that may not use medical cannabis, including:

- Active duty law enforcement officers, correction officers, probation officers, firefighters;
- Anyone with a school bus permit;
- Anyone with a Commercial Driver’s License (CDL); and
- Anyone convicted of a felony under the Illinois Controlled Substance Act, Cannabis Control Act, or the Methamphetamine Control and Community Protection Act.

**NOTE:** For those who employ or insure those specific categories of people who are not allowed to "use" medical cannabis, there are additional considerations and a potential conflict with the definition of qualifying patient.

Additionally, there are a number of regulations for cultivation centers and dispensing organizations, which must be located in Illinois.

While the Act, on its face, is not focused on workers' compensation, it has the potential to have a profoundly wide-ranging impact on workers' compensation claims. At least 100,000 to 200,000 Illinois patients are currently estimated to be eligible for medical cannabis just based on medical conditions. Again, the list of medical conditions that allow patients to become eligible for medical cannabis is expected to grow, likely increasing the number of patients that may become eligible in the future. Colorado, a state with less than half the population of Illinois, currently has more than 116,000 patients registered to use medical cannabis. Thus, the number of patients expected to eventually be registered to use medical cannabis in Illinois is significant. It is important to understand some of the consequences medical cannabis may have for workers' compensation claims despite the lack of guidance provided thus far by the legislature and the Illinois Workers' Compensation Commission.
II. HOW ARE EMPLOYERS IMPACTED BY THE ACT?

It is necessary to be aware of the Act's provisions directed to employers, as they provide some insight on how to handle workers' compensation claims. First, employers may not discriminate against an employee because he or she is a medical cannabis patient. Merely possessing a medical cannabis registration card is not a cause for an adverse employment action. Treating an employee, including an employee who filed a workers' compensation claim, differently may lead to a claim of unlawful discrimination.

Employers may continue to develop and enforce anti-drug policies. “Nothing in this Act shall prevent a private business from restricting or prohibiting the medical use of cannabis on its property.” 410 ILCS 130/30(h). Employers may continue to adopt reasonable regulations concerning consumption, storage or timekeeping requirements for qualifying patients.

A. Can employers continue to require drug tests for employees who report work accidents?

Many employers require their employees to take a drug test upon reporting a work accident. This is often a requirement for two reasons. First, a drug test can be a deterrent to employees filing frivolous workers' compensation claims. Second, the employer needs to know if the employee was intoxicated or impaired at the time of the injury, which may allow it to assert an intoxication defense.

Employers may continue to enforce policies concerning drug testing, zero-tolerance, or a "drug free workplace" provided the policy is applied in a non-discriminatory manner. Thus, employers administering drug tests to employees who report work injuries must administer drug tests for all employees and avoid singling out employees with medical cannabis registration cards. Further, employers may continue disciplining employees for violating workplace drug policies, assuming such discipline is applied in a non-discriminatory manner. Fortunately, the Act, unlike similar statutes in other states, gives employers defined guidance on actions and practices they can continue.

B. So we can continue to drug test, but is intoxication still a defense?

Under section 11 of the Illinois Workers' Compensation Act, employers do not owe any compensation to the employee if (1) the employee's intoxication is the proximate cause of the employee's accidental injury or (2) at the time the employee incurred the accidental injury the employee was so intoxicated that the intoxication constituted a departure from the employment. 820 ILCS 305/11. Admissible evidence of the concentration of cannabis shall be considered in any workers' compensation hearing to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries. The difficulty remains that cannabis is not like other drugs. It stays in one's system for up to thirty days and a positive test does not mean the person recently used cannabis or was under the influence of cannabis at the time of the injury. A “zero tolerance” policy may still be enforced; however, employers may not
want to do so if they believe the cannabis usage by a registered user only takes place outside of work hours and the employee is not impaired at work.

When asserting the intoxication defense for cannabis use, impairment, not a positive drug test, is regarded to be the most important consideration. The Act states the following regarding impairment:

An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee’s job position, including symptoms of the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination.

410 ILCS 130/50(f).

Whether an employee is impaired is clearly a subjective determination by the employer. As long as the employer uses “good faith” in making the assessment, an employer’s finding of an employee’s impairment should allow for disciplinary action. Prior to administering disciplinary action, however, the employer must afford the employee a reasonable opportunity to contest the basis of the determination. This can be done by meeting with the employee privately, having a third party present, discussing the employer’s observations, and finding out if there is a valid explanation. The employer should document its observations and the discussion had with the employee.

The Illinois Workers’ Compensation Act, however, requires more than an impairment finding for the intoxication defense to be successful. 820 ILCS 305/11. The employer asserting the defense must prove that any impairment rose to the level of intoxication. At this point, it is still unclear if those two standards can be treated similarly or if it will be more difficult to prove intoxication. Nevertheless, even if the employee was intoxicated or impaired at the time of the work accident, the employer must prove that the employee’s intoxication was the proximate cause of the injury or that the employee was so intoxicated that the intoxication constituted a departure from the employment. Therefore, in order to assert the intoxication defense for medical cannabis users, it will be extremely important for the employer to obtain detailed documentation of any impairment that was observed at or around the time of the accident.

With the differences or lack thereof between impairment and intoxication, we may see clarification from either the General Assembly or the Illinois Workers’ Compensation
Commission. For now, employers asserting the intoxication defense can attempt to intertwine impairment and intoxication to their benefit. Petitioner’s attorneys are likely to take the position that medical cannabis is a lawful medication certified by a licensed physician and because the employee was legally entitled to take it, and even if it were a cause of the accident, the accident is still compensable. Based on the impairment definition in the Act, it is likely that petitioner’s attorneys will lose that argument. The causation element, however, will be difficult for employers to prove because cannabis only stays in one’s system for up to 30 days. It will continue to be a challenge to prove the use of cannabis was the proximate cause of the work accident, but certainly not insurmountable.

C. Are employers required to pay for workers to get high?

Several states with medical cannabis statutes specifically contain language that employers do not have to pay for medical cannabis. The Illinois Act remains silent on this issue. In those states that do not specify if employers must pay for medical cannabis, some employers have successfully argued that the lack of approval from the U.S. Food and Drug Administration and a federal law banning its use precludes workers compensation insurers from paying for medical cannabis as a treatment for injured workers. While it is unclear whether workers’ compensation insurers in Illinois will be required to pay for medical cannabis, the likely bet is that they will be forced to do so if all of the requirements of the Act are met. Employers can attempt to fight authorizing medical cannabis by arguing it is not reasonable and necessary.

The Illinois Workers’ Compensation Act requires the employer to pay reasonable and necessary medical expenses. It specifically states that the following:

The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider’s actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury … The employer shall also pay for treatment, instruction and training necessary for the physical, mental, and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto.

820 ILCS 305/8(a). The Act, likely in anticipation of various attacks on the medical evidence supporting the use of medical cannabis, goes to great lengths to justify its use for the wide array of debilitating medical conditions. The Act states the following:

The recorded use of cannabis as a medicine goes back nearly 5,000 years. Modern medical research has confirmed the beneficial uses of cannabis in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions, including cancer, multiple sclerosis, and
HIV/AIDS, as found by the National Academy of Sciences' Institute of Medicine in March 1999.

410 ILCS 130/5(a).

The Act relies on the American Academy of HIV Medicine, the American College of Physicians, the American Nurses Association, the American Public Health Association, and the Leukemia & Lymphoma Society, to support the medical utility of cannabis. The Act's provisions regarding the reasonableness and necessity of medical cannabis seemingly offer a convenient tool for arbitrators in Illinois to rule in favor of the authorization of medical cannabis.

On the face of the Act, it is clear that an employer can successfully challenge the request for payment for medical cannabis if the employee is not a registered user or if a written certification has not been issued by a medical provider for one of the listed debilitating medical conditions. Assuming those requirements have been met, there are two primary ways employers can challenge the reasonableness and necessity of medical cannabis use among injured workers.

First, an employer can obtain a utilization review for the use of medical cannabis. "Utilization review" means the evaluation of proposed or provided health care services to determine the appropriateness of both the level of health care services medically necessary and the quality of health care services provided to the patient, including evaluation of their efficiency, efficacy, and appropriateness of treatment. A utilization review denying the reasonableness or necessity of medical cannabis as a treatment for the employee's injuries will give the employer a basis to deny payment and avoid penalties.

Second, an employer can obtain an Independent Medical Examination (IME) under the appropriate circumstances. A physician may provide an employee with written certification for one of the over thirty-five debilitating conditions covered under the Act. If the employer does not believe that the employee actually has that condition, it can obtain an IME to determine whether the employee has that debilitating medical condition. While the proper method of determining whether medical treatment is reasonable and necessary is through a utilization review, the IME can also address that issue.

Remember, the Act does not create a prescription for medical marijuana; rather, it creates a certification that the patient might benefit from the cannabis.

D. Do employees have any causes of action against the employer under the Act?

Fortunately, the Act provides some protections for employers if they engage in actions based on good faith beliefs regarding the employee's cannabis use. The Act does not provide employees with a cause of action against their employer for (1) actions based on a good faith belief that the employee used or possessed cannabis on the employer's premises; (2) actions based on a good faith belief that the employee used or possessed cannabis during employment hours; and (3)
injuries or losses to third parties, if the employer did not know or have reason to know that the employee was impaired.

III. FUTURE OF MEDICAL CANNABIS IN ILLINOIS WITH GOVERNOR RAUNER AT THE HELM

In April 2015, Rep. Lou Lang began pushing an extension for the program, set to expire on January 1, 2018. Due to significant delays, Illinois is almost 1½ years into the pilot program and patients are still not expected to have access to medical marijuana for another six months. As a result, Rep. Lou Lang is striving to extend the program to four years from when the first dispensary officially begins operating. Governor Bruce Rauner, as of April 2015, does not wish to extend the program until it has been “fully evaluated.” This may be an early indication that Gov. Rauner is not supportive of the program, but regardless of whether he supports it, patients in Illinois are expected to begin taking medical marijuana by the end of 2015 and at least through January 1, 2018.

IV. HOW TO PREPARE FOR MEDICAL CANNABIS USAGE COMING IN LATE 2015

While the Act provides limited guidance for the effects it will have on workers’ compensation claims, employers retain significant rights under the Act. Employers can continue to prohibit employees from using cannabis at work and they can continue to administer drug tests. Employers, insurance companies, and third party administrators can take the following steps to position themselves for the implementation of medical cannabis.

A. Employers:

1. Review your drug, alcohol, and anti-smoking policies.
2. Add provisions to your policies for registered qualified patients. Make it clear that they cannot be under the influence at work, even if they are legally using medical cannabis.
3. Make employees overly aware of your policies, especially if you decide to continue using zero tolerance policies.
4. If using a zero tolerance policy, it must be enforced non-discriminately. Avoid enforcing it selectively.
5. Be cautious about bringing medical cannabis users back to work where job safety is a concern. It may be necessary to sit down with that employee to discuss how the transition back to work will be navigated.
6. Train supervisors regarding the warning signs of intoxication or impairment from cannabis. Supervisors’ testimony on the level of the employee’s impairment will be necessary to assert a successful intoxication defense.

B. Insurance Companies and Third Party Administrators:

1. Determine if you want to challenge requests for payment of medical cannabis.
2. Be prepared to obtain a utilization review or IME when medical cannabis is prescribed.
3. Understand the drug policies of your employers and how that may affect the compensability of claims.
4. Evaluate whether an intoxication defense may be used prior to accepting a claim.

In addition to these points, it will also be necessary to determine just how the cost of medical cannabis, if awarded by the Commission, will be paid. The Act designates this as a cash-only business; how an employer will accommodate this aspect has yet to be determined.

The issues addressed herein only scratch the surface of the potential implications the Act may have on workers’ compensation claims. Medical cannabis may turn out to be a less addictive and less costly medication than more potent medications, such as opioids. On the other hand, medical cannabis may turn into a major cost driver for workers’ compensation claims if there are side effects that necessitate other medications or prevent employees from quickly returning to work. It is too early to accurately determine the overall effect of medical cannabis on workers' compensation claims and the position the Commission will take regarding its use.

We will monitor activity on the medical cannabis front and keep you advised of any new developments that will affect the way you handle your workers’ compensation claims. If you encounter a claim involving medical cannabis, feel free to contact any of our workers' compensation attorneys to further discuss the issues and possible defenses.
Bruce L. Bonds  
- Partner

Bruce is a past Chair of our state-wide workers’ compensation practice group and has spent his entire legal career with Heyl Royster beginning in 1982 in the Peoria office. He concentrates his expertise in the area of workers’ compensation, third-party defense of employers, and employment law. He served as a technical advisor to the combined employers group in the negotiations which culminated in the 2005 revisions to the Illinois Workers’ Compensation Act. More recently, Bruce worked as a technical advisor to the Illinois Chamber of Commerce as well as a number of Illinois legislators and State agencies in the process that resulted in the 2011 Amendments to the Illinois Workers’ Compensation Act.

Bruce was appointed by Mitch Weiss, Chairman of the Illinois Workers’ Compensation Commission, to a committee of attorneys who reviewed and made recommendations for revisions to the Rules Governing Practice before the Workers’ Compensation Commission.

With extensive experience before the Illinois Workers’ Compensation Commission, Bruce has defended employers in thousands of cases during the course of his career. As a result of his experience and success, his services are sought by self-insureds, insurance carriers, and TPAs.

Bruce is an Adjunct Professor of law at the University of Illinois College of Law where he has taught Workers’ Compensation Law to upper-level students since 1998.


Bruce is a frequent speaker on workers’ compensation issues at bar association and industry-sponsored seminars.

Bruce has served as Vice-Chair of the ABA Committee on Employment, Chair of the Illinois State Bar Association Section Council on Workers’ Compensation, and currently serves on the Employment Law Committee of the Chicagoland Chamber of Commerce and the Illinois Chamber of Commerce Workers’ Compensation Committee. He has been designated as one of the “Leading Lawyers” in Illinois as a result of a survey of Illinois attorneys conducted by the Chicago Daily Law Bulletin; another survey published by Chicago magazine named Bruce one of the “Best Lawyers in Illinois” for 2008.

Publications


Public Speaking

- “Defending High Exposure and Catastrophic Workers’ Compensation Cases” Heyl Royster 29th Annual Claims Handling Seminar (2014)
• “The 2011 Amendments to the Illinois Workers’ Compensation Act”
• “AMA Guides – Seize the Moment to Reduce PPD Awards”
  Heyl Royster 27th Annual Claims Handling Seminar (2012)
• “What Every Employer Should Know About the 2011 Amendments to the Illinois Workers’ Compensation Act”
• “Investigating the Suspicious Claim”
  Danville Area Dental Society (2012)
• “2011 Amendments to the Illinois Workers’ Compensation Act: One Year Later”
• “Use of AMA Ratings to Evaluate Permanent Partial Disability”
• “Workers’ Compensation Reform in Illinois”
  Illinois Association of Defense Trial Counsel Webinar (2011)
• “2005 Amendments to the Workers’ Compensation Act: Yesterday, Today and Tomorrow”
• “The 2005 Amendments, 3 Years Later: The Respondent”
• “Update on the Illinois Workers’ Compensation Act and Medical Fee Schedule”
• “Recent Changes to the Illinois Workers’ Compensation Statutes”
  Illinois Manufacturers Association (2005)

Professional Recognition
• Martindale-Hubbell AV Preeminent
• Inducted as a Fellow in the College of Workers’ Compensation Lawyers
• Named as one of the “50 Most Influential People In Workers’ Compensation” by SEAK, Inc. in 2014.
• Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
• Named to the Illinois Super Lawyers list (2012-2015). The Super Lawyers selection process is based on peer recognition and professional achievement. Only five percent of the lawyers in each state earn this designation.

