

# SURVEY OF ILLINOIS LAW: WORKERS' COMPENSATION

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## I. INTRODUCTION

Workers' compensation law has seen several changes since our last survey update in 2002.<sup>1</sup> Most prominent have been the 2005 amendments, which saw increases in the value of scheduled benefits,<sup>2</sup> the addition of various cost-saving procedures (namely, the establishment of utilization review boards<sup>3</sup> and medical fee schedules<sup>4</sup>), anti-fraud legislation,<sup>5</sup> and the creation of an additional Commission review panel<sup>6</sup> to expedite the resolution of workers' compensation cases. Another significant matter has been the evolving impact of the Medicare Second Payer Act,<sup>7</sup> which without question adds to the complexity in settling worker's compensation cases. While the topic of MSAs was thoroughly discussed in one of our earlier survey volumes,<sup>8</sup> there have been numerous noteworthy developments since its publication in 2002. However, this topic is beyond the scope of this article and will not be discussed in detail.<sup>9</sup>

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1. Bradford Peterson, *Survey of Illinois Law: Summary of Medicare, Workers' Comp., and Set-Aside Trusts*, 26 S. ILL. U. L.J. 713 (2002). The last full survey was in 1997. See Robert B. Ulrich and Scott A. Carlson, *Survey of Illinois Law: Workers' Comp. Law*, 21 S. ILL. U. L.J. 931 (1997).
2. 820 ILL. COMP. STAT. ANN. 305/8(b) 4.1, 4.2, 8(c) (West 2009).
3. *Id.* at 8.7.
4. *Id.* at 8.2.
5. *Id.* at 25.5.
6. *Id.* at 13. Section 13 adds a third panel and brought the total number of Comm'ners up to ten, including the Chairman. The third panel is referenced as Panel C.
7. 42 U.S.C.A. §1395y(b) (West 2009).
8. Bradford Peterson, *Survey of Illinois Law: Summary of Medicare, Workers' Comp., and Set-Aside Trusts*, 26 S. ILL. U. L.J. 713 (2002).
9. See James Voelker, ILLINOIS WORKERS COMP. PRACTICE Ch. 12, "Medicare Secondary Payer Statute" (ICLE 2009).

This survey article discusses the 2005 amendments to the Act and further provides an overview of the more significant appellate and supreme court cases in workers' compensation law that have been handed down between January 1, 2006, and December 31, 2009. The cases are discussed according to recognized topics rather than in a chronological fashion. The survey also provides a short overview of the appellate review process in Illinois for workers' compensation cases.

## II. THE WORKERS' COMPENSATION APPEAL PROCESS

The appeal process in workers' compensation cases differs from the traditional civil appeal in that there is one appellate court tasked with deciding all cases concerning workers' compensation issues. By its constitution, Illinois has a single appellate court, which has been divided by legislation into five appellate districts.<sup>10</sup> As practitioners are well aware, this means that Illinois common law can develop with various nuances depending upon which district hears the case. In workers' compensation, however, all appeals from the circuit court, regardless of the judicial district in which the circuit court sits, are heard by a special division of the Appellate Court, designated as the Illinois Workers' Compensation Commission Division.<sup>11</sup> This court is comprised of five members, one justice from each of the five districts, who are selected by the Supreme Court justice of that district to serve on the Commission Division.<sup>12</sup> The special division was created in 1984<sup>13</sup> by the Illinois Supreme Court in an effort to promote consistency in the law of workers' compensation and to provide for speedier resolution of cases. Prior to that time, all cases enjoyed an automatic direct appeal to the Illinois Supreme Court.

There were 82 workers' compensation cases published during the run of this survey, with the highest number, 24 decisions, occurring in 2005, and the lowest number, 12, occurring in 2006.<sup>14</sup> In the most recent year for which statistics are available, 2008, the Division issued 13 published decisions.<sup>15</sup> As with the various appellate court districts, the majority of the Illinois Workers'

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10. ILL. CONST. Art. 6, § 4.

11. ILL. S. CT. R. 22(g).

12. At the time of writing, the five members of the Court are: Justice Thomas Hoffman, First District; Justice Donald Hudson, Second District; Justice William Holdridge, Third District; Presiding Justice John C. McCullough, Fourth District; and Justice James Donovan, Fifth District. Each justice has a designated alternate as well.

13. ILL. S. CT. R. 22(g).

14. 2008 Case Load and Statistical Records: Appellate Court of Illinois, pp. 2, 3.

15. *Id.* p. 3.

