The Year In Review – 2016

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The past year was a busy one for the Appellate Court, Workers' Compensation Commission Division, which handles all appeals throughout the state that arise out of the Workers' Compensation Act. A total of 21 cases were released as published decisions by the court in 2016, an increase over recent years and another 12 civil appeals dealt with workers' compensation-related issues. In this special issue we highlight a few of the more significant workers' compensation decisions that might affect your claims handling. Those 2016 decisions concerning purely procedural issues are not discussed here.

AMA Impairment Ratings

Three cases were handed down in 2016 concerning section 8.1b's AMA impairment rating report provision. In *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, the appellate court held that section 8.1b did not require the claimant to obtain and introduce into evidence an AMA impairment rating report as set forth in subsection (a) of the Act. The court held that the report was optional and could be offered by either party. Moreover, it held that when a report is offered, it, and the remaining four factors of subsection (b) must be expressly discussed along with the basic facts applicable to each factor. A petition for leave to appeal to the Illinois Supreme Court was filed but denied.

In the fall of 2016, the appellate court issued two additional section 8.1b decisions. First, in *Flexible Staffing Services v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 151300WC, ¶ 22, the court confirmed that whether the Commission has adequately articulated and evaluated the section 8.1b(b) factors will be reviewed under a manifest weight of the evidence standard of review. The court also announced that it would give the Commission's findings "great deference" in its evaluation of the five factors and held that the factors enunciated in subsection (b) are not exclusive. Thus, "[T]he Commission remains free to evaluate other relevant considerations." Also, on the same day it decided *Flexible Staffing*, the appellate court issued *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152576WC, wherein it held that the Commission is not required to treat the impairment rating as the "primary factor," but instead can weigh it in consideration of all other factors.

> **For a full discussion of the facts and holdings of these three decisions, please see our December 2016, issue of *Below the Red Line* newsletter.**

"Arising Out Of"

These published decisions concerned "arising out of" analysis in cases involving an accident from what could be considered "normal daily life activities." These cases have reached similar conclusions but the analysis is quite different. With the retirement of Justice Stewart in December 2016, the court is now evenly split 2-2 on the issue; we will have to await a ruling from the current court before we can resolve this split.

In *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, the claimant, a clerk, "jammed" his wrist when he was sitting in a rolling chair and reached for a dropped pen. In denying benefits, the Appellate Court, Workers' Compensation Commission Division, held that sitting in a chair and reaching for a pen did not present an employment-related risk. Further, the court held that claimant was injured while performing an act that presented a neutral risk and the claimant failed to show he was exposed to that risk to a greater degree than the general public.

In *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, the claimant, a manager at a restaurant, injured her thumb wiping down a table. The Appellate Court, Workers' Compensation Commission Division, held that the claimant sustained an injury arising out of her employment because wiping down tables was a risk distinctly associated with her employment. The court determined the first step in analyzing whether the injury arose out of claimant's employment was to determine whether the injury was a result of an employment-related risk and, if so, it is unnecessary to apply a neutral-risk analysis.

In *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, the claimant was injured while bending down to pick up a bolt that fell on the ground. The Appellate Court, Workers' Compensation Commission Division, held that the claimant sustained an injury arising out of his employment while performing an activity of daily living when the claimant showed he sustained the injury as a result of an employment-related risk. Although the claimant was performing an activity of daily living, the court held that it was unnecessary to perform a neutral risk analysis when the injury was sustained while performing an integral part of the claimant's job duties.

> **For a full discussion of the facts and holdings of *Noonan*, please see our November 9, 2016, Workers' Compensation e-clip, "Recent Decision Addresses What Constitutes 'Incidental to Employment' in 'Arising Out Of' Analysis."**

Exclusive Remedy Provision & *Kotecki*

In *Locasto v. City of Chicago*, 2016 IL App (1st) 151369, the Appellate Court, First District, held that the exclusive remedy provision of Section 5(a), prohibited the claimant firefighter from bringing a civil suit for an intentional tort against his employer where he also filed a workers' compensation claim and collected benefits on the premise that the injury was accidental. Under these circumstances, the court held the claimant was barred from later asserting the conduct complained of was intentional.

> **For a full discussion of the facts and holdings of *Locasto*, please see our Workers' Compensation e-clip, "It's No Accident: Workers' Compensation Act Recovery Bars Civil Tort Claim."**

In *Burhmester v. Steve Spiess Constr., Inc.*, 2016 IL App (3d) 140794, the Appellate Court, Third District, reaffirmed that the *Kotecki* Doctrine – providing that limited contribution may be recovered against an employer in a third-party claim – is limited to the amount paid or to be paid in worker's compensation benefits. The court held *Kotecki* was not an affirmative defense that must be plead, but should be viewed as a set-off that the employer could show post-judgment that it was entitled to take against the judgment already entered against it.

Independent Contractors

In *Esquinca v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150706WC, the claimant, a truck driver for a transportation company in the business of warehousing, yard storage, truck brokering and intermodal freight transport, was injured in a multi-vehicle accident while delivering a load for the respondent. The claimant argued he was an employee and thus entitled to workers' compensation benefits. The arbitrator denied the claim and the Commission affirmed 2-1. The appellate court upheld the Commission majority decision finding that the numerous factors supported the conclusion the claimant was an independent contractor. The claimant worked under a contract identifying him as an independent contractor; the alleged employer did not have the right to control the claimant's work performance or route; although the claimant had to deliver each shipment on time, he decided his own schedule and where to stop and refuel; the claimant was free to decline jobs; and the claimant owned his own truck and was responsible for all operational expenses associated with the truck, as well as speeding tickets and driving citations. Finally, the claimant was not paid hourly, but received 70-75 percent of each shipment.