Professional Associations
• Illinois State Bar Association (Past Chair Workers’ Compensation Law Section Council)
• Champaign County Bar Association
• Illinois Association of Defense Trial Counsel (Member, Workers’ Compensation Committee)
• Defense Research Institute
• Illinois Self-Inspectors Association

Court Admissions
• State Courts of Illinois
• United States District Court, Central District of Illinois
• United States Court of Appeals, Seventh Circuit
• United States Supreme Court

Education
• Juris Doctor, Washington University School of Law, 1982
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INFECTIONIOUS DISEASES: THERE’S SOMETHING GOING AROUND

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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.
INFECTIOUS DISEASES: THERE’S SOMETHING GOING AROUND

I. INTRODUCTION

With the resurgence of measles and the U.S. outbreak of Ebola, it seems relevant to discuss workers’ compensation law in the context of infectious diseases. How does the Illinois Occupational Diseases Act address compensability for occupational diseases, and, more specifically, infectious diseases, including those as prevalent as even the common cold? Would an employee of Disneyland in California have a legitimate claim for workers’ compensation benefits under Illinois law? Or what does a nurse that treats a patient infected with Ebola (or any other infectious disease) need to show to secure benefits under Illinois law on her own behalf? Does it matter if the nurse eventually contracts the illness? Does the fear of catching a serious disease alone trigger an analysis of whether benefits are due under the Illinois Workers’ Compensation Act if there is no eventual manifestation of an actual disease?

II. APPLICABLE LAW

In the Occupational Disease Act, an “Occupational Disease” is defined as a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. In the case of an aggravation, it shall arise out of a risk peculiar to or increased by the employment and not common to the general public. It would also be appropriate to file a claim under the Illinois Workers’ Compensation Act for a disease that is caused by an identifiable accident or occurrence. 820 ILCS 310/1(d).

A. Accident

The focus in occupational diseases is clearly more on “exposure” and less on a physical accident. In fact, the “accident date” we are so familiar with is actually the date of last exposure for occupational diseases (with the exception of silicosis and asbestos). The Act further states that an employee “shall be conclusively deemed to have been exposed to the hazards of an occupational disease when, for any length of time however short, he or she is employed in an occupation or process in which the hazard of the disease exists.” 820 ILCS 310/1(d) (emphasis added).

The element of proving an accident “arose out of employment” encompasses situations in which it appears to a rational mind that a causal connection exists between a work condition and the disease; the disease must have its origin or aggravation in a risk connected to the employment and must naturally result from that risk. 820 ILCS 310/1(d). Prior to 1975, ordinary diseases of life were specifically excluded under the Occupational Diseases Act. However, that exception was removed and now, an ordinary disease of life comes within the definition of an “occupational disease” as long as it is caused or aggravated by an employment-related risk.
B. Notice/Statute of Limitations

Notice of exposure is not required under the Act. Rather, an employee is required to give notice of disablement from the disease “as soon as practicable.” Disablement means an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation of equal wages in other suitable employment.

Even if a claimant is symptom-free when not exposed to the occupational irritant, he may still establish disability for which benefits can be awarded. In *E.R. Moore Co. v. Industrial Commission*, 71 Ill. 2d 353 (1978), the claimant developed contact dermatitis by reason of her exposure to a cleaning solvent at work. The employer asserted she had no disability as she would remain healthy as long as she avoided contact with the irritating chemical. The court denied that argument, relying on the medical testimony indicating claimant had a medical disability that was precipitated by her on-the-job exposure to a particular chemical and that the resulting susceptibility was a permanent condition and awarded benefits.

If no compensation is paid, the statute of limitations is three years from the date of disablement. If benefits are paid, the statute of limitations for filing a claim is three years from the date of disablement or two years from the last payment of compensation, whichever is later in time.

C. Causation

Causation in occupational diseases is two prong. In addition to showing the workplace caused the occupational disease, the claimant must also present evidence to show the disease caused a condition of ill-being or disablement. The first element of showing the workplace caused the disease involves the analysis regarding a compensable exposure or accident and, presumably, a medical opinion indicating said exposure caused the disease at issue. The second prong surely cannot be satisfied without presenting some evidence of the consequences of the disease, no matter how minor.

D. Exceptions

Firefighters/EMTs/Paramedics – there is a rebuttable presumption that the condition or impairment arose out of and in the course of the employment and it is rebuttable presumed to be causally connected to the hazards of employment. The presumption also applies to any hernia or hearing loss but does not apply to any employee who has been employed in such capacity for less than five years at the time he files an Application for Adjustment of Claim.

Emotional Stress – employee must establish (1) the mental disorder arose from a situation of greater dimension than the normal or usual day-to-day emotional strain and tension which employees are subjected to in the work force generally or in the petitioner’s particular job; (2)
the stressful conditions actually exist on the petitioner’s job; and (3) the employment conditions, when compared to non-employment conditions, were the major contributory cause of the mental disorder.

III. RELEVANT CASE LAW

A. Goolish v. Village of Wheeling

_Goolish v. Village of Wheeling_, 2009 Ill. Wrk. Comp. LEXIS 1330, 05 WC 30212 – Claimant was hired as a firefighter/paramedic in 1999. In 2003, he responded to a call for a patient that was diabetic and not breathing. During the course of treatment, which included checking the patient’s blood sugar and administering an IV, claimant wore rubber gloves. Upon removing his rubber gloves, claimant noticed blood on his right index finger.

Claimant testified he did not see the patient bleed, that he was confident he did not suffer a needle stick during the response, and that the finger on his glove was not torn or ripped in any manner.

The treated patient was HIV positive. Claimant subsequently started on a treatment of Combivir therapy and had regular follow-up appointments to check for any manifestation of HIV infection. With no signs of infection, therapy and follow-up appointments were stopped after six months.

Claimant did not miss any time from work. Other than check-ups to rule out possible HIV infection, claimant sought no treatment. At trial, he claimed he suffered from stress stemming from fear of possibly contracting HIV and that the relationship with his girlfriend had deteriorated. He never sought therapy for his alleged stress.

The Commission found claimant did not prove a compensable exposure under the Occupational Diseases Act. There was insufficient evidence to establish the origin of the blood on claimant’s finger, and claimant admitted he did not suffer a needle stick during the responsive call. Further, claimant did not suffer from any actual disease; there was no evidence he, in fact, contracted HIV, and he had no diagnosis of a mental condition as a result of the alleged exposure. The Commission further noted claimant did not have a claim for a stress related mental disorder as there was no evidence of extraordinary intolerable conditions of employment, nor was there a traumatically induced mental disease.

B. Mola v. University of Illinois

_Mola v. University of Illinois_, 2000 Ill. Wrk. Comp. LEXIS 463, 00 I.I.C. 0795 – Claimant was a hospital employee and, in 1983, was pricked by a needle while working. The needle was infected with hepatitis, resulting in the claimant being diagnosed with carrier state hepatitis. He filed a claim for workers’ compensation benefits and was awarded 8% MAW.
Claimant filed a 19(h) Petition claiming his disability had increased since the original determination by the Commission. Since the Commission’s decision affirming the 8% MAW award, claimant testified he continued treating for joint and right quadrant pain, although he continued to work while the symptoms were manageable. Following a series of examinations and tests after passing out while driving and having more severe, unmanageable pain, claimant was diagnosed with the HIV virus and chronic active hepatitis. He presented evidence that Hepatitis B accelerates the progression of the HIV disease and worsens the course of an HIV infection. His physician indicated he was unable to work for an “indefinite” period of time, and listed hepatitis B as one of the causes of his disablement.

The Commission found claimant was permanently and totally disabled as a result of the hepatitis caused by the original work-related needle prick. The Commission further pointed out that, irrespective of the hepatitis being a disabling factor in claimant’s condition, the primary cause of his HIV condition, which was also a disabling condition per his treating physician, was coinfection that occurred when he was stuck by an infected needle at work in 1983.

C. Bauer v. Omron Electronics

*Bauer v. Omron Electronics*, 2012 Ill. Wrk. Comp. LEXIS 740, 12 I.W.C.C. 0799 – The deceased worked as chief operating officer of respondent for four years prior to his death on June 25, 2006. As part of his job as COO, he traveled frequently, visiting China, Japan, and Brazil in June 2006 alone. From June 7, 2006 through June 10, 2006, claimant was in China for a business acquisition. From June 10, 2006 through June 14, 2006, the deceased travelled to Japan for business. Upon returning from China/Japan, he worked in the Schaumburg office for two days without any signs of illness.

From June 20, 2006 through June 23, 2006, the deceased was in Brazil interviewing candidates for a manager vacancy in the Brazil office. Upon returning from Brazil, the deceased “seemed tired,” and “kind of pale, not feeling great.” In the late afternoon of June 24, 2006, he developed a rash and his symptoms continued to worsen. He presented to the emergency room and died of Neisseria meningitides shortly after being transferred to the Intensive Care Unit of a different hospital.

Testimony at trial from a co-worker included a conversation with the deceased on June 20, 2006 wherein the deceased responded with “[f]ine, but I think I got the bird flu in China,” when asked how he was feeling. *Bauer*, 2012 Ill. Wrk. Comp. LEXIS 740, at *4. Medical records included the deceased reporting he had been sick with cold symptoms since coming from Japan, but that the rash and generalized weakness started following the trip to Brazil. Medical records also indicated the deceased had an upper respiratory infection prior to leaving for Brazil.

At arbitration, the arbitrator concluded petitioner (the deceased’s widow) failed to prove the deceased was infected with Neisseria meningitides while in Brazil. The Commission reversed, and, in unpublished opinions, the circuit court and appellate court affirmed the Commission’s decision. Neither party appealed.
The Commission reversed the arbitrator’s denial of a claim. Several things were at issue on appeal, including whether there was any direct evidence of the deceased coming in contact with someone infected with the disease, as well as trying to pinpoint whether it was possible for him to have contracted the disease while in Brazil considering the typical incubation period.

Despite conflicting testimony, the Commission found the deceased contracted the disease while in Brazil. When addressing the argument that the incubation period for Neisseria meningitides ranged anywhere from two to ten days, with the average being three to four days, thereby making it unlikely the deceased contracted the disease during his short time in Brazil, the Commission noted that the medical evidence established the upper respiratory infection decreased the average incubation period to just two days. The Commission also denied respondent’s argument that the deceased failed to present evidence that he came into contact with a person known to be infected with Neisseria meningitides to establish a compensable exposure.

Instead, the Commission considered that Neisseria meningitides is transmitted by droplets sprayed when one coughs or talks and that most infections are caused by an asymptomatic carrier. Considering the evidence that the deceased had significant contacts with the general public while in Brazil including interviewing candidates for the job, staying at a public hotel, visiting the company office, eating at a public restaurant, spending several hours at the airport, and using a taxi for transportation on at least one occasion.

The Commission ultimately determined that the evidence lead to the “rational conclusion” that the deceased acquired Neisseria meningitides in Brazil and awarded benefits to the surviving spouse.

IV. EFFECTS OF CASE LAW AND PRACTICE POINTERS

So how can we apply the Act and the lessons from the cases above to current issues like Ebola or measles? Or, even more generally, how about something as ubiquitous as the common cold?

Recall there is a presumption of exposure if the employment involves the ‘hazard of the disease,” with the exposure being for any length of time, however short. So, take the case of the recent measles outbreak. Patient Zero was likely a happy little tot running from attraction to attraction around Disneyland, stopping only to grab a quick hug from Cinderella and Mickey Mouse along the way. If the employee dressed as Mickey Mouse contracts measles, does he have a compensable workers’ compensation claim under Illinois law?

It seems so. The Act states an exposure exists when an employee is employed in an occupation or process in which the hazard of the disease exists. It has already been determined that the measles outbreak started in Disneyland, California. So, even if the Mickey Mouse actor can present no evidence of having direct contact with someone actually infected with measles, he
would still likely have a compensable exposure. He would then have to establish the workplace exposure caused the debilitating condition, but the Illinois Supreme Court has held that the standard of proof for causation is whether it is more probably true than not that the workplace was a causative factor; scientific or conclusive proof is not required, and testimony to the effect that a work condition could or might have been a causative factor is sufficient. Baggett v. Industrial Commission, 201 Ill. 2d 187 (2002). Surely Mickey Mouse could get an opinion from a physician indicating he was asymptomatic for an extended period of time, not seeking treatment until after working during the time period in which it was determined Patient Zero visited Disneyland, thereby suggesting his employment was a causative factor. Mickey could also establish an actual condition of ill-being or disablement through the evidence that he actually contracted measles.

Or consider an employee in the medical field who contracts Ebola and makes a claim for benefits. It is important to clearly read the language of the statute. The presumption of a compensable exposure applies when the employment is in an occupation or process in which the hazard of the disease exists. This suggests there has to be some evidence that the disease for which the employee is seeking benefits was present at the place of occupation. So although no one can argue that the medical field and a medical facility is not an occupation where the potential hazard of disease exists, if there is no evidence that a patient or other employee infected with Ebola visited the particular facility where a claimant worked, the employee may get some sympathy, but will probably not get workers’ compensation benefits.

What about something as widespread as the common cold, though? Would an office worker claimant seeking benefits for the common cold, i.e. TTD benefits in lieu of using sick time and reimbursement for out of pocket expenses, perhaps, be successful in her claim? She would probably not enjoy the presumption of “an exposure due to employment in an occupation or process in which the hazard of the disease exists” because, arguably, there is no “hazard of the disease” innate to office employment. In that case, she would have to present evidence to prove actual exposure to the debilitating disease. That would presumably involve testimony from a co-worker that could conclusively testify regarding what specific condition he had, the dates he had it, and the interaction he had with the claimant during the times he was infected. Seems unlikely.

Then, what condition of ill-being or disablement could the claimant prove? What “permanency” does she have once she no longer has a cold? There is no evidence she is more susceptible to catching a cold or other illness now that she has had the cold once, and once the virus is gone, all residual symptoms should be as well.

What if, however, the claimant’s common cold naturally develops into a more serious condition? That might be a case where the claimant goes through all those extra hoops to prove exposure to an occupational disease. She still would not have the presumption discussed above as, again, presumably, an office is not a place of occupation where the hazard of any given disease exists. Although the common cold may have been the pre-existing condition that led to the development of the more serious disease, she would still need to establish exposure to the initial pre-existing condition in order to get benefits for the latter developing condition. Even
though Illinois does not require the workplace to be a direct causation to the development of a disease, it does seem unlikely for something as ordinary as the common cold to turn into a compensable occupational “disease.”

V. FURTHER DISCUSSION

It may be far-reaching, but should an employer then require an employee to stay home and take a sick day when he is ill? In occupations where the hazard of a given disease exists, such a requirement would not seem to make much a difference since the presumption of a compensable exposure is already there. But what about for bronchitis or strep throat? Those are contagious diseases that can be transmitted simply through a cough or a sneeze. And how do you enforce such a requirement?

What about requiring vaccines? Beyond the vaccines for measles, mumps, etc., there are, of course, flu shots to prevent the contraction of influenza, a common, infectious disease. Should employers require employees to get the flu vaccine so as to avoid potential claims for benefits for contracting that disease? It seems like it would be quite difficult for one to establish his contraction of the flu was rationally related to work unless he can specifically point to one co-worker infected with the disease, identify the interactions with that co-worker, and rule out any other possible causes, such as just being out in the general public.

How do we avoid turning into a ‘positional risk’ state if injuries as common as the common cold or influenza are deemed compensable? There would likely need to be a detailed analysis of the risk associated with the claimant’s employment in building defenses to compensability.
Dan concentrates his practice in the areas of workers’ compensation and general insurance defense, including auto liability, premises liability and third-party defense of employers. Since graduation from law school in 1984, he has spent his entire legal career at Heyl Royster in the Springfield office. He became a partner in 1996.

Dan has extensive litigation experience. He has taken over 40 cases to jury verdict both in state and federal courts. Additionally, he has arbitrated hundreds of workers’ compensation claims before the Illinois Workers’ Compensation Commission. Dan appreciates that his clients’ goal is to conclude claims in the most efficient, economical means possible and strives to achieve that goal through motion practice, settlement or trial.

Dan is a frequent author and lecturer on civil liability and workers’ compensation issues. His speaking is both to clients and to Illinois attorneys for continuing legal education. Dan has a particular interest in speaking with employers on issues of risk management and injury prevention. The best way to resolve workers’ compensation matters is to do as much as possible to prevent injuries and the subsequent claims from occurring. If claims cannot be prevented, Dan works with clients on strategies to effectively and economically bring the claim to a satisfactory conclusion.

Dan is a past president and program director of the Lincoln-Douglas American Inn of Court. The Inn is designed to promote legal education, civility and collegiality among members of the bar.

**Significant Cases**

- **Sheffer v. Simmons Airlines** (1994) - The plaintiff slipped and fell on ice while walking on the tarmac at the Springfield airport from the plane to the gate. Numerous attempts at dismissal were denied by the court and the case went to trial. The jury found for the plaintiff and awarded $301,000 and found the airline 80% at fault and the airport 20% at fault. The airport settled for its proportional fault. We appealed on behalf of the airline. The Fourth District Appellate Court reversed the trial court, finding that no duty existed because the fall was on a natural accumulation of snow and ice and that the airline’s original motion for summary judgment should have been granted.