Compensation Commission Division's cases are disposed of through unpublished Rule 23 orders.<sup>16</sup> Per Rule 23, these orders are not to be cited and have no precedential value.<sup>17</sup> Of particular interest, of the 24 published opinions in 2005, twelve decisions affirmed the circuit court, one reversed, six affirmed in part/reversed in part, four reversed and remanded and one vacated.<sup>18</sup> Moreover, of the unpublished decisions, 63 circuit courts' decisions were affirmed, three were reversed, and twelve were affirmed in part/reversed in part.<sup>19</sup>

While the enactment of Supreme Court Rule 22(g) has had the effect of making the appellate court the primary body responsible for formulating Illinois law in workers' compensation, Supreme Court review is still possible under the special provisions of Supreme Court Rule 315(a).<sup>20</sup> Under Rule 315(a), a party seeking Supreme Court review of a decision of the Appellate Court Illinois Workers' Compensation Commission Division, must first petition the appellate court and request a finding by at least two members of the court that the case involves a question of importance and that review by the supreme court is warranted.<sup>21</sup> According to statistics, only 26 cases were certified by the appellate court since 2006.<sup>22</sup> Of these 26 cases, the Supreme Court allowed only eight appeals.<sup>23</sup> Rule 315(a) was amended in 2006 to increase the number of justices required for certification from one to two.<sup>24</sup>

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16. For example, in 2008, there were 13 published opinions and 105 Rule 23 orders issued by the Appellate Court, Workers' Comp. Comm'n Division, and three cases disposed of by summary order out of 166 dispositions. The Division began 2008 with 115 cases pending and ended with 199 cases pending. See [http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008\\_Acaseload.pdf](http://www.state.il.us/court/SupremeCourt/AnnualReport/2008/StatsSumm/2008_Acaseload.pdf) (last visited March 31, 2010).

17. ILL. S. CT. R. 23.

18. 2005 Case Load and Statistical Records: Appellate Court of Illinois, pp. 2, 3.

19. *Id.* at p. 3.

20. ILL. S. CT. R. 315(a).

21. ILL. S. CT. R. 315(a). The request must be made in writing and within 21 days of the appellate court decision. *Id.* It is typically joined with a petition for rehearing. A request made after the denial of rehearing will not be considered.

22. Elward, Brad. A., *Judicial Reviews and Workers' Comp. Comm'n Decisions*, IDC Defense Update, Workers' Comp., Vol. 10, No. 4, p. 5 (June 2009).

23. *Id.*

24. ILL. S. CT. R. 315(a), amended Oct. 2, 2006.

### III. THE 2005 AMENDMENTS

On July 20, 2005, the Workers' Compensation Act was amended, bringing significant changes to the Act which resulted from an extended negotiation between labor and business.<sup>25</sup> While there were several changes, only the most significant provisions of the Amendments are discussed below.<sup>26</sup>

#### A. Benefits Increased

Perhaps the most significant of all of the amendments were those increasing the benefits available to injured workers. First, the amendments increased the minimum compensation rates for total temporary disability ("TTD") and permanent partial disability ("PPD") to 66 2/3 percent of the higher of the federal minimum wage or the Illinois minimum wage, multiplied by 40 hours.<sup>27</sup> That rate is increased by 10 percent for each spouse and child, not to exceed 100 percent of the total minimum wage calculation, or the employee's average weekly wage. The maximum rate for section 8(d)(1) wage differential payments was also increased to equal 100 percent of the statewide average weekly wage.<sup>28</sup>

Scheduled benefits under section 8(e) were increased by approximately 7.5 percent across the board, effective February 1, 2006. To illustrate, the maximum number of weeks payable for a thumb injury increased from 70 weeks to 76 weeks, and the maximum number of weeks payable for an arm injury increased from 235 weeks to 253 weeks.<sup>29</sup> Death benefits under section 7(f) and 8(b) were increased as follows: burial expenses increased from \$4,200 to \$8,000 and the maximum death benefit increased from the greater of \$250,000 or 20 years to the greater of \$500,000 or 25 years.<sup>30</sup>

The amendments further addressed maintenance benefits and established that the minimum maintenance benefit for vocational rehabilitation shall not be less than the employee's TTD rate. Maintenance shall also include costs and expenses incidental to the vocational rehabilitation program.<sup>31</sup> Finally,

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25. Pub. Act. 94-0277 (began as House Bill 2137).

26. For a good summary of all of the 2005 amendments, see <http://www.iwcc.il.gov/HB2137.pdf>. The amendments also changed the name of the Illinois Industrial Commission to the Illinois Workers' Compensation Commission, which can be seen in this article as the title of the cases change.

27. 820 ILL. COMP. STAT. ANN. 305/8(b) 4.1, 4.2, 8(c) (West 2009).

28. *Id.* 8(b).

29. *Id.* at 8(e).

30. *Id.* at 7(f).

