Below the Red Line

Heyl Royster
Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *November 2011*

A WORD FROM THE PRACTICE GROUP CHAIR

For this month's issue, I volunteered to examine the new "accident" definition that is part of the recent workers' compensation amendments which were signed into law in June 2011.

As you have probably been told, many petitioners' attorneys claim that this new legislation defining "accident" is simply a codification of existing workers' compensation case law.

We disagree.

The General Assembly used a term of legal art that should give us more room for argument in favor of a more reasonable interpretation of the claimant's burden of proof. Just as all of us should use the new AMA impairment ratings to our benefit, we need to utilize the case law defining what "preponderance of the evidence" and "burden of proof" really mean.

We will keep you informed of the success we hope to obtain in making these arguments.

All of us at Heyl Royster wish you a wonderful Holiday season filled with good cheer and much happiness!

Kevin J. Luther
Chair, WC Practice Group
kluther@heylroyster.com

Section 8.2 – Accident – 2011 Amendment

Section 1 of the Illinois Workers' Compensation Act was amended in 2011 to statutorily define who bears the burden of proof and what standard is required in the establishment of compensable accidental injuries. The statute now provides:

> To obtain compensation under this Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accident injuries arising out of and in the course of the employment.
>
> 820 ILCS 309/1(d) (June 28, 2011).

There were no other amendments with respect to the codification of this standard and no definitions were provided by the legislature.

This Month's Author:

Kevin Luther has spent his entire legal career with Heyl Royster. He started in 1984 in the Peoria office, and moved to Rockford when the firm opened that office in 1985. Kevin is currently in charge of the firm's workers' compensation practice group and is a member of the firm's board of directors. He concentrates his practice in workers' compensation, employment law, and employer liability. In addition to arbitrating hundreds of workers' compensation claims and representing numerous employers before the Illinois Human Rights Commission, he has also tried numerous liability cases to jury verdict.

Accordingly, to understand this new standard, one must understand what is meant by "a preponderance of the evidence." The dictionary definition of "preponderance" is "a superiority or excess in number or quantity." Webster's Third New International Dictionary, 1791 (1976). Webster further defines "majority" as "a number greater than half of a total." Webster's Third International Dictionary, 1363 (1976).

Illinois courts almost uniformly hold that "preponderance of the evidence" is a common phrase and requires no definition. *Chicago City Ry. Co. v. Kastrzewa,* 141 Ill. App. 10 (1st Dist. 1908); *Scerrino v. Dunlap,* 14 Ill. App. 2d 355, 144 N.E.2d 859 (1st Dist. 1957). Any terms or added language modifying "preponderance" are generally condemned. Language imposing the burden upon the plaintiff, such as stating that if the evidence preponderates in favor of the plaintiff, even slightly, the plaintiff should prevail, is error. *Wolczek v. Public Service Co. of Northern Illinois,* 342 Ill. 482, 174 N.E. 577 (1930). It is also improper to give instructions requiring the plaintiff to "establish" or "show" by a preponderance of the evidence or instruct that the jury must be "satisfied." *Rolfe v. Rich,* 149 Ill. 436, 35 N.E. 352 (1893); *Rithmiller v. Keenan,* 3 Ill. App. 2d 214, 121 N.E.2d 46 (2d Dist. 1954). Furthermore, it is error to impose a greater burden, such as the burden of "convincing" or "satisfying" the jury. *Abrahamian v. Nickel Plate Co*., 343 Ill. App. 353, 99 N.E.2d 153 (1st Dist. 1951).

When Illinois courts define the preponderance standard, "greater weight of the evidence" is the generally accepted phrasing. *Cleveland C.C. & St. L. Ry. Co. v. Trimmell,* 75 Ill. App. 585 (3d Dist. 1898). An example of a definition that courts have found acceptable is "that evidence which, in the light of all the facts and circumstances in the case, and guided by these instructions is, in your judgment entitled to the greater weight and credit." *Gleason v. Cunningham,* 316 Ill. App. 286, 44 N.E.2d 940 (4th Dist. 1942). Another court found "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it" acceptable. *Traveler's Ins. Co. v. Webster,* 251 Ill. App. 3d 46, 621 N.E.2d 242 (3d Dist. 1993).

Illinois pattern jury instructions reflect the courts' reluctance to define the term. The civil jury instruction, which acts as the basis for the criminal preponderance instruction, defines preponderance as "[w]hen I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, the proposition on which he has the burden of proof is more probably true than not true." Ill. Pattern Jury Inst. – Civ. 21.01 (2011 Ed.).