- **Gill v. Aquino, MD** (1993) - The plaintiff underwent abdominal surgery in Springfield and was discharged. Not feeling better, he sought care with Dr. Aquino, his family physician and our client. He ultimately had a significant complication that required extensive corrective abdominal surgery. The case went to a jury trial, which found that Dr. Aquino’s delay in sending the plaintiff back to his original surgeon for follow up was the proximate cause of his injuries. The plaintiff was awarded $55,000 and found to be 50% at fault for not going back to his surgeon on his own accord. The original surgeon and hospital settled before trial for $35,000, therefore the net verdict against the doctor was less than the setoff and the doctor owed nothing on the award. The verdict and comparative fault decisions were upheld by the Fourth District Appellate Court and the Illinois Supreme Court.

- **Adkins v. Sarah Bush Lincoln Health Center** (1989) - A physician had his hospital privileges suspended in part and not renewed in part. The Illinois Supreme Court found that the suspension of the physician was proper because the physician had notice of the claims against him and the hospital committee took action that it was authorized to take under the hospital bylaws. The Illinois Supreme Court also found that the hospital did not properly follow its bylaws when it denied the application for privileges renewal, however, that issue was rendered moot because of the proper imposition of the summary suspension.

- **Farmer’s State Bank and Trust v. Lahey’s Lounge** (1988) - The plaintiff was killed by a drunk driver and her estate brought suit against the establishments where the drunk driver had been drinking before the accident. The case was brought under the Illinois Dram Shop Act. The sole damages being claimed were for loss of domestic services, loss of society and loss of...
companionship. The trial court granted summary judgment to the defendants because those elements of loss were not recoverable under the Act. The Fourth District Appellate Court affirmed, finding that elements of loss are limited to those in the Act and the elements of loss were not compensable under allowed loss of means of support.

- **Crouse v. Benning (2012)** - Our client was involved in a rear end collision with the plaintiff. She filed suit for personal injury and the case went to trial in Sangamon County. Our defense was that, despite the fact that this was a rear end collision, the plaintiff failed to signal a pending turn as a traffic control device turned green and that as a result of that failure the plaintiff either was solely at fault for the collision or more than 50% at fault so that her recovery would be barred. The jury returned a defense verdict. The Fourth District Appellate Court affirmed the defense verdict. The plaintiff's petition for leave to appeal to the Illinois Supreme Court was denied.

- **Koch v. Edge Elevator (1999)** - The petitioner in this workers' compensation case worked with his son erecting pole buildings for farmers and rural businesses. Edge Elevator hired the petitioner to frame and erect a pole building on its premises. During construction the petitioner sustained a severe back injury that required surgery and an inability on his part to return to work. The petitioner claimed that he was not an independent contractor of Edge Elevator, but was under Edge Elevator’s control so that it was responsible for the injury under the Worker’s Compensation Act. The arbitrator found in favor of the petitioner and issued an award worth over $250,000. The appellate court, workers’ compensation division, ultimately reversed the decision and agreed with Edge Elevator that the facts showed that the petitioner was an independent contractor and not under Edge Elevator’s control. The award was vacated and the claim denied.

**Professional Recognition**
- Martindale-Hubbell AV Preeminent
- Selected as a *Leading Lawyer* in Illinois in the areas of Workers’ Compensation Defense Law; and Personal Injury Defense: General. Only five percent of lawyers in the state are named as *Leading Lawyers*.

**Professional Associations**
- Lincoln-Douglas American Inn of Court (past president and program director)
- Illinois State Bar Association
- Sangamon County Bar Association
- Central Illinois Claims Adjusters’ Association

**Court Admissions**
- State Courts of Illinois
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**Education**
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Learn more about our speakers at www.heyloyster.com
Jessica focuses her practice on the defense of insurance clients and employers in workers’ compensation matters. She joins the firm with extensive workers’ compensation defense experience, having appeared before the Illinois Workers’ Compensation Commission representing employers and insurance companies across the state. Jessica has also spoke with businesses directly to help assist in their understanding of the Workers’ Compensation system, as well as the handling of claims within their business.

Jessica is a member of the Workers’ Compensation Lawyers’ Association, Peoria County Bar Association, and Illinois State Bar Association. She is a past treasurer and vice-president of the Tazewell County Bar Association and former Tazewell County Assistant State’s Attorney. As an ASA, Jessica appeared before Judges in the 10th Circuit, handling matters ranging from petty offenses to felonies.

Jessica is a 2009 graduate of Saint Louis University School of Law, where she concentrated her studies in employment and labor law, taxation, and business transactions. She is a 2006 graduate of Duquesne University, graduating magna cum laude, with a B.S. in political science, psychology, and sociology.

**Professional Associations**
- Tazewell County Bar Association (Vice President, 2011-2012; Treasurer 2010-2011)
- Peoria County Bar Association
- Illinois State Bar Association
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**Court Admissions**
- State Courts of Illinois

**Education**
- Juris Doctor, Saint Louis University School of Law, 2009
- Bachelor of Arts-Psychology, Sociology, and Political Science (*magna cum laude*), Duquesne University, 2006
UNDOCUMENTED WORKERS: BENEFITS WITHOUT BORDERS

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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.
UNDOCUMENTED WORKERS: BENEFITS WITHOUT BORDERS

I. INTRODUCTION

One of the most significant issues today involves immigration. Whether legally documented or undocumented, foreign workers form a large and growing segment of today’s workforce. As a result, Illinois employers are frequently encountering injured workers seeking workers’ compensation benefits who are undocumented alien workers. In those instances, what are the employer’s obligations for paying compensation? Are benefits modified in any way based on the claimant’s work status?

II. ARE ALIEN WORKERS CONSIDERED THE SAME AS FULLY-DOCUMENTED WORKERS?

Illinois law, as reflected in the Workers’ Compensation Act, case law, and Commission decisions, places an alien worker on the same footing as fully-documented U.S. workers with the exception of death benefits payable to beneficiaries not living in the United States, Mexico, or Canada.

Section 1(b)2 of the Act specifically defines an “employee,” as meaning, “(2) [e]very person in the service of another under any contract of hire, express or implied, oral or written, … including aliens ….” 820 ILCS 305/1(b)2.

The Commission decisions have interpreted this definition to encompass those illegal workers who were working here in the United States and have held such workers are entitled to benefits under the Act. See, e.g. Tamayo v. American Excelsior and Labor World, Inc., 99 I.I.C. 0521, 94 IL.W.C. 19228 (June 7, 1999); Lopez v. AGI Media, 07 IL.W.C. 21879, 11 I.W.C.C. 0576; Miezio v. Z-Wawel Construction, 00 I.I.C. 0341, 98 IL.W.C. 16088 (Apr. 28, 2000).

The implications of these cases for Illinois employers are clear – all illegal aliens are considered employees entitled to benefits. Zendejas v. J & J Bros. Constr., 05 IL.W.C. 03276, 09 I.W.C.C. 06500 (June 26, 2009). The employee’s illegal or undocumented status is irrelevant.

III. WHAT BENEFITS ARE RECOVERABLE?

Concerning the entitlement to benefits, the decisions have been few and far between, but generally speaking, temporary total disability, medical and permanency benefits are available to an undocumented/illegal worker.
A. Leading Case

The leading Illinois case is *Economy Packing Co. v. Illinois Workers’ Compensation Comm’n*, 387 Ill. App. 3d 283 (1st Dist. 2008), where the appellate court held that an undocumented alien could receive TTD and permanent total disability (PTD) benefits from any employer despite the fact that federal law (the Immigration Reform and Control Act of 1986 (IRCA) – 8 U.S.C. § 1324a et seq.) prohibited potential employers from hiring undocumented aliens. The employer had argued that because of the illegal’s employment status, she was unemployable in the United States.

The appellate court first concluded that the IRCA did not preclude an award of PTD benefits. Second, the court concluded that “the traditional test to determine whether an employee falls into the ‘odd-lot’ category cannot be applied to undocumented aliens,” because an alien would always be able to demonstrate that no work was available due to her illegal status. *Economy Packing*, 387 Ill. App. 3d at 293-294. According to the court, “an undocumented alien may establish that she is permanently and totally disabled under an ‘odd-lot’ doctrine, so long as her employability is not based upon her immigration status.” *Id.* at 294.

The *Economy Packing* court pointed out that the issue was one of first impression in Illinois, and as a result, consulted a non-Illinois decision from North Carolina for guidance (*Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346 (2002)), then concluded that once the undocumented worker demonstrates that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status, the burden then shifts to the employer to produce sufficient evidence that suitable jobs would regularly and continuously be available to the undocumented alien but for her legal inability to obtain employment.

The *Economy Packing* court concluded that the evidence was sufficient to show that the claimant was unable to work, and that none of the consulted vocational experts considered the claimant’s immigration status when proffering their opinions. Thus, in the end, the employer was required to approach the case in a very similar manner as it would a traditional U.S. citizen or otherwise properly documented worker, and to establish through competent evidence that the worker’s condition permitted certain levels of work and that such work was available. In some respects, this burden is lesser when dealing with undocumented workers because there is no requirement that the employer actually attempt to place the worker in alternative employment.

In a footnote the court noted the employer had argued the traditional “odd-lot” test could not be applied to an undocumented alien because a lawful employer could not mitigate its damages either by returning the injured employee to work in a modified capacity or providing job placement services, without violating IRCA. The court said the Commission had not addressed this point, and further that it did not need to address this point, because the claimant had been found to be incapable of returning to work, and “[c]onsequently, the issue of mitigation is not relevant to the facts of this case.” *Economy Packing*, 387 Ill. App. 3d at 294 fn.2.
B. PPD Benefits

This language was seized upon by the Commission in Lopez, where the Commission denied a wage differential in favor of a PPD award. The Commission observed that, “[b]y basing a wage differential award on a job in the U.S., [it] would presuppose that petitioner would actually be able to take the employment offered. However, petitioner is an undocumented worker. The Arbitrator is unwilling to sanction the illegal employment of the petitioner.” Lopez, 07 IL.W.C. 21879, at 48 (citing Miezio v. Z-Wawel Construction, 00 I.I.C. 0341).

In Tamayo v. American Excelsior and Labor World, Inc., 99 I.I.C. 0521, 94 IL.W.C. 19228 (June 7, 1999), the Commission found that claimant was entitled to vocational rehabilitation and retraining to allow her to return to work as a secretary in any country where she would be legally entitled to earn wages. “The Arbitrator takes judicial notice that, in general, wages in Mexico are lower than those in the U.S. The Arbitrator draws the reasonable inference that it follows from Tamayo that, ceteris paribus, an undocumented worker from a lower-wage country, whether or not he or she returns to work in the homeland, would be entitled to a greater wage differential award than would a properly documented worker.” Lopez, 07 IL.W.C. 21879, at 48-49.

As a result, the Commission, which adopted the arbitrator’s findings, upheld the concept of awarding PPD benefits, but reversed the PPD award in total because it found no evidence of disability.

In Miezio, the Commission side-stepped the question of whether, as a matter of law, the fact that a claimant cannot legally be employed in this country absolutely precluded an award under Section 8(d-1) of the Act, noting instead that it is a factor to be considered in the totality of evidence.

C. TTDs — Is the undocumented/illegal worker entitled to TTD benefits if terminated because of his or her illegal status?

Following the Illinois Supreme Court’s decision in Interstate Scaffolding, Inc. v. Illinois Workers’ Compensation Comm’n, 236 Ill. 2d 132 (2010), which held that an employee terminated for cause was entitled to receive TTD benefits until he reached maximum medical improvement. The Commission in Rosas v. GM Warehouse, Inc., 10 IL.W.C. 22555, 12 I.W.C.C. 0419 (Apr. 23, 2012), held that an illegal alien, who could not return to work for his former employer because he is prohibited from working by federal law, was nevertheless entitled to receive continued TTD benefits the same as a worker on restrictions who is discharged for cause.

According to the Commission, the claimant “was allegedly terminated because he was unable to provide a valid social security number. If [the claimant] did not have a valid social security number, his continued employment ... by Respondent would be a violation [of] 8 U.S.C.S. § 1324 a(a)(2).” Rosas, 12 I.W.C.C. 0419, at *14. The Commission rejected the argument by the employer that there was a valid reason for discharge, namely, the claimant’s inability to be employed due to federal law, noting, “the reasoning for [the claimant’s] discharge is immaterial to the issue at
hand. The only material question is whether [he] was at MMI. It is clear from the medical records ... and respondent’s Section 12 report that [the claimant] was not at MMI ... .” Id.

IV. STRATEGIES REGARDING AVAILABLE BENEFITS

Given the language of the Illinois Act and the Economy Packing case, it is clear that undocumented/illegal workers are employees under the Act. Moreover, with respect to most benefits, the undocumented/illegal worker is likewise entitled to medical and TTD benefits, and permanency benefits, although the later has some limitations. TTD benefits and medical benefits should be handled in the same manner as a claim involving a fully-documented worker.

A. Death Benefits

As noted, death benefits are limited based on the recipient’s location. When the dependents of a deceased employee are aliens not residing in the United States, Mexico, or Canada, the amount of compensation payable is limited to the beneficiaries described in paragraphs 8(a)-(c), and is 50 percent of the compensation provided therein. Section 8(a) applies to the widow, widower, and children, section 8(b) applies to totally dependent parents, and section 8(c) applies to partially dependent parents and children. 820 ILCS 305/7(i).

B. PTD and Wage Differential Benefits

Permanent total disability and wage differential benefits are treated slightly different, based on the difficulties associated with presenting the claimant with alternative job market options.

Handling PTD and wage differential cases requires a multi-faceted approach. First, as a matter of law, a wage differential award should not be available to an undocumented worker because of the difficulty in establishing alternative employment. Instead, it should be argued that a PPD award is best suited for undocumented/illegal workers. Lopez, 07 IL.W.C. 21879, at 48-49.

Second, if a wage differential award is not prohibited as a matter of law, then it should be defended by pointing to available work in the abstract, apart from whether the claimant, as an illegal alien, could actually obtain the employment.

Third, a PTD claim should be defended by showing the availability of work within the claimant’s restrictions, as happened in Economy Packing Co. Again, by not having to show that the work is actually available should place employers in an easier position versus documented workers.

If you have any questions concerning claims by undocumented/illegal workers, please feel free to contact any of our attorneys across the state.
Born and raised in Rockford, Dana joined the firm’s Rockford office as an associate in 2006. There, she defended the rights of employers in workers’ compensation claims before arbitrators and commissioners at the Illinois Workers’ Compensation Commission and protected their interests in state courts in third party claims. She was an active member in the Winnebago County Bar Association, serving on its Board of Directors and Diversity Committee, and as past Chair of the association’s Workers’ Compensation Section. Dana also served as an arbitrator for the Seventeenth Judicial Circuit’s Court-Annexed Arbitration System.

In April of 2015, Dana relocated to the firm’s Peoria office to join its workers’ compensation group, where she continues to concentrate her practice in the representation of employers throughout the central part of the state. Dana is a member of the Peoria County Bar Association, Illinois Association of Defense Trial Counsel and Defense Research Institute.

Dana is an annual contributor to the firm’s claims handling seminar publication and the firm’s monthly publication devoted to workers’ compensation issues, Below the Red Line. She has contributed to in-house newsletters for clients and has presented before the ISBA’s Insurance Law Section. She has been a guest speaker to local community college and high school students on topics such as leadership and the practice of law. In 2015, Dana co-authored an extensive survey of Illinois Workers’ Compensation Law published in the Southern Illinois University Law Journal.

While in law school, Dana was a student representative to the Illinois State Bar Association. She served as a judicial law clerk in the Fifteenth Judicial Circuit. She was member of the NIU Law Review, where her writing was published in the Northern Illinois University Law Review and Kane County Bar Journal. Dana was also recipient of the Women’s Bar Foundation’s scholarship, which is awarded to one female law student from each of Illinois’ law schools.