Permanency Benefits

In *Jackson Park Hosp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, the Appellate Court, Workers' Compensation Commission Division, held that the claimant was entitled to a wage differential award even though the claimant was earning the same amount of wages pre-injury as post-injury. The court held that other factors must be considered in determining whether the claimant sustained an impairment of earning capacity including the nature of the employment in comparison to the wages that could be earned in a competitive job market. In considering that claimant would be unable to obtain a job at her pre-injury wages in a competitive job market, the court held the claimant was entitled to wage differential benefits rather than a person-as-a-whole award because she sustained an impairment in earning capacity.

For a full discussion of the facts and holdings of *Jackson Park Hospital*, please see our March 2016 *Below the Red Line* newsletter.

In *Chlada v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150122WC, claimant, injured in a work-related accident and unable to return to his pre-injury employment, was awarded wage differential benefits due to an impairment in his earning capacity. After sustaining a second work-related injury which rendered the claimant totally disabled, the Appellate Court, Workers' Compensation Commission Division, held that claimant could collect wage differential benefits and permanent total disability benefits simultaneously because they placed the claimant at his original average weekly wage, subject to applicable max rates. The claimant's wage differential benefits do not terminate unless the claimant's disability is lessened.

For a full discussion of the facts and holdings of *Chlada*, please see our August 2016 *Below the Red Line* newsletter.

Section 19(g) Proceedings

Two cases were decided on the scope of a section 19(g) proceeding to enter judgment on a Commission decision. In *Foster v. Mitsubishi Motors of North America, Inc.*, 2016 IL App (4th) 160199, the appellate court upheld the circuit court's entry of judgment on a Commission award in a case where the arbitrator had mistakenly made a weekly death benefit award in excess of the statutory maximum weekly benefit amount. The mistake was not caught by the parties and was not appealed. The employer paid the statutory amount rather than the stated award. Years later, when the claimant was trying to resolve her lien in the personal injury claim, the underpayment was discovered. The court entered judgment and found the sole means to attack the award was through a direct appeal to the circuit court or a motion to correct error.

In *Reed v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 130681, the appellate court dismissed the claimant's section 19(g) petition on the ground the Commission's decision was still on appeal. The employer had appealed only a part of the award and was not appealing that portion relating to the award of medical benefits. The court held that the appeal process must be complete before a section 19(g) proceeding may be filed, even though the employer was not contesting the medical portion of the award.

Set-Offs

In *Bayer v. Panduit Corp.*, 2016 IL 119553, the Supreme Court held that Section 5(b) of the Workers' Compensation Act required an employer to pay 25 percent of the gross amount it obtained in reimbursement, (including the value of future medical services, as attorney fees, absent any other agreement). The Court held that when the employer's obligation to pay benefits is cut off by settlement or a judgment against a third party, the employer receives a benefit from the third-party litigation and is relieved of having to make payments. However, the employer's financial obligations to the employee remain unchanged under the Act and, but for the third-party recovery, the employer would have been obligated to pay future medical.

Traveling Employees

In *Allenbaugh v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150284WC, the claimant, a patrol police officer employed by the City of Peoria, was injured in an auto accident while *en route* to the police station for mandatory training. The officer's normal shift began in the mid-afternoon, but his training required him to report at 8:00 a.m. The arbitrator found the claim compensable on the basis that the officer was ordered to perform mandatory training outside his normal work hours. The Commission reversed and its decision was upheld on appeal. The appellate court found that the claimant was not under the control of the employer at the time he was injured and the fact that the training occurred outside his usual hours of employment had no impact on the analysis. Moreover, the court rejected the claimant's contention that he was a traveling employee, finding that he was merely commuting to work at the time of his accident. The court held that the traveling employee doctrine should not be extended to include any claimant who is in an accident while on their way to work, driving a personal vehicle, without any further compensation for his time and travel, and while not performing any duties incidental to their employment solely because the claimant's regular work shift was different for that particular day.

In *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 151693WC, the claimant was a flight attendant who worked a route out of LaGuardia in New York but lived in Colorado. The claimant departed Colorado for New York dressed in her flight attendant uniform, which she used to get preferential boarding, and was injured while on the flight. She was not working as a flight attendant at the time, but was utilizing the airlines free leisure travel standby status. The claimant was not paid for this travel and was not reimbursed for any expenses. The Commission's decision to deny benefits, although reversed by the circuit court, was affirmed on appeal. The appellate court concluded that the claimant was merely commuting to work and was not a traveling employee at the time of her accident. United had no control over where the claimant decided to live and derived no benefit from her choice to live in Colorado.

Voluntary Recreational Programs

In *Calumet School Dist. #132 v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 153034WC, the appellate court upheld the Commission's decision to find a school teacher's injury while playing basketball after school a compensable accident. The teacher testified that he was not required to participate and was not compensated for participation in the after-school games, but due to the fact he had not yet had his contract renewed or his employment review, he nevertheless felt compelled to participate. The employer had presented testimony that the teacher was not required to participate and that his refusal to participate would not have adversely affected his job or review. The appellate court found that the claimant was not engaged in a voluntary recreational program under section 11 of the Act and concluded that the claim was compensable.