However, one Illinois court has defined the burden in terms of a percentage. The court determined that when interpreting the Illinois Public Labor Relations Act, the term preponderance, as intended in the statute, meant "majority." The court relied on Webster's definition of majority as "a number greater than half of a total" in concluding that preponderance meant greater than 50 percent. *Dept. of Cent. Mgmt. Serv. v. Illinois State Labor Relations Bd*., 249 Ill. App. 3d 740, 748, 619 N.E.2d 239 (4th Dist. 1993).

Only a small number of other states' court's decisions have defined preponderance in terms of a percentage. Like the Illinois Fourth District Court, the Pennsylvania Supreme Court and the Louisiana Appellate Court have defined preponderance as "more than 50 percent." *Wilson v. El-Daief,* 600 Pa. 161, 964 A.2d 354, FN 14 (Pa. 2009); *Lovelace v. Giddens,* 740 So.2d 652 (La. App. 2 Cir., 1999). The Oregon Supreme Court stated the traditional preponderance standard is "50+ percent." *Senn v. Merrell-Dow Pharm., Inc.,* 305 Or. 256, 270, 751 P.2d 215 (Oregon 1988).

A court would likely find that defining "preponderance of the evidence" in terms of a percentage is error. The reasoning for Illinois courts' decision not to define the term is presumably that the burden of "a preponderance of the evidence" is qualitative, not quantitative. Preponderance merely requires that the jury is inclined to believe one side more than the other. *Moss-American Inc. v. Fair Emp. Practices Comm'n,* 22 Ill. App. 3d 248, 259, 317 N.E.2d 343 (5th Dist. 1974); *Wolter v. Chicago Melrose Park Assoc*., 68 Ill. App. 3d 1011, 1017, 386 N.E.2d 495 (1st Dist. 1979). Characterizing "preponderance" in terms of a percentage could impose the same type of heightened burden that is sought to

be avoided by striking down modifying terms such as convincing or satisfying the jury, "slight" preponderance, or language requiring the plaintiff to "show" or "establish" a preponderance. A court may find that such a characterization would impose a quantum of proof that is not required by law. However, the decision of *Dept. of Cent. Mgmt. Serv. v. Illinois State Labor Relations Bd*., 249 Ill. App. 3d 740, 619 N.E.2d 239 (4th Dist. 1993), may support a definition of preponderance in terms of a percentage when interpreting a statute.

The Illinois Workers' Compensation Act and its current rules do not contain a definition of preponderance of the evidence. However, "preponderance of the evidence" has been defined as the greater weight of the evidence which renders a fact more likely than not in other areas of Illinois administrative law. 89 Illinois Administrative Code 336.20.

One section of the Illinois Administrative Code discussing "preponderance of the evidence" was examined in *Lyon v. Dept. of Children & Family Serv*., 209 Ill. 2d 264, 807 N.E.2d 423 (2004). This Appellate Court decision interpreted "preponderance of the evidence" as defined in the Administrative Code and confirmed that preponderance of the evidence is to be defined as "the greater weight of the evidence or evidence which renders a fact more likely than not."

The Illinois Supreme Court has considered the phrase "preponderance of the evidence." In *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 835 N.E.2d 801 (2005), the Supreme Court noted that "the party with the burden of persuasion must prove his or her case by a preponderance of the evidence." The Supreme Court stated that "a proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true."

In conclusion, the Illinois Workers' Compensation Act now clearly states that an employee has the burden of showing that he or she sustained accidental injuries arising out of and in the course of the employment. This burden of proof requires a showing by "a preponderance of the evidence" with facts more probably true than not true. Reviewing courts have relied on Webster's definition, which requires a "number greater than half of the total," which supports an argument that a preponderance means greater than 50 percent. Appellate courts from other states have defined preponderance as "more than 50 percent."

Two Significant Appellate Court Decisions

The Appellate Court has handed down two decisions in the past month that may impact your workers' compensation practice. The first case, *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, was decided by the Appellate Court, Workers' Compensation Commission Division, and concerns the employer's obligation to pay any undisputed portion of an award while the case is on appeal. There, the employer refused to pay undisputed portions of the claimant's benefits until the entire appeal was resolved on an unrelated issue. The employer had reviewed issues of medical expenses, TTD, and PTD to the Commission while the employee sought review of penalties/fees. Following the Commission's decision, the employer did not file any further challenges; however, the employee continued her review concerning the denial of penalties and fees. Despite not filing for further review, the employer did not tender the undisputed amounts for TTD, medical expenses, and PTD.