**Publications**
- “Appellate Court Further Restricts Employer’s Ability to Terminate Temporary Total Disability Where Employee Was Discharged for Cause,” Illinois Defense Counsel Quarterly (2015)

**Public Speaking**
- “Social Media: A New Litigation Tool?” Winnebago County Bar Association’s Trial Section (2012)
- “Uninsured & Underinsured Motorist Coverage” ISBA Insurance Law Section (2011)

**Professional Associations**
- Peoria County Bar Association
- Winnebago County Bar Association (Board of Directors, 2009-2012)
- Illinois State Bar Association
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**Court Admissions**
- State Courts of Illinois
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EMPLOYEE VICTIMS OF WORKPLACE VIOLENCE: NEW PERSPECTIVES ON EXPOSURE AND DEFENSES

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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.
EMPLOYEE VICTIMS OF WORKPLACE VIOLENCE:
NEW PERSPECTIVES ON EXPOSURE AND DEFENSES

I. INTRODUCTION

In 2013, Illinois became the final state in the union to adopt legislation allowing for concealed carry of certain firearms. The Firearm Concealed Carry Act, 430 ILCS 66/1 et seq., became effective January 1, 2014. This Act allows individuals with a valid license issued by the Illinois State Police to carry a concealed handgun. As one might imagine, the legislation includes numerous restrictions as to when and where a concealed firearm can be carried, and what class of individuals is allowed the privilege of concealed carry.

This paper will not focus on the details of the Concealed Carry Act, but rather on the possible implications of this Act in the workplace. While there is nothing about the Firearm Concealed Carry Act specifically addressing workers’ compensation, in practice, it is obvious this law creates a greater likelihood of firearms being present in the workplace and increases the possibility of violence in the workplace being carried out with the deadly force of firearms, and the implication that certain injuries and deaths caused by firearms could be compensable under the Workers’ Compensation Act.

II. BASICS OF FIREARM CONCEALED CARRY ACT

In analyzing how and when the Firearm Concealed Carry Act might increase the likelihood of firearm violence in the workplace, some basic understanding of the Act is necessary. The Act does not allow for concealed carry in all business and employment locations. The Act enumerates numerous prohibited areas, including:

- Local government buildings
- State government buildings (courts and buildings controlled by the executive and legislative branches)
- Federal prohibited areas
- Public transportation
- Hospitals
- Schools and childcare facilities
- Colleges and universities
• Parks, playgrounds, athletic facilities, and stadiums

• Amusement parks and zoos

• Library and museums

• Nuclear facilities

• Airports

• Gambling facilities

• Certain bars, taverns, and other places serving alcohol

In addition to the specifically enumerated locations where concealed carry is not allowed, other businesses can prohibit concealed carry by clearly and conspicuously posting a no firearms sign at the entrance of the building. Standard four inch by six inch signs are available from the Illinois State Police.

There is a parking lot exception which allows for a licensee to carry a concealed firearm on or about his or her person within a vehicle into the parking area of a prohibited location and further allows that the licensee may store a firearm or ammunition concealed in a case within a locked vehicle or locked container out of plain view within the vehicle in the parking area. Also, a licensee may carry a concealed firearm in the immediate area surrounding his or her vehicle within a prohibited parking lot area only for the limited purpose of storing or retrieving a firearm within the vehicle’s trunk, providing the licensee insures the concealed firearm is unloaded prior to exiting the vehicle.

III. VIOLENCE IN THE WORKPLACE

Even without the implications created by firearms in the workplace, violence in general has become a significant factor in workplace safety and injuries. The most recent national statistics from 2011 indicate that violence caused 17 percent of workplace fatalities. Of those fatalities, gun-related deaths were the most frequent. Most workplace shootings are caused by employees or former employees. The general risk factors which lead to workplace violence caused by handguns include:

• Face-to-face contact with the public

• Exchange of money

• Delivery of services or goods
Generally, there are four categories of workplace violence. Those include the following:

A. **Violence Caused by Criminal Intent**

These injuries and deaths are caused by or happen incidental to another crime such as a robbery or an assault.

B. **Interaction Between Customer and Client**

These injuries and deaths are caused in situations where the perpetrator has a business relationship with the company or organization and generally flows from dissatisfaction with the business relationship.

C. **Worker on Worker**

These workplace injuries and deaths arise from conflict between past or current employees.

D. **Injuries Arising Out of a Personal Relationship**

These injuries are surprisingly common and involve violence perpetrated on an employee by a relative or someone else with whom the employee has a personal relationship. The assailant often is not a co-employee.

**IV. ANALYSIS OF ILLINOIS LAW PERTAINING TO COMPENSABILITY OF ACTS ARISING OUT OF WORKPLACE VIOLENCE**

Before addressing scenarios involving gun violence, it is necessary to have a general understanding of Illinois law pertaining to workplace violence. Not all cases cited below involve injuries or deaths caused by firearms, but they do outline certain principles pertaining to when violence in the workplace could be compensable under the Workers’ Compensation Act.

A. **Assaults in the Workplace**

Assaults in the workplace are not always compensable. Like any other injury, compensability will turn on whether or not the fight or assault had an origin in some risk peculiar to the employment. Generally, in Illinois, when there is an assault between coworkers, the commission will find compensability if it is determined that the assault arises from a dispute involving the performance of or the details of the work. In *Chicago Park District v. Industrial Comm’n*, 263 Ill. App. 3d 835 (1st Dist. 1994), the court addressed a situation in which the claimant was working for the Chicago Park District under a general supervisor. On the date of the injury, a dispute arose over the petitioner’s performance in creating a permit agreement for a children’s museum. The facts of the case indicated the supervisor became angry at the petitioner over the agreement, began slapping him and punching him to the point where the petitioner ultimately
Numerous other cases have held disputes arising out of the workplace to be compensable, including disputes with a coworker over quality of the work, *Ford Motor Co. v. Industrial Comm'n*, 78 Ill. 2d 260 (1980); disputes involving the division of labor between the aggressor and the claimant, *Franklin Coal and Coke Corp. v. Industrial Comm'n*, 322 Ill. 23 (1926); disputes concerning the aggressor’s taking of materials needed by the claimant to do his job, *Pekin Cooperage Co. v. Industrial Comm'n*, 285 Ill. 31 (1918) and, assaults arising out of an employee’s refusal to leave the jobsite after being fired until a paycheck was provided, *Graphic Group and KLW, Inc. v. Industrial Comm'n*, 167 Ill. App. 3d 1041 (1st Dist. 1988).

Illinois is a state which holds that the aggressor in a workplace dispute or assault cannot recover. In the Chicago Park District case cited above, the court specifically held that the aggressor’s injuries would not have arisen out of the employment. Often, determining who is the aggressor in a fight is difficult, and is a factual issue to be determined by the Commission. It is not necessary that the aggressor strike the first blow. It has been held that antagonistic words which could be expected to provoke an altercation will suffice, *Ford Motor Co. v. Industrial Comm'n*, 78 Ill. 2d 260 (1980).

Injuries resulting from assaults which are based on a personal disagreement, as opposed to a disagreement arising out of the work, are non-compensable so long as the disagreement has no connection with the employment. In *Fischer v. Industrial Comm'n*, 408 Ill. 115 (1951), the court addressed an altercation which was held to be personal in nature. The claimant was fighting with a coworker over various issues associated with singing and generally obstructing the work. A fight ensued and the court held that the risk arose out of a personal dispute and compensability was therefore denied.

### B. Horseplay

Injuries in the workplace arising out of violence associated with horseplay are generally not compensable. In the case of *Payne v. Industrial Comm'n*, 295 Ill. 388 (1920), the court addressed the situation in which two employees were playing with a compressor hose and one fell to the ground and sustained injuries ultimately causing death. The court held that because the hose was being used for play, as opposed to anything arising out of the employment, the injuries sustained did not arise out of the employment.

### C. Assaults Occasioned by Location of Employment

Illinois courts have generally held that if an employee is assaulted, and the assault is occasioned by the dangerous location of the employment, the resulting injuries may arise out of the employment. In *Holthaus v. Industrial Comm'n*, 127 Ill. App. 3d 732 (5th Dist. 1984), the court addressed a situation in which a city worker was getting a park pool ready for the season. The petitioner was working at a swimming pool in a park at 6:00 p.m. getting the pool ready for the
season. The park was 40 acres surrounded by residential and agricultural areas and was near a U.S. highway. On the day of the occurrence, the petitioner was approached by an escaped convict and ultimately was shot. The court relied upon the fact that the pool was in an isolated area, the petitioner was working alone, and the fact that the petitioner was required to work in an area where the convict was more likely to appear, as factors establishing that the injuries arose out of the employment.

Similarly, in the case of Chicago Housing Authority v. Industrial Comm’n, 241 Ill. App. 3d 720 (1st Dist. 1993), the court addressed injuries sustained by a CHA employee who was assaulted and struck in the head while on his way to pick up tools from his vehicle located in the parking lot of the CHA’s public housing project. The court held that the injuries occurred in a location where there was an increased risk of beatings and robberies and the injuries sustained therefore arose out of the employment.

D. Assaults Motivated by Racial or Ethnic Prejudice

In the decision of Rodriguez v. Industrial Comm’n, 95 Ill. 2d 166 (1983), the Supreme Court addressed facts in which the petitioner was assaulted based solely on the fact that the coworker assailant did not like Mexicans. The employer argued the injuries therefore arose out of a dispute which was personal in nature and therefore non-compensable. In an interesting decision, the Court held that the dispute was not personal in nature because it did not arise from something brought by the claimant to the workplace from his private life. Rather, the petitioner brought only his ethnic heritage, over which he had no control, to the workplace. The Court cited Larson’s Workmen’s Compensation to hold that an assault by a defective person in the workplace is similar to an injury caused by a defective machine. As a result, the racially motivated assault was held to arise out of the petitioner’s employment.

E. Injuries Arising From Assaults Motivated by Neutral Or Unknown Risks

Generally, there is a mix in the case law as to whether or not an assault motivated by an unknown cause or risk is compensable. Such assaults have been held compensable but usually rely on the analysis that the location of the employment somehow increased the risk, e.g., Holthaus. In other cases, however, the court has denied compensability when the motive for the assault is unexplained. In the case of Greene v. Industrial Comm’n, 87 Ill. 2d 1 (1981), the court denied compensability when the claimants’ aggressor was unknown. Conversely, in the case of Health and Hospitals Governing Comm’n of Cook County Hospital v. Industrial Commission, 62 Ill. 2d 28 (1975), the court found an assault by an unknown assailant to be compensable.

V. DECISIONS FROM OTHER JURISDICTIONS SPECIFICALLY ADDRESSING GUN VIOLENCE

Surprisingly, Illinois does not have a large body of case law addressing assaults involving gun violence. That is perhaps because of the fact that until recently, we were the only state which did
not allow concealed carry. While there are some cases in Illinois addressing gun violence, other jurisdictions provide guidance as to how certain factual situations involving injuries and deaths caused by firearms might be determined. A review of these decisions may be instructive as to how the Illinois courts may rule on certain situations which could develop as a result of increased gun violence in the workplace.

A. *Panpat v. Owens-Brockway Glass Container, Inc.*

In the case of *Panpat v. Owens-Brockway Glass Container, Inc.*, 334 Ore. 342 (2002), the Supreme Court of Oregon addressed a situation in which a boyfriend and girlfriend worked the same shift at the employer’s manufacturing plant. Ultimately, the relationship ended badly and the boyfriend was away from the plant on medical leave because of difficulty coping with the breakup. While on medical leave, the boyfriend entered the plant and shot and killed the girlfriend while she was working. The court held the case was not compensable because the incident arose purely out of the personal relationship and did not arise out of the employment.

B. *Johnson v. Drummond, Woodsum, Plimpton & Nelson*

In the case of *Johnson v. Drummond, Woodsum, Plimpton & Nelson*, P.A., 490 A.2d 676 (Me. 1985), the Supreme Court of Maine addressed a situation in which a law firm employee was shot in the law firm’s reception area by her estranged husband. An argument was made by the claimant that the incident arose out of the employment because the employer was on notice of the problem and therefore should have reasonably foreseen that the occurrence might happen. There was testimony that the firm’s office manager had discussed the situation with the employee and had advised her she was not to use other employees as a buffer between her and her husband. Despite the employer’s knowledge of this dispute, the court denied benefits because the assault arose purely out of a personal issue.

C. *Koerner v. Orangetown Police Department*

In the case of *Koerner v. Orangetown Police Dept.*, 68 N.Y. 2d 974 (Ct. App. N.Y. 1986), the appellate court of New York addressed a factual situation in which a police officer’s wife accidentally shot and killed him with his service revolver. The accident occurred while the decedent was sleeping at his home. Department policy required the decedent to have his firearm with him at all times during off duty hours. The court did a detailed analysis in which it addressed both the “arising out of” component and the “in the course of” component of the compensability analysis. The court ultimately held the incident did arise out of the employment due to the requirement the petitioner have his firearm with him while off duty. Compensability ultimately was denied, however, due to the fact the petitioner was off duty and therefore was not at a time and place of work.

D. *Galaida v. AutoZone, Inc.*

In *Galaida v. AutoZone, Inc.*, 882 So. 2d 1111 (Fla. App. 2004), an appellate court in Florida addressed a situation in which an employee had a loaded firearm in his car in the employer’s
parking lot. The employee was on an employer approved cigarette break and had gone to his car to smoke. While in the car, somehow the loaded firearm fell out of the car, hit the ground and discharged, shooting the petitioner in the leg. The petitioner argued that since he was allowed to visit his car to smoke, his injury should be held compensable under the personal comfort doctrine. The court denied compensability and held the injury did not arise out of the employment since exposure to a firearm is not a foreseeable consequence of a cigarette break. The court also relied in part on the fact that the employer’s policies prohibited firearms on the property.

E.    Southland Corp. v. Hester

Finally, in the case of Southland Corp. v. Hester, 253 Ark. 959 (1973), the Supreme Court of Arkansas addressed a factual situation in which an employee was found in his employer’s office and had been shot with the employee’s own rifle. The decedent was found sitting in a chair in front of his desk. His own 22 caliber rifle had been propped against a surface mounted electrical outlet on the floor. The barrel of the weapon was pointed towards the decedent’s chest in the vicinity of the heart. The powder burns indicated that the gun had been pressed against the claimant’s chest when the fatal shot was fired.

Witnesses on behalf of the claimant’s beneficiary offered significant testimony to rebut the inference of suicide. The court held that it was convincingly shown that the decedent had no known motive for taking his own life and also that he was not familiar in any way with firearms. The wife offered testimony that four months prior to the occurrence, the decedent had asked where the gun was. When she asked him why, he said there had been quite a few rough-looking youths coming and applying for jobs and he felt they were not really looking for jobs, but looking for money. While the court found the evidence disputing suicide convincing, they none the less ruled there was insufficient evidence to establish any connection to the employment and the death was held to not arise out of the employment.

VI.    PRACTICE POINTERS

There is little doubt in light of the recently enacted concealed carry law, at least some increased risk of firearm violence now exists in the workplace. Certainly, employers that do not exercise their option to prohibit firearms need to recognize this increased risk. Also, there clearly will be more guns in society in general. The above analysis establishes that in some situations, injuries and deaths caused by firearm violence will be held compensable.

To manage this risk, employers should consider the following in an effort to prohibit firearm violence in the workplace, and protect against compensability when such violence occurs:

• Prohibit guns in the workplace as allowed by the Firearm Concealed Carry Act
• Train supervisors to spot potentially violent employees
- Improve physical security
  - Adequate lighting
  - Alarms
  - Controlled entry points
- Develop and enforce workplace violence policies
- Promptly investigate all claims
- Get copies of photographs, surveillance tapes, and employer’s workplace violence policy
- Identify a motive
  - Employment-related motives
  - Motives personal to the employer
  - Motives neutral to the employee
Craig S. Young  
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Craig is Chair of the firm's workers' compensation practice group. Craig began his career at Heyl Royster as a summer clerk while in law school and became an associate in the firm's Peoria office in 1985. He has spent his entire career with Heyl Royster and became a partner in 1992. He is recognized as a leading workers' compensation defense lawyer in the state of Illinois and has handled all aspects of Illinois workers' compensation litigation including arbitrations, reviews, and appeals. He has developed expertise in the application of workers' compensation to certain industries including hospitals, trucking companies, municipalities, large manufacturers, school districts, and universities.

In addition to his expertise in litigated cases, Craig has developed a reputation for counseling employers regarding overall management of the workers' compensation risk. Through seminars and presentations to local and national industry groups, in-house meetings, regular claims review analysis, and day-to-day legal counsel, Craig assists his clients in looking beyond each individual case in an effort to reduce overall workers' compensation expense. His comprehensive approach to workers' compensation issues also includes third-party liability and lien recovery issues.

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Publications

Public Speaking
- “Effective Strategies for Defending Traveling Employee Claims”  
  Heyl Royster 29th Annual Claims Handling Seminar (2014)
- “Workers’ Compensation Reform in Illinois”  
  Presented in numerous locations (2012)
- “Elements of a Winning Workers’ Compensation Program”  
- “Family Medical Leave Act (FMLA); Americans with Disabilities Act (ADA); and Workers’ Compensation”  
  Risk Control Workshop (2010)
- “Medical Science, Industrial Commission Science - Understanding the Industrial Commission’s Approach to Medical Issues”  
  Lorman Education Services (2008)
- “The Employee Who Can’t Return to Work: Wage Differentials, Vocational Rehabilitation & Job Placement”  
  Lorman Education Services (2008)
- “Medicare Set-Aside Agreements-The Rest of the Story”  
  Defense Research Institute (2007)
- “Resolving (or Alleviating) the Chronic Pain Case”  
  Heyl, Royster, Voelker & Allen (2007)
- “Definition, Statutory Employers, Self-Insureds, Insurance Non-Compliance and the Stop-Work Order: Sections 1, 3 and 4”  
  Heyl, Royster, Voelker & Allen (2006)
- “Workers’ Compensation and Illegal Aliens”  
- “The Employee Who Can’t Return to Work: Wage Differentials, Vocational Rehabilitation and Job Placement”  
  Lorman Educational Services (2006)
- “Medical Science, Industrial Commission Science - Understanding the Industrial Commission’s Approach to Medical Issues”  
  Lorman Educational Services (2006)
**Professional Recognition**
- Martindale-Hubbell AV Preeminent
- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers.
- Peoria County Bar Association 2008 Distinguished Community Service Award

**Professional Associations**
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association (Second Vice President; Chair, Professional Standards Committee; Vice Chair, Budget Committee)
- Defense Research Institute (Immediate Past Chair, National Workers' Compensation Committee)

**Court Admissions**
- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

**Education**
- Juris Doctor, University of Illinois, 1985
- Bachelor of Arts-History (summa cum laude), Bradley University, 1982

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“THIS JUST IN: AMA IS DOING ITS JOB”
– AN UPDATE ON THE JOB IT’S DOING

Presented and Prepared by:
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Heyl, Royster, Voelker & Allen
PEORIA • CHICAGO • EDWARDSVILLE • ROCKFORD • SPRINGFIELD • URBANA
"THIS JUST IN: AMA IS DOING ITS JOB" –
AN UPDATE ON THE JOB IT’S DOING

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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.
"THIS JUST IN: AMA IS DOING ITS JOB" – AN UPDATE ON THE JOB IT’S DOING

I. INTRODUCTION

The last amendment to the Illinois Workers’ Compensation Act included a new statutory provision which was fought for and won by business interests which came in the form of AMA ratings. These ratings would be taken into account when dealing with the issue of determining the “nature and extent” of the employee’s injury, or permanent partial disability. This section is 820 ILCS 305/8.1b and is commonly referred to as “AMA Guides.” The pertinent statutory language is as follows:

§8.1b: Determination of permanent partial disability
Sec. 8.1b. Determination of permanent partial disability. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall 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. The most current edition of the American Medical Association’s “Guides to the Evaluation of Permanent Impairment” shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (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. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

(Source: P.A. 97-18, eff. 6-28-11.)

This section will provide the reader with an update regarding the cases which have identified and placed into evidence AMA ratings (typically provided by employers) for purposes of
evaluating the PPD exposure and analysis as part of the five different criteria which are to be considered by the arbitrator. It is important to note the statutory language identifies five specific factors which all must be considered, and not one above the rest. They are supposed to be equal in importance. Those five factors are already outlined and noted in the statutory provision cited above, but those five criteria, in a condensed format, are as follows:

- AMA rating (6th Edition)
- Occupation
- Age
- Future earning capacity
- Medical records

II. HOW WELL IS USE OF THE AMA GUIDES WORKING?

The cases below include matters which have gone up to the circuit court, as well as matters which have been before the Commission, and also listed are cases which have recently been before arbitrators (both for trial purposes and based upon pro se settlement contracts).

The cases cited are fairly new. As identified above, the new statute came into play for accidents which occurred after September 1, 2011. Therefore, it has taken some time for the cases dealing with AMA issues to work their way through the court system. As a matter of fact, a recent case before a circuit court judge (Bureau County) was argued on behalf of the employer that the petitioner was not entitled to any PPD benefits based upon the simple fact he failed to provide an AMA rating/report from an expert of his choosing. Note when reviewing the statutory language cited above, the language uses the term “shall” when indicating that a report needs to be provided in order to fully consider permanency. Defense counsel believe such a report is mandatory because of the “shall” language identified in Section 8.1(b). The result was an unfavorable decision from the trial court judge. Because it was not favorable, it is expected that this case will be appealed to the appellate court (which is by design in order to establish good case law on point). *Corn Belt Energy Corp. v. Lind,* Bureau County, Case No. 14-MR-37.

As a practical consideration, obtaining an AMA rating is generally recommended; however, there are times when it is not necessary. For example, if a claim has been treated as compensable and the issue which remains is the “nature and extent” of the injury in question wherein the parties cannot reach an accord as to the PPD value which should be attached to the claim, and the parties agree a pretrial hearing is a reasonable course of action in order to get an arbitrator’s recommendation regarding the PPD value. In such a circumstance, if opposing counsel allows the respondent to argue during the pretrial conference before the arbitrator what the AMA value would be (or a reasonable range concerning same), then a strategy wherein an AMA rating/report is not obtained, but rather argue before the arbitrator identifying what the rating would probably be based upon expertise and knowledge of the 6th Edition of the AMA Guides. Why consider such a course of action? It saves time and money and still allows the use of the weight of an AMA argument as one of the five factors which the arbitrator should consider. If
the arbitrator allows this, then time has been saved scheduling the AMA visit with an expert who will perform an examination, and money has been saved since the cost of obtaining such a rating can be anywhere between $1,000 to $2,500. Instead, those monies can be used towards the amicable settlement of the case.

If opposing counsel will not allow for such an argument or if the arbitrator will not allow argument during a pretrial conference as to what impact an AMA rating will have as one of the five factors without the actual rating/report provided, then undoubtedly the AMA rating should be obtained. If this matter is going to go to trial because the petitioner will not agree to a pretrial hearing (or a pretrial recommendation made by an arbitrator previously) then again obtaining an AMA rating from an expert of respondent's choosing is recommended.

Another rare circumstance when obtaining an AMA rating is not recommended is if the injury is de minimus and the worker's PPD rate is at or close to the statutory minimum. It is not financially reasonable to spend $2,000 to get a favorable AMA rating if the value of the claim is about that same figure ($2,000). The decision to spend money and get the AMA rating must be a reasonable one.

If unsure under what circumstance an AMA rating/report should be obtained, the best course of action is to consult counsel, provide them with information regarding the facts of the case, where the accident took place so venue can be determined and potential arbitrator who will be assigned to the claim, and identify the attorney representing the petitioner (unless they are a pro se petitioner) and then a defense strategy be formulated regarding whether or not an AMA rating is necessary and reasonable.

Now, turning attention to the cases, it is important to note these were reviewed and current as of April 2015. Generally speaking, the news has been rather positive. There are always exceptions where there are still a few arbitrators (especially in Chicago) who do not give the weight and authority to the AMA ratings which they should. But as mentioned previously, this is not a sprint but rather a marathon where the goal is to educate the arbitrators and commissioners as to the importance of an AMA rating and why it should be given certain weight and authority (at least as much as the other factors, including the treatment records).
### III. CASE UPDATE/AMA RATINGS