On appeal, the Appellate Court reversed the Commission's denial of penalties and fees and remanded the case back to the Commission for the determination of section 19(k) and (l) penalties and section 16 attorneys' fees. The Appellate Court held that any portion of the claimant's benefits which are undisputed must be

promptly paid or the employer will be subject to penalties and attorneys' fees under the Act. An employer cannot delay payment of otherwise undisputed amounts while pursuing or defending an appeal on other unrelated issues.

In *Burcham v. West Bend Mut. Ins. Co.*, 2011 IL App (2d) 101035, the Appellate Court, Second District, addressed what damages can be recovered under an uninsured motorist and underinsured motorist policy when the plaintiff has also received benefits under the Workers' Compensation Act. In that case, the plaintiff/employee was involved in an automobile accident caused by an uninsured driver. At the time of the accident, the plaintiff was driving a truck owned by his employer, P&M Mercury Mechanical Corporation. P&M paid monies to the plaintiff under its workers' compensation policy and the plaintiff filed claims under P&M's uninsured and underinsured motorists policy. When the claims were denied, he then filed a declaratory judgment action. At the time of the Appellate Court arguments, the plaintiff's workers' compensation claim was still open and awaiting a determination of permanency.

Per its workers' compensation policy, the employer paid $490,879.71 of the plaintiff's medical expenses as of January 2, 2010, an amount that had been discounted from $679,404.67. The employer also paid the plaintiff over $100,000 in temporary total disability benefits for work payments and it continued to pay him $925.11 per week in TTD weekly.

The endorsement for uninsured motorist coverage provided:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by an "accident." Central to this case, the policy also contained the following limitation provision:
>
> No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage Form, Medical Payments Coverage Endorsement or Underinsured Motorists Coverage Endorsement attached to this Coverage Part.
>
> * * *
>
> *We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law* (emphasis added).

The policy further requires the arbitration of disputes about the amount of damages. It states, in part:

> If we and an 'insured' disagree whether the "insured" is legally entitled to recover damages from the owner or driver of an 'uninsured motor vehicle' or do not agree as to the amount of damages, then the disagreement will be arbitrated.
>
> P&M's policy also has an underinsured motorist endorsement, with a limitation provision stating that the "Limit of Insurance for this coverage shall be reduced by all sums paid or payable" under "any workers' compensation, disability benefits or similar law."

Burcham v. West Bend Mut. Ins. Co., 2011 IL App (2d) 101035, ¶¶5-6.

Upon the filing of cross motions for summary judgment, the circuit court granted the motion in favor

Past issues of
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of the plaintiff and further specifically found that the plaintiff was entitled to make claims for the following elements of loss in the uninsured motorist arbitration: (1) disfigurement not awarded in his workers' compensation claim; (2) loss of a normal life; (3) increased risk of future harm; (4) pain and suffering; (5) "the discounted amount of the medical expenses totaling $188,524.96," pursuant to *Wills v. Foster*, 229 Ill. 2d 393, 892 N.E.2d 1018 (2008); and (6) loss of earnings in excess of the amount actually paid in his workers' compensation claim.

On appeal, the Appellate Court affirmed in part and reversed in part, and further entered partial summary judgment in favor of the defendant carrier. First, the Appellate Court affirmed the uncontested portions of the circuit court's order relating to pain and suffering and the increased risk of future harm. The Appellate Court also affirmed the circuit court's order requiring arbitration of the disfigurement award, finding that compensation for disfigurement was not awarded in the workers' compensation claim. The court noted that disfigurement was not yet awarded and that permanency was still open.

The Appellate Court, however, reversed the circuit court on several other aspects of its ruling. Namely, the Appellate Court reversed the award of arbitration relating to the loss of normal life, the amount of discounted medical expenses, and the loss of earnings in excess of that paid through workers' compensation. Concerning the loss of a normal life, the court found that the pattern jury instructions allow for either a loss of a normal life or disability to be awarded. The court found that the benefits paid under the Workers' Compensation Act were in truth disability and that the IPI required a choice. Since the employee had elected disability benefits, his selection met the IPI.

Concerning the medical expenses, the Appellate Court also reversed the circuit court, finding that the language of the policy precluded the plaintiff from recovery for the medical expenses already compensated for under the Act, even if that amount had been compromised. The court opined that the uninsured motorist coverage provision stated that the insurer would not pay for "any element of 'loss'" if a person was entitled to receive payment for the same element of "loss" under the Act. It deemed medical as an element and considered the benefits exclusive. Finally, the court reversed the circuit court's award of loss of earnings using the same rationale.

Please feel free to contact any of Heyl Royster's workers' compensation attorneys should you have any questions concerning this recent amendment or have any other workers' compensation needs throughout the State of Illinois..