<table>
<thead>
<tr>
<th>Name of Case</th>
<th>Case Number</th>
<th>Arbitrator (Date of Decision) (Venue)</th>
<th>Injury (Body Part)</th>
<th>AMA Expert (Doctor)</th>
<th>AMA Rating (6th Edition)</th>
<th>PPD Award</th>
<th>Status Update</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael Workman v. Ryan Electric, Inc.</td>
<td>15WC008805</td>
<td>Arb. Molly Dearing (03/17/2015) (Springfield)</td>
<td>Right shoulder rotator cuff tear (surgery)</td>
<td>Dr. Stephen Weiss</td>
<td>5% UEI 3% WPI 3% MAW (5.93% Right arm)</td>
<td></td>
<td>Pro se contract approved by Arbitrator Dearing (03/17/2015); case closed</td>
</tr>
<tr>
<td>Christopher Cunningham v. B &amp; B Electric, Inc.</td>
<td>15WC002090</td>
<td>Arb. William Gallagher (02/19/2015) (Springfield)</td>
<td>Left knee meniscus tear (surgery)</td>
<td>Dr. Paul Smucker</td>
<td>0% LEI 0% WPI 6% Left leg (pro se settlement)</td>
<td></td>
<td>Pro se settlement approved by Arbitrator Gallagher (02/19/2015); case closed</td>
</tr>
<tr>
<td>Jeffrey Prodoehl v. Southwest Airlines</td>
<td>13WC000665</td>
<td>Arb. Jeffrey Huebsch (09/02/2014) (Chicago)</td>
<td>Left shoulder rotator cuff tear (surgical repair)</td>
<td>Dr. Peter Hoepfner</td>
<td>3% UEI 2% WPI 9.75% MAW (19.23% arm)</td>
<td></td>
<td>Arbitration Decision rendered (no review)</td>
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<tr>
<td>Rodney Bergae v. Southern Wine &amp; Spirits</td>
<td>13WC010681</td>
<td>Arb. Molly Dearing (07/22/2014) (Springfield)</td>
<td>Left distal biceps tendon repair (surgery)</td>
<td>Dr. David Fletcher (deposed)</td>
<td>5% UEI</td>
<td>20% Left arm</td>
<td>Arbitration Decision rendered (no review)</td>
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<tr>
<td>James Byars v. United Parcel Services</td>
<td>13WC014189</td>
<td>Arb. Kurt Carlson (04/17/2014) (Chicago)</td>
<td>SLAP tear left shoulder operated; cervical injury (surgery on arm only)</td>
<td>Dr. Joseph Monaco</td>
<td>2% LEI (Left) 1% WPI (cervical not related) 15% MAW (equivalent of 29.64% left arm)</td>
<td></td>
<td>Arbitration Decision rendered (no review)</td>
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<tr>
<td>Daniel Mota v. Con-Way Freight</td>
<td>12WC012112 12WC041879 (consolidated claim)</td>
<td>Arb. Jessica Hegarty (03/11/2014) (Chicago)</td>
<td>Left shoulder strain</td>
<td>Dr. Kevin Tu (twice)</td>
<td>2% UEI 1% WPI 5% MAW (9.88% Left arm)</td>
<td></td>
<td>Arbitrator Decision rendered (no review)</td>
</tr>
<tr>
<td>Plaintiff &amp; Defendant</td>
<td>Case Number</td>
<td>Arbitrator</td>
<td>Description of Injury</td>
<td>Medical Specialists</td>
<td>UEI</td>
<td>WPI</td>
<td>MAW</td>
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<tr>
<td><strong>Stephanie Wright v. Aramark</strong></td>
<td>12WC009505</td>
<td>Arb. Carolyn Doherty</td>
<td>Left shoulder impingement, SLAP tear (surgery)</td>
<td>Dr. Charles Carroll (deposed)</td>
<td>5%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td><strong>Randall Renken v. Chief Redi Mix</strong></td>
<td>12WC018040</td>
<td>Arb. Stephen Mathis</td>
<td>Clavicle and scapula fractures; facial contusions (no surgery)</td>
<td>Dr. Li</td>
<td>2%</td>
<td></td>
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</tr>
<tr>
<td><strong>Gene Eubanks v. Con-Way Freight</strong></td>
<td>12WC033476 (total of four consolidated claims)</td>
<td>Arb. Carolyn Doherty</td>
<td>Medial meniscectomy at left knee (surgery)</td>
<td>Dr. Patari</td>
<td>4%</td>
<td>2%</td>
<td></td>
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<tr>
<td><strong>Ninus McLean v. Sysco Central Illinois</strong></td>
<td>11WC043008</td>
<td>Arb. Stephen Mathis</td>
<td>Possible shoulder tear and elbow strain (no surgery)</td>
<td>Dr. Paul Paperski (deposed)</td>
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<td><strong>Aaron Yingst v. Caterpillar</strong></td>
<td>13WC006303 (consolidated with two more claims)</td>
<td>Arb. Douglas McCarthy</td>
<td>Bilateral carpal tunnel syndrome (surgical releases)</td>
<td>Dr. Ethiraj (deposed)</td>
<td>2%</td>
<td></td>
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<tr>
<td><strong>Cindy Ziemer v. Caterpillar</strong></td>
<td>12WC029231</td>
<td>Arb. Douglas McCarthy</td>
<td>Rotator cuff tear (surgery)</td>
<td>Dr. Ethiraj (deposed)</td>
<td>5%</td>
<td>3%</td>
<td></td>
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<tr>
<td><strong>Lino Gonzales v. Spring Meadows</strong></td>
<td>12WC013350</td>
<td>Arb. Peter O'Malley</td>
<td>Bilateral carpal tunnel syndrome (surgical releases)</td>
<td>Dr. Jeffrey Coe</td>
<td>2%</td>
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<tr>
<td><strong>Bruce Burger v. Con-Way Freight</strong></td>
<td>12WC012111</td>
<td>Arb. Gregory Dollison</td>
<td>Comminuted displaced fracture distal phalanx great toe</td>
<td>Dr. Eric Bartel (treater) and Dr. Ira Kornblatt (IME)</td>
<td>0%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>Case Title</td>
<td>Arb. Name</td>
<td>Date of Injury</td>
<td>Date of Decision</td>
<td>Doctor's Name</td>
<td>Award Description</td>
<td>Arbitration Decision Details</td>
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<tr>
<td>Nicholas Duncan v. Federal Whalen Moving Storage</td>
<td>Arb. Anthony Erbacci</td>
<td>(09/04/2013)</td>
<td>(Waukegan)</td>
<td>Dr. John Cherf</td>
<td>1% LEI 1% WPI 25% Left leg</td>
<td>Arbitration Decision rendered; Respondent filed review; review dismissed by Commissioner Ruth White (06/27/2014)</td>
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<tr>
<td>Lena Terry v. Caterpillar</td>
<td>Arb. Brandon Zanotti</td>
<td>(08/07/2013)</td>
<td>(Springfield)</td>
<td>Dr. Rajesh Ethiraj</td>
<td>5% UEI 10% Whole person</td>
<td>Arbitration Decision rendered (no review)</td>
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<tr>
<td>Brandon Saner v. Caterpillar</td>
<td>Arb. Brandon Zanotti</td>
<td>(08/07/2013)</td>
<td>(Springfield)</td>
<td>Dr. Rajesh Ethiraj</td>
<td>5% UEI 3% WPI 10% Whole person</td>
<td>Arbitration Decision rendered (no review)</td>
<td></td>
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<tr>
<td>Steven Miller v. Con-Way Freight</td>
<td>Arb. Lyne Thompson-Smith</td>
<td>(09/30/2014)</td>
<td>(Chicago)</td>
<td>Dr. Craig Westin</td>
<td>7% UEI 4% WPI 12% MAW (23.72% Right arm) 12% MAW contracts approved</td>
<td>Arbitration Decision rendered; Respondent filed review; a Decision was never issued by Commission; parties reached a settlement; Commissioner Thomas Tyrrell approved contracts (08/09/2013)</td>
<td></td>
</tr>
<tr>
<td>Eugenio Vasquez v. United Conveyor Corp.</td>
<td>Arb. Deborah Simpson</td>
<td>(07/08/2013)</td>
<td>(Chicago)</td>
<td>Dr. Mark Levin</td>
<td>2% WPI 2% MAW</td>
<td>Arbitration Decision rendered (no review)</td>
<td></td>
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<tr>
<td>Cheryl Sprague v. Dickey John Corp.</td>
<td>Arb. Douglas McCarthy</td>
<td>(06/19/2013)</td>
<td>(Springfield)</td>
<td>Dr. Robert Gordon</td>
<td>1% UEI (Left) 4% UEI (Right)</td>
<td>Arbitration Decision rendered (no review)</td>
<td></td>
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<tr>
<td>Michael Harrison v. Village of Park Forest</td>
<td>Arb. David Kane</td>
<td>(06/11/2013)</td>
<td>(Chicago)</td>
<td>Dr. Simon Lee</td>
<td>1% LEI 12.5% Right foot</td>
<td>Arbitration Decision rendered (no review)</td>
<td></td>
</tr>
<tr>
<td>Plaintiff</td>
<td>Case Number</td>
<td>Arbitrator</td>
<td>Description</td>
<td>Dr.</td>
<td>% WPI</td>
<td>% MAW</td>
<td>Notes</td>
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<tr>
<td>Anthony Rummans v. City of Peoria</td>
<td>12WC000663</td>
<td>Arb. Joann Fratianne (06/05/2013) (Peoria)</td>
<td>Left foot accessory navicular syndrome</td>
<td>Dr. Nord (deposed)</td>
<td>1%</td>
<td>20%</td>
<td>Left foot Arbitration Decision rendered; Respondent filed review; parties reached settlement before any Commission Decision issued (07/23/2013)</td>
</tr>
<tr>
<td>Albert Kasper v. Con-Way Freight</td>
<td>11WC043891</td>
<td>Arb. Lyne Thompson-Smith (02/25/2013) (Chicago)</td>
<td>Thoracic and lumbar strain (no surgery)</td>
<td>Dr. Michael Kornblatt</td>
<td>0%</td>
<td>3%</td>
<td>Thoracic and lumbar strain Arbitration Decision rendered</td>
</tr>
<tr>
<td>Alice Kruger v. Building Blocks Daycare</td>
<td>12WC015575</td>
<td>Arb. Stephen Mathis (02/06/2013) (Springfield)</td>
<td>Non-displaced fracture shaft fifth metatarsal (no surgery)</td>
<td>Dr. Li (deposed)</td>
<td>0%</td>
<td>10%</td>
<td>Non-displaced fracture shaft Arbitration Decision rendered</td>
</tr>
<tr>
<td>Timothy Brown v. Con-Way Freight</td>
<td>12WC004657</td>
<td>Arb. Joshua Luskin (01/14/2013) (Mt. Vernon)</td>
<td>Rotator cuff tear (surgery)</td>
<td>Dr. David Fetter</td>
<td>6%</td>
<td>4%</td>
<td>Rotator cuff tear Arbitration Decision rendered</td>
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<tr>
<td>Martha Mansfield v. Ball-Chatham Community School District</td>
<td>12WC014648</td>
<td>Arb. Neva Neal (01/07/2013) (Springfield)</td>
<td>Left knee meniscus tear (surgery)</td>
<td>Dr. Michael Lewis (deposed)</td>
<td>1%</td>
<td>17.5%</td>
<td>Left knee meniscus tear Arbitration Decision rendered</td>
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<tr>
<td>Party A</td>
<td>Arbitrator</td>
<td>Nature of Injury/Procedure</td>
<td>Doctor</td>
<td>WPI/UEI/WPI/MAW %</td>
<td>Recovery %</td>
<td>Notes</td>
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<tr>
<td>Zachary Johnson v.</td>
<td>Lyne Thompson-Smith (08/09/2012)</td>
<td>Fractured metacarpal neck with angulations (no surgery)</td>
<td>Dr. Michael Vender</td>
<td>7% index finger, 1% hand 1% UEI 0% WPI</td>
<td>10% Right hand</td>
<td>Arbitration Decision rendered; after Decision received, parties reached settlement (no review filed); case settled at 8.5% right hand (09/20/2012)</td>
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<td>Central Transport</td>
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<td>Joe Jeffrey Imbrugia v.</td>
<td>George Andros (08/25/2014) (Waukegan)</td>
<td>Left shoulder rotator cuff tear, bicep tendon repair (surgery)</td>
<td>Dr. Stephen Weiss</td>
<td>7% WPI (11% UEI)</td>
<td>15% MAW (29.64% Left arm)</td>
<td>Arbitration Decision rendered, Respondent filed review (pending)</td>
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<tr>
<td>Custom Nardi Systems, Inc.</td>
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<tr>
<td>Leah Roman-Estrada v.</td>
<td>David Kane (11/10/2014) (Chicago)</td>
<td>Left knee strain (no surgery)</td>
<td>Dr. Joseph Monaco</td>
<td>0% LEI</td>
<td>7.5% Left leg</td>
<td>Arbitration Decision rendered; Respondent filed review (pending)</td>
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<tr>
<td>University of Illinois Police Department</td>
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<tr>
<td>Jason McKenna v.</td>
<td>Joann Fratianni (08/15/2014) (Waukegan)</td>
<td>Left distal biceps tendon repair (surgery)</td>
<td>Dr. Mark Levin</td>
<td>0% UEI</td>
<td>25% Left arm</td>
<td>Arbitration Decision rendered (on review at Commission filed by Respondent; currently pending)</td>
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<tr>
<td>Lincolnshire Riverwoods Fire Protection District</td>
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<tr>
<td>Shawn Gilbertson v.</td>
<td>Robert Falconi (06/05/2014) (Rockford)</td>
<td>Two level lumbar laminectomy, no fusion (surgery)</td>
<td>Dr. Stephen Weiss (deposed)</td>
<td>11% WPI</td>
<td>25% MAW</td>
<td>Arbitration Decision rendered (on review with Commission filed by Respondent)</td>
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<td>City of Rockford</td>
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<tr>
<td>Jonathan Shannon v.</td>
<td>Gerald Granada (04/04/2014) (Geneva)</td>
<td>Left shoulder rotator cuff (surgery)</td>
<td>Dr. Coe</td>
<td>8% UEI 5% WPI</td>
<td>8% MAW (15.81% LOU Left arm)</td>
<td>Arbitration Decision rendered; Petitioner filed a review (pending)</td>
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<tr>
<td>Caterpillar</td>
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<td>Case Name</td>
<td>Case Numbers</td>
<td>Arbitrator</td>
<td>Injuries/Condition</td>
<td>Medical Expert</td>
<td>Award</td>
<td>Percentages/Cases</td>
<td>Result of Review</td>
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<tr>
<td>Kenneth Cubilo v. URS</td>
<td>12WC034037</td>
<td>Arb. Douglas McCarthy (02/25/2014) (Peoria)</td>
<td>Rotator cuff tear (surgery)</td>
<td>Dr. Lawrence Li (deposed)</td>
<td>5% UEI 3% WPI 10% MAW (19.76% Right arm) 8.7% MAW (17.19% Right arm) Settlement contract</td>
<td>Arbitration Decision rendered; Respondent filed review; before Commission issued Decision, a settlement was reached by the parties and approved by Commissioner Kevin Lamborn (03/06/2014)</td>
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<tr>
<td>Carl Jones v. Orland Fire Protection District</td>
<td>11WC040157</td>
<td>Arb. Molly Dearing (12/03/2013) (Urbana)</td>
<td>C5-6 disc bulge/herniation one injection</td>
<td>Dr. Michael Kornblatt (deposed)</td>
<td>4% WPI 6% MAW</td>
<td>Arbitration Decision rendered; Petitioner filed review; oral arguments before Commissioner Charles DeVriendt; awaiting Decision</td>
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<tr>
<td>David Sharpe v. Lake Land College</td>
<td>12WC042493</td>
<td>Arb. William Gallagher (03/11/2014) (Springfield)</td>
<td>Distal biceps tendon rupture (surgery)</td>
<td>Dr. Frank Petkovich (deposed)</td>
<td>5% UEI</td>
<td>22.5% Left arm (17.5% Left arm altered by Commission)</td>
<td>Arbitrator rendered Decision; Respondent filed review; Commissioner Ruth White lowered the award (04/15/2014)</td>
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<tr>
<td>Keith Maffia v. Con-Way Freight</td>
<td>13WC008352</td>
<td>Arb. Gregory Dollison (02/24/2014) (New Lenox)</td>
<td>Distal biceps tendon tear (surgery recommended, declined)</td>
<td>Dr. Keith Rezin</td>
<td>5% UEI</td>
<td>12.5% Left arm (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Decision issued by Commissioner Mario Basurto (03/28/2014)</td>
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C. Commission Decision
<table>
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<tr>
<th>Claimant</th>
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<th>Arb.</th>
<th>Description</th>
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<tr>
<td>Alfonso Sepeda v. Keystone Calumet</td>
<td>12WC041328 14IWCC0510</td>
<td>Arb. Barbara Flores (01/08/2014) (Chicago)</td>
<td>Comminuted fracture great toe; 2nd toe FX (no surgery)</td>
<td>Dr. Sam Vinci (deposed)</td>
<td>2% LEI</td>
<td>10% Left foot</td>
<td>10% Left foot (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Ruth White affirmed and adopted Decision (06/18/2014)</td>
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<tr>
<td>Michael Pyle v. CDS</td>
<td>12WC009720 14IWCC0497</td>
<td>Arb. Anthony Erbacci (12/11/2013) (Waukegan)</td>
<td>Spiral fractures right distal fibula and tibia, ORIF (surgery)</td>
<td>Dr. Alan League (not deposed)</td>
<td>9% LEI 4% WPI</td>
<td>45% Right leg</td>
<td>50% Right leg (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Thomas Tyrrell increased PPD award (06/23/2014)</td>
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<tr>
<td>Kent McFall v. The Sygma Network</td>
<td>12WC039335 14IWCC0297</td>
<td>Arb. Nancy Lindsay (10/18/2013) (Urbana)</td>
<td>Fusion at cervical spine; C7-T1 (surgery)</td>
<td>Dr. Stephanian (treater)</td>
<td>10% WPI</td>
<td>17.5% MAW 22.5% MAW</td>
<td>(Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Michael Brennan issued Decision and increased award (04/28/2014)</td>
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<tr>
<td>Michael McKenzie v. Continental Tire North America</td>
<td>12WC006169 14IWCC0434</td>
<td>Arb. William Gallagher (09/12/2013) (Mt. Vernon)</td>
<td>Bilateral cubital tunnel and right carpal tunnel (surgeries)</td>
<td>Dr. Richard Howe</td>
<td>2% UEI Left 4% UEI Right</td>
<td>15% Left arm</td>
<td>15% Right arm 12.5% Right hand</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Daniel Donohoo affirmed and adopted Decision (06/05/2014)</td>
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<td>Scott Buxton v. Caterpillar</td>
<td>11WC041682 14IWCC0704</td>
<td>Arb. Brandon Zanotti (08/07/2013) (Springfield)</td>
<td>Left thumb fracture (three surgeries)</td>
<td>Dr. Rajesh Ethiraj (deposed)</td>
<td>6% digit 2% hand 2% UEI</td>
<td>25% Left thumb 25% Left thumb (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Mario Basurto adopted and affirmed Decision (08/20/2014)</td>
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<td>Nancy Watkins v. Masterbrand Cabinets</td>
<td>12WC017286/14IWCC0035</td>
<td>Arb. Nancy Lindsay (07/11/2013) (Urbana)</td>
<td>Bilateral carpal tunnel syndrome (surgical releases)</td>
<td>Dr. Benson 1% UEI 1% WPI</td>
<td>7.5% Each hand 12% Each hand (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Thomas Tyrrell increased award (01/23/2014); no appeal to Circuit Court by Respondent</td>
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<td>Bill Zettler v. American Coal</td>
<td>12WC020486/13IWCC1124</td>
<td>Arb. Gerald Granada (07/03/2013) (Herrin)</td>
<td>Carpal tunnel syndrome (surgical release)</td>
<td>Dr. Mitchell Rotman 5% hand (should have been designated as upper extremity, but was not by Dr. Rotman)</td>
<td>10% Right hand 10% Right hand (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Michael Brennan affirmed and adopted Decision (12/30/2013)</td>
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<td>Hosam Salama v. UPS</td>
<td>12WC019435/13IWCC1058</td>
<td>Arb. Lyne Thompson-Smith (06/07/2013) (Chicago)</td>
<td>Fracture 5th metacarpal right hand (ORIF - surgery)</td>
<td>Dr. Michael Lewis (deposed) 0% UEI</td>
<td>17% Right hand 17% Right hand (Commission Decision)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commissioner Michael Brennan adopted and affirmed Decision (12/11/2013); no appeal to Circuit Court</td>
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<td>Steven Thomas v. Peoples Gas, Light &amp; Coke</td>
<td>12WC018268/13IWCC1001</td>
<td>Arb. Barbara Flores (05/24/2013) (Chicago)</td>
<td>Right shoulder rotator cuff partial tear (surgery)</td>
<td>Dr. Marsh 5% UEI 3% WPI</td>
<td>7.5% MAW (14.82% Right arm) 12.65% MAW (25% Right arm) (Commissioner David Gore Decision; adopted via settlement contracts)</td>
<td>Arbitration Decision rendered; Respondent filed review; Commission modified award by increasing it; parties settled for the Commission award amount (01/09/2014)</td>
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<tr>
<td>Rick Fassero v. UPS</td>
<td>12WC017291</td>
<td>Arb. Brandon Zanotti</td>
<td>05/09/2013 (Springfield) Right knee meniscectomy (surgery)</td>
<td>Dr. Lawrence Li</td>
<td>1% LEI</td>
<td>1% WPI</td>
<td>15% Right leg (Commission Decision)</td>
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<tr>
<td>Jeff Wessel v. Village of Millstadt</td>
<td>12WC030259</td>
<td>Arb. William Gallagher</td>
<td>04/02/2013 (Collinsville) Left knee ACL tear and meniscectomy tear (surgery)</td>
<td>Dr. Richard Rende</td>
<td>8% LEI</td>
<td>3% WPI</td>
<td>30% Left leg (Commission Decision)</td>
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<tr>
<td>Robert Liazuk v. Bolingbrook Police Department</td>
<td>12WC011804</td>
<td>Arb. Robert Falcioni</td>
<td>03/28/2013 (New Lenox) Multiple disc protrusions and spinal stenosis (injections, no surgery)</td>
<td>Dr. Klaud Miller</td>
<td>0% WPI</td>
<td>5% MAW</td>
<td>5% MAW (Commission Decision)</td>
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<td>Robert Griffin v. Caterpillar</td>
<td>11WC040321</td>
<td>Arb. Stephen Mathis</td>
<td>03/01/2013 (Springfield) Left knee medial meniscectomy (surgery)</td>
<td>Dr. Rajesh Ethiraj (deposed)</td>
<td>2% LEI</td>
<td>1% WPI</td>
<td>15% Left leg (Commission Decision)</td>
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<td>Robert Todd Riley v. Con-Way Freight</td>
<td>12WC011083</td>
<td>Arb. Joshua Luskin</td>
<td>01/14/2013 (Mt. Vernon) Right knee ACL tear (surgery)</td>
<td>Dr. McIntosh (treater)</td>
<td>7% LEI</td>
<td>3% WPI</td>
<td>27.5% Right leg (Commission Decision)</td>
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<td>Michael Arscott v. Con-Way Freight</td>
<td>12WC003876 14IWCC0018</td>
<td>Arb. Joshua Luskin (01/14/2013) (Mt. Vernon)</td>
<td>Left knee medial meniscus tear (surgery)</td>
<td>Dr. Sanjay Patari</td>
<td>20% LEI 8% WPI</td>
<td>20% Left leg 25% Left leg (Commission Decision)</td>
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<tr>
<td>Jeffrey Garwood v. Lake Land College</td>
<td>12WC004194 14IWCC0068</td>
<td>Arb. Nancy Lindsay (01/03/2013) (Quincy)</td>
<td>Left knee medial and lateral meniscus tears (surgery)</td>
<td>Dr. Joseph Monaco (deposed)</td>
<td>8% LEI 3% WPI</td>
<td>20% Left leg 20% Left leg (Commission Decision)</td>
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<td>Robert Armstrong v. Con-Way Freight</td>
<td>12WC015358 15IWCC1360 15L50168</td>
<td>Arb. Kurt Carlson (04/17/2014) (Chicago)</td>
<td>Acute dislocation 5th metatarsal; spiral fracture 4th metatarsal; surgery</td>
<td>Dr. Mark Levin</td>
<td>4% LEI (Right) 0% LEI (Left)</td>
<td>30% Right foot 8% Left foot (affirmed and adopted by Commission)</td>
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<td>Keith Littlejohn v. ABF Freight</td>
<td>13WC002732 15IWCC0028 15MR291</td>
<td>Arb. Gregory Dollison (01/27/2014) (Geneva)</td>
<td>Rotator cuff tear (surgery)</td>
<td>Dr. Ram Aribindi</td>
<td>3% UEI 2% WPI</td>
<td>15% MAW (29.64% arm) 17% MAW (33.60 Arm)</td>
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**D. On Appeal to Circuit Court**

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<td>Arbitration Decision rendered. Respondent filed review. Commissioner Michael Brennan issued Decision (05/07/2014) affirming Decision; Respondent filed appeal to Circuit Court (Judge James M. McGing)</td>
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<td>27.5% MAW (Commission Decision)</td>
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<td>Arbitration Decision rendered; claim denied; Petitioner filed review with Commission; Commissioner David Gore reversed Decision and awarded 27.5% MAW; Respondent filed appeal to Circuit Court; during pending appeal, parties reached a settlement for 27.5% MAW (04/03/2014)</td>
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<tr>
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<th>Injury</th>
<th>Benefits</th>
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<tr>
<td>Terry Bone v. Aramark Management Services</td>
<td>11WC043241 14IWCC0134</td>
<td>Arb. William Gallagher (08/30/2013) (Collinsville)</td>
<td>Complete laceration Achilles tendon (surgery)</td>
<td>Dr. John Krause (deposed) 6% LEI 30% LOU right foot 15% LOU Right foot (Commission Decision)</td>
<td>30% LOU right foot</td>
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<td>15% LOU Right foot (Commission Decision)</td>
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<td>Arbitration Decision rendered; Respondent filed review; Commission modified Decision and lowered it to 15% loss of right foot; Petitioner filed appeal with Circuit Court; Circuit Court sent case back to Commission with instructions for further proceedings regarding more evidence to support lowering the original PPD award (03/2015)</td>
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**E. Circuit Court Decision**
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<tbody>
<tr>
<td>Frederick Williams v. Flexible Staffing</td>
<td>Lyne Thompson-Smith (07/24/2012) (Chicago)</td>
<td>Ruptured distal biceps tendon (surgery)</td>
<td>Mark Levin</td>
<td>6%</td>
<td>4%</td>
<td>30% Right arm (Arbitration Decision); Respondent filed review; Commissioner Charles DeVriendt decreased award; Respondent filed appeal to Circuit Court; Circuit Court affirmed; Respondent is now considering an appeal to Appellate Court</td>
</tr>
<tr>
<td>Curtis Oltmann v. Continental Tire North America</td>
<td>Joshua Luskin (01/14/2013) (Mt. Vernon)</td>
<td>Non-displaced wrist fracture (no surgery)</td>
<td>David Brown (treater) (deposed)</td>
<td>0%</td>
<td></td>
<td>5% Left hand (Arbitration Decision); Respondent filed review; Commissioner Charles DeVriendt affirmed and adopted Decision; Respondent appealed to Circuit Court; Circuit Court confirmed Decision (08/29/2014); appeal to Appellate Court (parties briefing arguments)</td>
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**F. On Appeal to Appellate Court**

<table>
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<th>Arbi.</th>
<th>Diagnosis</th>
<th>Dr.</th>
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<tbody>
<tr>
<td>Curtis Oltmann v. Continental Tire North America</td>
<td>Joshua Luskin (01/14/2013) (Mt. Vernon)</td>
<td>Non-displaced wrist fracture (no surgery)</td>
<td>David Brown (treater) (deposed)</td>
<td>0%</td>
<td></td>
<td>5% Left hand (Arbitration Decision); Respondent filed review; Commissioner Charles DeVriendt affirmed and adopted Decision; Respondent appealed to Circuit Court; Circuit Court confirmed Decision (08/29/2014); appeal to Appellate Court (parties briefing arguments)</td>
</tr>
</tbody>
</table>

**G. Appellate Court Decision**

None at this time
Toney J. Tomaso
- Partner

Toney is a partner who concentrates his practice in the areas of workers’ compensation, third-party defense of employers, workers’ compensation appeals, and protecting workers’ compensation liens.

Toney works out of the Urbana and Edwardsville offices covering a vast majority of the state of Illinois for workers’ compensation docket and trial coverage purposes. Based upon the current makeup and system put in place by the Illinois Workers’ Compensation Commission, Toney has become familiar with most, if not all, of the Arbitrators and Commissioners who have been appointed by the IWCC.

Toney takes great pride in working directly with employers and their insurance carriers in order to build an important relationship and foster a team mentality and approach to defending workers’ compensation claims. This includes consistent and constant communication and on-site meetings to enable and form the trust within the team which has proven to be an important formula in protecting the client’s most important asset -- the client’s business itself.

Significant Cases
- Land v. Montgomery - Eight week medical malpractice class action lawsuit.
- Jerry Grant v. Clennon Electric, et al., 02-WC-10537/09 MR 503

Public Speaking
- “Recent Impact of AMA Ratings in Workers’ Compensation” Heyl Royster (2013)
- “Use of Utilization Review Under the New Act” Heyl Royster (2012)
- “Opportunities for TTD Defenses” Heyl Royster (2011)
- “Arising Out Of When Should Your Case Be Arbitrated” Heyl Royster (2008)
- “Recent Developments In Workers’ Compensation” Risk and Insurance Management Society (2007)

Professional Associations
- Champaign County Bar Association
- Illinois State Bar Association
- Will County Bar Association
- Illinois Trial Lawyers Association
- Illinois Association of Defense Trial Counsel

Court Admissions
- State Courts of Illinois
- United States District Court, Central District of Illinois

Education
- Juris Doctor, Louisiana State University, 1995
- Bachelor of Arts (Golden Key Honor Society), University of Illinois, 1992

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CLOSING MEDICAL RIGHTS: THE NEW FRONTIER OF MEDICARE SET-ASIDES AND ASSIGNMENTS OF MEDICAL RIGHTS WITH TODAY’S DEFENSE STRATEGIES

Presented and Prepared by: Bradford J. Peterson
bpeterson@heyloyster.com
Urbana, Illinois • 217.344.0060

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CLOSING MEDICAL RIGHTS: THE NEW FRONTIER OF
MEDICARE SET-ASIDES AND ASSIGNMENTS OF MEDICAL RIGHTS
WITH TODAY’S DEFENSE STRATEGIES

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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.
CLOSING MEDICAL RIGHTS: THE NEW FRONTIER OF MEDICARE SET-ASIDES AND ASSIGNMENTS OF MEDICAL RIGHTS WITH TODAY’S DEFENSE STRATEGIES

I. INTRODUCTION

The failure to properly address Medicare issues in handling a workers’ compensation claim can have dire consequences. It can expose the employee, the employer, the insurer and their counsel to double damages and duplicate payment for medical bills. In addition, the claimant also risks loss of coverage for current and future medical expenses.

The Medicare Secondary Payer Act (MSPA) provides that Medicare is not to make payment for medical expenses incurred by a beneficiary where the workers’ compensation insurer is liable for the bills. By definition, Medicare is deemed a secondary payer and the workers’ compensation insurer is deemed a primary payer. In the handling of an Illinois workers' compensation claim, the Medicare Secondary Payer Act must be addressed in several different circumstances. Those circumstances include when the claimant is a current Medicare beneficiary, when Medicare has or might have paid medical bills for the work related injury and where the claimant may be deemed a future beneficiary under CMS policy and memoranda. In addition, private insurers providing Medicare Part C coverage also appear protected under the MSPA and their interests must also be protected.

II. CONDITIONAL PAYMENTS

As a secondary payer, Medicare is not to make payment for medical expenses incurred where coverage exists under workers' compensation. However, the statute further provides authority for the Department of Health and Human Services through CMS to proceed with payment of those medical expenses where the workers’ compensation insurer has not. Such payments by Medicare are deemed “conditional payment” with Medicare being entitled to reimbursement from the primary payer. The statutory authority for Medicare's lien and right to reimbursement is further codified in the Code of Federal Regulations.

Where Medicare determines that a workers’ compensation respondent will not pay promptly, the medical providers and suppliers may submit claims to Medicare. In such cases, Medicare may proceed to make a conditional payment, however, when proceeds from settlement become available, Medicare has a priority right to recovery. Generally, liens and garnishments do not attach to the proceeds of a workers' compensation settlement. An exception, however, exists with regard to the Medicare super lien. The lien is deemed a "super lien" as Medicare is not required to provide formal notice of its lien and the Medicare lien generally takes priority over other liens.
Medicare’s right to recovery of its conditional payment applies not only to the claimant but others as well. Medicare can recoup its conditional payment from the rightful primary payer or from the recipient of such payment.

If medical expenses for a compensable or disputed case are paid by Medicare, counsel will need to address the possible Medicare lien prior to settlement. Releases can be acquired through the CMS Coordination of Benefits Office which, when signed and returned, will trigger a conditional payments search by the Coordination of Benefits Office. Once they identify medical bills for which they may be entitled to reimbursement, the workers’ compensation litigants will be notified of the amount of the conditional payments claim (lien). They will not, however, identify payments made under Medicare Part C coverage.

Once the amount of the Medicare secondary payer claim is identified for past medical expenses, the amount may be negotiated or compromised as in any other disputed case. In addition, a waiver of a claim or lien may be acquired in highly disputed and questionable claims. Ultimately, the Medicare lien must be addressed at the time of settlement even on disputed claims. If not, the employer, employee, medical providers, and counsel may be subject to enforcement action and penalties by Medicare.

On January 10, 2013, the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012 (Pub. L. No. 112-242) (the SMART Act) was enacted. The SMART Act provides for reforms to the Medicare conditional payment process. CMS is now required to provide parties with binding conditional payment amounts prior to settlement and further allows for the review and appeal of conditional payment disputes. Pursuant to the SMART Act, the Secretary for the Department of Health and Human Services is required to promulgate regulations, setting forth a right of appeal and an appeals process under which workers’ compensation claimants or applicable plans may appeal the conditional payments of determination. The regulations that implement requirements under the SMART Act were published by CMS on February 27, 2015, Federal Register, Vol. 80, No. 39, 10611-10618 (February 27, 2015).

**A. Future medical benefits**

The Medicare Secondary Payer Act is not limited to prior medical expenses paid by the workers' compensation carrier or conditional payments by Medicare. Pursuant to the statute, parties may not shift the expense of future medical expenses to Medicare. When future medical expenses are anticipated, Medicare’s interests must be considered. Accordingly, cases involving current or future Medicare beneficiaries must be evaluated in light of the obligation to protect Medicare’s interests under the Medicare Secondary Payer Act. A threshold determination must be made as to whether the claimant is reasonably anticipated to incur future medical expenses for the work-related injury. In such cases, Medicare’s interests must be protected by creating a source of funds to cover the future medical expenses. CMS states:
Because Medicare does not pay for an individual’s WC-related medical services and/or prescription drugs when the individual receives a WC settlement, judgment or award that includes funds for future medical and/or prescription drug expenses, it is in the best interest of the individual to consider Medicare at the time of settlement. For this reason, CMS recommends that parties to a WC settlement set aside funds, known as WC Medicare Set-Aside Arrangements (WCMSAs) for all future medical and/or prescription drug services related to the WC injury or illness/disease that would otherwise be reimbursed by Medicare.

Medicare Secondary Payer (MSP) Manual, Ch. 1, 10.4.1.

This determination must be made when a claimant is a current Medicare beneficiary as well as when the claimant may become a Medicare beneficiary within 30 months of settlement.

B. Current Medicare beneficiaries

When a claimant is a current Medicare beneficiary, the determination must be first made whether the claimant will receive future medical treatment for the work related condition. If so, then the parties must address funding for future medical expenses. Settlement of the claim with a closure of future medical benefits, without funding for such future benefits, would be deemed an improper shifting of responsibility for future medical expense to Medicare in violation of the Act.

C. Future Medicare beneficiaries

The Center for Medicare Services has made it clear that the scope of the Medicare Secondary Payer Act expands beyond merely current Medicare beneficiaries. The Center for Medicare Services has promulgated memoranda identifying when claimants are deemed future beneficiaries such that Medicare’s interests need be considered. Generally, the issue of whether a claimant is deemed a future beneficiary is determined by whether the claimant has a "reasonable expectation" of Medicare enrollment within 30 months. Medicare has established the following factors to determine whether a reasonable expectation exists:

(a) The individual has applied for Social Security Disability Benefits;
(b) The individual has been denied Social Security Disability Benefits but anticipates appealing that decision;
(c) The individual is in the process of appealing and/or re-filing for Social Security disability benefits;
(d) The individual is 62 years and six months old (i.e., may be eligible for Medicare based upon his/her age within 30 months); or
(e) The individual has End Stage Renal Disease (ESRD) condition but does not yet qualify for Medicare based upon ESRD.
Accordingly, each workers’ compensation settlement, where future medical expenses are anticipated, must be evaluated in light of these factors. Where any of these five factors apply, Medicare’s interests must be protected with regard to future medical expenses.

III. MEDICARE SET-ASIDE ARRANGEMENTS

Medicare has not specifically limited the type of account or vehicle that parties use to create the Medicare Set-Aside arrangement. Often times Medicare Set-Aside accounts are simply FDIC insured savings accounts or interest-bearing checking accounts. Cases involving more significant expenditures for future medical expenses may involve issuance of an annuity. Furthermore, Medicare Set-Aside arrangements may be self administered by the beneficiary or a third party administrator may be retained to manage the account.

The amount of the Medicare Set-Aside should be sufficient to pay for reasonably anticipated and causally related medical bills for the life expectancy of the claimant. Effective January 19, 2013, CMS requires that Medicare Set-Asides be calculated based upon the CDC’s Table 1; life table for the total population; United States, 2008. Furthermore, funding should be based upon Medicare covered amounts for such future medical expenses.

In the event the claimant exhausts the allocated funds for future medical expenses, then Medicare will cover medical expenses thereafter, provided the MSA account has been properly accounted for and reported to CMS. Payments from such Medicare Set-Aside accounts must be reported annually to the Center for Medicare Services.

IV. CMS APPROVAL – SETTLEMENT THRESHOLDS

The Center for Medicare Services has established procedures for the review and approval or rejection of proposed Medicare Set-Aside arrangements. Proposed Medicare Set-Aside arrangements are submitted to the Medicare Coordination of Benefits Office for processing. Furthermore, Medicare has established review thresholds as to when Medicare Set-Aside arrangements should be submitted to CMS for approval.

For current Medicare beneficiaries, the Center for Medicare Services has established a $25,000 review threshold. CMS has made clear that this is only a work-load threshold as to when Medicare Set-Aside arrangements should be submitted to CMS for approval. Where the settlement is $25,000 or less, the parties still must protect Medicare’s interests with regard to a Medicare Set-Aside arrangement, however, CMS will not review Set-Asides that do not meet the review threshold.

For claims involving future beneficiaries, a CMS review is only requested for settlements exceeding $250,000. Once again, this is a work-load threshold and not a safe harbor. As such settlements of $250,000 or less must still protect Medicare’s interests. CMS will not review Set-
Asides that fail to meet the threshold. In addition, the threshold amounts do not create a requirement that the Set-Aside be submitted to CMS for review. Submission is always discretionary for the settling parties. Submission and approval by CMS, however, provides the security of knowing that the Set-Aside amount is deemed sufficient to protect Medicare's interests under the Medicare Secondary Payer Act.

The threshold amounts consist of settlement amounts including wages (TTD/PPD), attorney's fees, all future medical expenses, and any repayment of Medicare conditional payments. The amount of medical expenses previously paid as part of the claim are not considered in the threshold total. Where an annuity or structure is used as a part of a Medicare Set-Aside arrangement, the total payout under the annuity is calculated into the threshold and not merely the cost or present cash value of the annuity.

Many vendors exist that evaluate the claim and calculate the necessary amount to be funded as a part of the Medicare Set-Aside arrangement. In highly disputed cases involving significant compromise, it is possible to secure Medicare approval of the settlement even if no funds are allocated for future medical expenses in a Medicare Set-Aside account. Generally, such Medicare Set-Aside proposals are referred to as "zero set asides." Although CMS has not promulgated any policies with regard to zero set aside proposals, such proposals may be approved particularly where the disputed settlement amount is only for prior unpaid disputed medical expenses.

Where a Medicare Set-Aside proposal is rejected by Medicare, Medicare will customarily identify the sum of money that should be placed into the Medicare Set-Aside in order to properly protect Medicare's interests. Unfortunately, there is no appeal procedure for a denial of a proposed Medicare Set-Aside allocation, although one may request reconsideration of CMS's determination. Accordingly, parties are often forced to either accept the CMS proposed amount or simply proceed to arbitration.