HRVA Makes House Calls!

If you or your organization is interested in a presentation on the recent Amendments to the Workers' Compensation Act and how they will affect your claims handling, Heyl Royster would be happy to visit. To schedule your "house call" please contact:

Kevin Luther
kluther@heylroyster.com

Bruce Bonds
bbonds@heylroyster.com

Craig Young
cyoung@heylroyster.com

We look forward to stopping by!

Workers' Compensation Venues & Contact Attorneys

Heyl, Royster, Voelker & Allen

Peoria

Attorneys:
Bradford B. Ingram - bingram@heylroyster.com
Craig S. Young - cyoung@heylroyster.com
James M. Voelker - jvoelker@heylroyster.com
James J. Manning - jmanning@heylroyster.com
Stacie K. Hansen - shansen@heylroyster.com
Timothy D. Gronewold - tgronewold@heylroyster.com

Dockets Covered:
Bloomington • Galesburg • Peoria • Rock Island

Springfield

Attorneys:
Gary L. Borah - gborah@heylroyster.com
Daniel R. Simmons - dsimmons@heylroyster.com
John O. Langfelder - jlangfelder@heylroyster.com
Jeffrey G. Cox - jcox@heylroyster.com

Dockets Covered:
Decatur • Quincy • Springfield

Urbana

Attorneys:
Bruce L. Bonds - bbonds@heylroyster.com
John D. Flodstrom - jflodstrom@heylroyster.com
Bradford J. Peterson - bpeterson@heylroyster.com
Toney J. Tomaso - ttomaso@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com
Joseph K. Guyette - jguyette@heylroyster.com

Dockets Covered:
Danville • Herrin • Joliet • Kankakee
Mattoon • Mt. Vernon • Urbana

Appellate:

Brad A. Elward - belward@heylroyster.com

Dockets Covered: Statewide

Rockford & Chicago

Attorneys:
Kevin J. Luther - kluther@heylroyster.com
Brad A. Antonacci - bantonacci@heylroyster.com
Thomas P. Crowley - tcrowley@heylroyster.com
Lynsey A. Welch - lwelch@heylroyster.com
Dana J. Hughes - dhughes@heylroyster.com

Dockets Covered:
Chicago • DeKalb • Geneva • Ottawa
Rock Falls • Rockford • Waukegan
Wheaton • Woodstock

Edwardsville

Attorneys:
Daniel R. Simmons - dsimmons@heylroyster.com
James A. Telthorst - jtelthorst@heylroyster.com

Dockets Covered:
Collinsville

State of Missouri

Attorney:
James A.Telthorst - jtelthorst@heylroyster.com

Peoria
Suite 600
124 SW Adams St.
Peoria, IL 61602
309.676.0400

Springfield
Suite 575
1 N. Old State Capitol Plaza
PO Box 1687
Springfield, IL 62705
217.522.8822

Urbana
102 E. Main St.
Suite 300
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
Second Floor
120 W. State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Mark Twain Plaza III
Suite 100
105 W. Vandalia St.
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Theater District Business Center
60 W. Randolph St.
Suite 220
Chicago, IL 60601
312.762.9237

HEYL ROYSTER

Practice Groups & Contacts

Appellate Advocacy
Karen Kendall
kkendall@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business and Corporate Organizations
Brent Gwillim
bgwillim@heylroyster.com

Civil Rights Litigation/Section 1983
Brad Ingram
bingram@heylroyster.com

Class Actions/Mass Tort
Barney Shultz
rshultz@heylroyster.com

Construction
Gary Nelson
gnelson@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Insurance Coverage
Gary Nelson
gnelson@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Ed Wagner
ewagner@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Dave Sinn
dsinn@heylroyster.com

Property
Steve Heine
sheine@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Tort Litigation
Gary Nelson
gnelson@heylroyster.com

Toxic Torts & Asbestos
Barney Shultz
rshultz@heylroyster.com

Truck/Motor Carrier Litigation
Matt Hefflefinger
mhefflefinger@heylroyster.com

Workers' Compensation
Kevin Luther
kluther@heylroyster.com

Peoria
Suite 600,
Chase Building
124 S.W. Adams Street
Peoria, IL 61602
309.676.0400

Springfield
Suite 575,
PNC Bank Building
1 North Old State Capitol Plaza
PO Box 1687
Springfield, IL 62701
217.522.8822

Urbana
Suite 300
102 E. Main Street
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
2nd Floor,
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100, Mark Twain Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Theater District Business Center
60 W. Randolph St.
Suite 220
Chicago, IL 60601
312.762.9237

To learn more about the firm, visit our website
www.heylroyster.com