V. FAILURE TO COMPLY AND ENFORCEMENT

Violations of the Medicare Secondary Payer Act can result in additional payment for medical expenses by the employer and/or its insurer. Where the employer/insurer fails to satisfy Medicare's conditional payments lien, the statute allows a direct private cause of action against the workers' compensation carrier for failure to make primary payment or appropriate reimbursement. Such actions may be brought within three years from the date that the service was provided. Medicare's right to seek recovery and pursue a private cause of action is not limited to actions against the workers' compensation carrier. CMS also has a right to recover its payments from any entity including a beneficiary, providers, supplier, physician, attorney, state agency or private insurer, that has received the third-party payment. CMS is further entitled to subrogate against any provider, supplier, physician, private insurer, state agency, attorney or any other entity that is entitled to payment by the third-party payer.
In addition to exposure for conditional payments, violations can also result in liability for satisfaction of future medical expenses. An additional remedy for violations results in the loss of Medicare coverage to the Medicare beneficiary for any injury-related medical expenses.

Penalty provisions of the Act further allow double damages if CMS initiates legal action to recover conditional payments and it is determined that the party attempted to intentionally shift liability to Medicare for medical expenses. As such, potential damages can become considerable where the conditional payments by Medicare are substantial.

Accordingly, the SCHIP Extension Act provides a means by which the Center for Medicare Services is able to identify all Medicare beneficiaries who are receiving workers’ compensation medical benefits and may be entitled to future medical expenses under the Illinois Workers' Compensation Act. Responsible reporting entities are also required to further report any settlement or conclusion of the claim. As such, CMS will have notice of all pending claims involving Medicare beneficiaries where medical expenses are incurred. Further, they require information as to the settlement terms. This will allow Medicare to identify those claims in which the parties are obligated to protect Medicare with regard to past and future medical expenses under the Medicare Secondary Payer Act.

VI. PROTECTING MEDICARE ADVANTAGE PLANS REGARDING CONDITIONAL PAYMENT OF MEDICAL EXPENSE

Part C of the Medicare statute allows for the creation of the Medicare Advantage Program. Medicare Advantage Organizations (MAO’s) are private insurers who contract with Medicare to provide coverage to beneficiaries. Those beneficiaries choose to obtain coverage under Part C as opposed to obtaining coverage directly from Medicare under Part A or B. The MAO’s are paid a fixed amount from Medicare for each enrollee and then directly administer benefits to the insureds. Since the Medicare Advantage Organizations are private insurers, the question arises as to whether they have the same standing as Medicare with regard to right and obligations under the Medicare Secondary Payer Act 42. U.S.C. § 1395y(b)(2).

The issue was addressed in In Re Avandia Marketing, 685 F.3d 353 (3d Cir. 2012). In Avandia, the Third Circuit Appellate Court held that Medicare Advantage plans such as Humana, had an express private cause of action, including the right to double damages against primary payers under the Medicare Secondary Payer Act. Humana, a Medicare Advantage plan, had brought suit against GlaxoSmithKline seeking recovery of medical expenses and double damages based on payments Humana had made to its enrollees for medical expenses associated with the diabetes drug Avandia. The district court originally dismissed Humana’s action; however, the third circuit reversed finding that the Medicare Secondary Payer Act in fact accorded Medicare Advantage plans a private cause of action to recover from primary payers such as GlaxoSmithKline. Humana filed a petition for certiorari before the U.S. Supreme Court which was denied.
Since the Avandia case was decided, several additional district courts have found that a private cause of action exists under the Medicare Secondary Payer Act in favor of Medicare Advantage Organizations. The most recent example occurred in *Humana Medical Plan, Inc. v. Western Heritage Ins. Co.*, 2015 U.S. Dist. LEXIS 31875 (S.D. Fla. March 16, 2015). In its March 2015 decision, the United States District Court for the Southern District of Florida held as a matter of law that *Humana*, a Medicare Advantage plan, was entitled to maintain a private cause of action for double damages against *Western Heritage Insurance* pursuant to 42 U.S.C. § 1395y(b)(3)(A).

In addition to awarding *Humana* its conditional payments claim, it further entered judgment for double damages. Mrs. Reale suffered a slip and fall at the Hamptons Condominium Complex and suffered personal injury. The Hamptons’ liability carrier, Western Heritage Insurance Co., entered into a settlement with Reale for the sum of $115,000. In the settlement agreement, Reale asserted that she had no outstanding Medicare liens. In addition, a letter from the Center for Medicare and Medicaid Services (CMS) dated December 2009, confirmed that CMS had no record of processing any Medicare claims on behalf of Reale.

Western Heritage learned prior to consummating the settlement that Humana made payments for medical expenses as a Medicare Advantage insurer. Western Heritage therefore attempted to require that Reale accept a draft with Humana also named as payee. The state court judge hearing the personal injury case ordered Hamptons to tender full payment to Mrs. Reale without including any lien holders on the draft. Reale’s counsel was ordered to hold sufficient funds in trust to resolve all medical liens.

A disputed existed as to the amount of the Humana conditional payments. When that dispute could not be resolved, Humana filed an action against Western Heritage seeking recovery of conditional payments and double damages under the Medicare Secondary Payer Act. On Motion for Summary Judgment, the court found that the Medicare Secondary Payer Act allowed a private cause of action against Western Heritage Insurance Co. thereby following the holding of the third circuit in *Avandia*. The court stated “[t]herefore, after Western Heritage became aware of payments Humana advanced on behalf of Mrs. Reale, it had an obligation to independently reimburse Humana.” *Humana*, 2015 U.S. Dist. LEXIS 31875, at *18-19. Because it didn’t, the court rules as a matter of law, Humana is entitled to maintain a private cause of action for double damages pursuant to 42 U.S.C. § 1395y(b)(3)(A) and is therefore entitled to $38,310.82 in damages.

It is therefore important in both workers’ compensation and liability cases to not only identify whether Medicare has made conditional payments, but also whether the claimant has Medicare coverage under a Medicare Part C policy. In such instances, the current case law trend suggests that an independent duty exists to protect the conditional payments made by the Medicare Advantage Organization. Unfortunately, CMS does not coordinate benefits paid by Medicare Advantage Organizations and those payments are not identified or disclosed in a traditional conditional payments search obtained through Medicare.
VII. CMS IMPLEMENTS SMART ACT REGULATIONS FOR APPEAL OF CONDITIONAL PAYMENTS DETERMINATIONS

On February 27, 2015, The United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) published in the Federal Register its final regulation implementing the requirements of the Strengthening Medicare and Repaying Tax Payers Act (SMART Act). The SMART Act required CMS to prepare regulations providing appeal rights to applicable plans with regard to CMS conditional payment demands.

The regulations became effective April 28, 2015, and the appeal rights will vest for any “initial determination” (conditional payments demand) issued on or after the effective date.

The party entitled to appeal is limited to the “applicable plan,” which is defined as the “identified debtor, with a recovery demand letter issued to the applicable plan or its agent or representative requiring repayment,” Federal Register, Vol. 80, No. 39, 10611-10618 (February 27, 2015).

The regulation sets out a four step process. That process is as follows:

1. Reconsideration

Once the conditional payments demand is received, if an objection exists to the demand, reconsideration is sought through the CMS contractor. The applicable plan will write a dispute letter to the Benefits Coordinator and Recovery Center (BCRC) outlining why certain items or charges should be eliminated. Once the letter is received by the BCRC, the next level of appeal becomes available.

2. Qualified Independent Contractor Review

If the dispute is not resolved by reconsideration with CMS contractor then the applicable plan may seek review by the designated, qualified independent contractor (QIC). If the dispute is not resolved with the QIC then further appeal may be had.

3. Adjudication by Administrative Law Judge

The next step in the appeal process is adjudication of the dispute by an administrative law judge. The process for appeal will then become much more formal and the process will become much more lengthy in terms of securing a determination. A hearing will be held before the administrative law judge and a decision will be issued thereafter. This process alone could take well over a year from the date of the initial appeal through issuance of a decision.
4. Review of ALJ Decision

If the applicable plan wishes to further appeal the determination issued by the administrative law judge, a further appeal can be pursued with the US Department of Appeals.

Once a decision is issued by the Department of Appeals, the applicable plan will have exhausted its administrative remedies and can further seek appeal to the US District Court.

VIII. CMS WITHDRAWS PROPOSED LIABILITY MSA REGULATIONS FOLLOWING REJECTION BY OMB

In July of 2014, the Center for Medicare and Medicaid Services (CMS) published Advance Notice of Proposed Rulemaking in the Federal Register regarding liability Medicare set-aside accounts in personal injury litigation. The proposed regulations set forth seven “options” which identify the cases where liability plaintiffs would be required to protect Medicare's interest under the Medicare Secondary Payer Act and set forth various alternatives on how Medicare’s interests could be protected. The proposed regulations were widely criticized for incorporating requirements such as injury severity scoring (ISS) in the required analysis. As a whole, the regulations were essentially unworkable and would have had a substantial chilling effect on settlements.

Fortunately, CMS withdrew the proposed regulations on October 8, 2014, after they were purportedly rejected by the United States Office of Management and Budget (OMB).

In 1994, CMS published regulations addressing the issue of protecting Medicare's interests on future medical expense in relation to workers' compensation claims. To date no such regulations exist in the context of liability settlements. The withdrawal of these proposed regulations may signal that CMS is going to re-evaluate its position with regard to attempts to apply the Medicare Secondary Payer Act to liability claims in relation to future medical expense. It is more likely, however, that CMS will redraft regulations in a further attempt to require personal injury litigants to protect Medicare’s interests as to future medical expense under the Medicare Secondary Payer Act. If and when such regulations are proposed, they will hopefully set forth a clear and concise standard, as well as process for compliance with the Medicare Secondary Payer Act in liability settlements. As indicated, the previous regulations, as proposed, were anything but clear and concise.

IX. SOCIAL SECURITY ADMINISTRATION PROPOSES MANDATORY REPORTING OF WORKERS’ COMPENSATION BENEFITS

The Social Security Administration has published its proposed 2016 budget, which also includes as an appendix, several legislative proposals. http://www.ssa.gov/budget/FY16Files/2016BO.pdf. The legislative agenda includes a proposal that would require states, local governments and
private insurers to report to the Social Security Administration workers’ compensation benefits that would affect the offset of social security disability benefits. The proposal states:

Current law requires SSA to reduce an individual’s Disability Insurance (DI) benefit if he or she receives workers’ compensation (WC) or public disability benefits (PDB). SSA currently relies upon beneficiaries to report when they receive these benefits. This proposal would improve program integrity by requiring states, local governments, and private insurers that administer WC and PDB to provide this information to SSA. Furthermore, this proposal would provide for the development and implementation of a system to collect such information from states, local governments and insurers.

Social Security FY2016 Budget Overview, pgs. 22-23.

When social security disability recipients also receive workers’ compensation benefits, the Social Security Administration is entitled to offset those benefits pursuant to the Social Security Act 42 U.S.C. § 424a. Generally, the Social Security Act requires that the total amount of social security disability and workers’ compensation or public disability benefit be reduced by an amount necessary to insure that the sum of the benefits does not exceed 80 percent of the individual pre-disability average current earnings. 42 U.S.C. § 424a(a).

Currently, the Social Security Administration does not have a means to independently determine whether a disability beneficiary is also receiving workers’ compensation benefits or governmental disability benefits. The Social Security Administration relies upon the beneficiary to report when they are receiving such benefits. The potential for fraud or underreporting is very apparent.

The proposal would call for the creation of a system for governments and insurers to report the nature and amount of the benefit received by the social security disability beneficiary. The proposal does not address the issue of how the insurers or governmental entities are to determine whether the claimant is, in fact, a social security disability beneficiary.

This proposal is substantially similar in principle to the MMSEA § 111 mandatory reporting requirement for reporting benefits and settlements to Medicare. While the goal of reducing fraud is certainly meritorious, the proposal will shift the burden of reporting workers’ compensation and public disability benefits from the claimant/beneficiary to government entities and workers’ compensation insurers. The burden may be increased if the Social Security Administration requires insurers and public entities to acquire releases from the claimant/beneficiaries prior to disclosure of their workers’ compensation or public disability benefit. It is likely that this proposal will receive widespread support. The proposal does not suggest an effective date; however, it is quite likely that the effective date would be approximately 12-18 months after any such legislative proposal became law.
Bradford J. Peterson
- Partner

Brad’s practice is divided between workers’ compensation, civil litigation and Medicare Secondary Payer Act compliance. He is experienced in the defense of construction and motor carrier liability, insurance coverage, workers’ compensation, and Medicare Secondary Payer Act compliance.

For over a decade Brad has had a special interest in Medicare Set-Aside Trusts and the Medicare Secondary Payer Act. He has written and spoken extensively on these issues. Brad was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers’ compensation claims: “Medicare, Workers’ Compensation and Set-Aside Trusts,” Southern Illinois Law Journal (2002). He has also closely followed developments regarding the need for Medicare Set-Aside accounts in liability cases. In 2010, his article entitled “Medicare’s Interests in Future Medical Expense Under Liability Settlements and Judgments” was published in the Illinois Bar Journal (January 2010).

Brad is a member of the Champaign County and Illinois State Bar Associations. He is a member of the National Association of Medicare Set-Aside Professionals. He served a number of terms in the Illinois State Bar Association Assembly. Brad has also been a member of the ISBA Bench and Bar Section Council and served as its Chair in 2000-2001. Brad is a member of the ISBA Workers’ Compensation Section Council where he served as Chairman in 2012-2013 and he is a past editor of the Workers’ Compensation Section Newsletter. Brad currently serves as the contributing editor of the Workers’ Compensation Report for the Illinois Defense Counsel Quarterly. Brad has spent his entire legal career with Heyl Royster beginning in 1987 in the Urbana office.

Significant Cases
- Johnson v. Daimler Chrysler Corporation, Blane Warren and Aladdin Electric - Obtained favorable settlement (structured settlement with cost in low seven figures) in negligent entrustment and product liability action involving death of an accountant with wife and two children.
- Tracy Green v. Freitag-Weinhardt - Obtained favorable settlement of workers’ compensation claim and third-party liability claim against petitioner/plaintiff’s employer. Plaintiff suffered from fractures to the T11-T12 vertebra with resulting paraplegia. Seven figure settlement reached with primary defendants and third-party liability claim as well as workers’ compensation claim resolved through workers' compensation lien waiver and partial satisfaction of future medical expense.
- Shuman v. Lauhoff Grain Company - Workers’ compensation decision for the respondent in case involving disputed hearing loss claim brought by a 37 year employee. Ruling in favor of respondent based, in part, upon proof that respondent had in place mandatory hearing protection during the entirety of petitioner’s career.
- West v. Kirkham, 207 Ill. App. 3d 954 (4th Dist. 1991) - Recognized that trial court may find plaintiff contributorily negligent as a matter of law.
- Propst v. Weir, 937 F.2d 338 (7th Cir. 1991) - Application of qualified immunity for university officials in First Amendment Retaliatory Transfer claim.

Publications
- “Appellate Court Further Restricts Employer’s Ability to Terminate Temporary Total Disability Where Employee Was Discharged for Cause,” Illinois Defense Counsel Quarterly (2015)
- “Illinois Chamber of Commerce Releases Report on Judicial Activism in Workers’

- “Are Temporary Partial Disability Benefits Subject to a Maximum Rate?,” *Illinois Defense Counsel Quarterly* (2013)

Public Speaking
- “Medicare Secondary Payer Act Compliance and Workers’ Compensation”
  Peoria County Bar Association Workers’ Compensation Seminar (2014)
- “Use of AMA Impairment Ratings in Workers’ Compensation Arbitrations”
  ISBA Workers’ Compensation Section Council Advanced Workers’ Compensation Seminar (2014)
- “Medicare Set-Asides/Conditional Payments Pitfalls and Practice Pointers”
  Heyl Royster 29th Annual Claims Handling Seminar (2014)
- “Medicare Set-Asides in Liability Settlements and Medicare Secondary Payer Act Compliance”
  Stratford Publications, National Webinar (2013)

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Professional Associations
- Champaign County Bar Association
- Illinois State Bar Association
- Illinois Association of Defense Trial Counsel
- The National Association of Medicare Set Aside Professionals

Court Admissions
- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

Education
- Juris Doctor, Southern Illinois University, 1987
- Bachelor of Science (with honors), Illinois State University, 1984

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