31. *Id.* at 8(a).

section 8(a) was amended to provide for temporary partial disability (“TPD”) benefits. Thus, when an employee is working light duty on a part-time or full-time basis and is earning less than he would have earned if fully employed, he can receive TPD at two-thirds of the difference between the average amount the employee would be able to earn in the full performance of his duties in the occupation he was engaged in at the time of the accident and the net amount he was earning in the modified job.<sup>32</sup>

#### B. Medical Fee Schedule

Section 8.2 of the Act now establishes a medical fee schedule, which sets forth the maximum allowable payment for medical treatment and procedures covered by the Act.<sup>33</sup> Under the new schedule, the employer is obligated to pay the lesser of the actual bill or the fee set by the schedule.<sup>34</sup> The fee schedule sets fees at 90 percent of the 80th percentile of actual charges within a geographic area based on geozip<sup>35</sup> and uses information provided by a national database. Part and parcel with the fee schedule is the creation of a Workers' Compensation Medical Fee Advisory Board, which is responsible for setting appropriate fees.<sup>36</sup>

#### C. Utilization Review Program

The amendments also introduced the concept of utilization reviews as a means to contain costs and to challenge allegedly unreasonable medical charges or procedures.<sup>37</sup> Section 8.7 sets forth the exact procedures to be followed.<sup>38</sup> The Commission is to consider the utilization review along with all other medical evidence in determining whether the proposed care or services are reasonable and necessary.

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32. *Id.* at 8(a).

33. *Id.* at 8.2.

34. *Id.*

35. A “geozip” is defined as a geographic area with the same first three digits of a zip code.

36. 820 ILL. COMP. STAT. ANN. 305/8.3 (West 2009).

37. *Id.* at 8.7.

38. *Id.*

#### D. Commission Processes

Section 13 of the Act was amended to increase the number of Commissions from seven to ten and to create a third panel of Commissioners to hear cases. The new panel was intended to provide for a speedier determination and resolution of workers' compensation cases.

#### E. Penalties

Sections 19(k) and (l) of the Act provide for penalties where the employer unreasonably and vexatiously delays payment of benefits. The 2005 amendments added more bite to section 19(l), increasing the per day penalty from \$10 per day to \$30 per day and increasing the maximum penalty under section 19(l) from \$2,500 to \$10,000.<sup>39</sup> Section 19(k), however, was amended to require the Commission, when evaluating penalties, to consider whether an arbitrator has determined the claim is not compensable or whether the employer has made payments under section 8(j) of the Act.<sup>40</sup>

#### F. Fraud

A new section 25.5 entitled "unlawful acts" was also added directed at employee and employer fraud arising out of or during the workers' compensation claim.<sup>41</sup> Section 25.5 sets forth a list of prohibited activities, including but not limited to intentionally presenting or causing to be presented any false or fraudulent claim for the payment of any workers' compensation benefits<sup>42</sup> and making false material representations.<sup>43</sup> Any person convicted of fraud related to workers' compensation is deemed ineligible to receive benefits under the Act relating to that claim, whether past or future.<sup>44</sup>

Amendments to section 4 of the Act further gave the Commission the authority to issue a work-stop order to any employer found by a panel of three Commissioners (one labor, one business, and one public) to have knowingly failed to provide insurance coverage.<sup>45</sup> The work-stop order can be lifted upon proof of insurance.

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39. *Id.* at 19(l).

40. *Id.* at 19(k). *See also* 820 ILL. COMP. STAT. ANN. 305/8(j) (West 2009).

41. *Id.* at 25.5.

42. *Id.* at 25.5(a)(1).

43. *Id.* at 25.5(a)(2)-(8).

44. *Id.* at 25.5(f).

45. *Id.* at 4(d).

### G. Balance Billing Prohibited

Two important provisions concerning medical benefits are found in section 8.2(d) and 8.2(e) of the Act. First, section 8.2(d) states that when an employer notifies a medical provider that the treatment is for a work-related injury, the provider shall bill the employer directly. Moreover, a medical provider is prohibited from holding an employee liable for costs related to non-disputed services and cannot bill or attempt to recover from the employee the difference between the provider's charge and the amount paid by the employer on a compensable injury.

Second, section 8.2(e) provides that if an employee informs the medical provider that the claim is compensable, the provider must cease all efforts to collect payment from the employee. This section further tolls any statute of limitations or repose applicable to the medical provider's collection claim until the date the provider is permitted to resume collection.

### H. Vocational Rehabilitation Certification

The amendments further alter the required qualifications for vocational rehabilitation counselors and mandate that any counselor who provides services under the Act have appropriate certifications that designate that he is qualified to render opinions relating to vocational rehabilitation. Vocational rehabilitation is defined as including but not limited to "counseling for job searches, supervising a job search program and vocational retraining including education at an accredited learning institution."<sup>46</sup>

## IV. JURISDICTION AND THE EMPLOYER-EMPLOYEE RELATIONSHIP

Two initial steps in evaluating a potential workers' compensation claim are ensuring jurisdiction in Illinois and establishing the existence of an employer-employee relationship. Issues of jurisdiction typically arise where an employee is injured outside the State of Illinois<sup>47</sup> or in circumstances where other statutes, such as the federal Longshore and Harbor Workers'

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46. *Id.* at 8(a).

47. *Mahoney v. Indus. Comm'n*, 355 Ill. App. 3d 267, 823 N.E.2d 110 (1st Dist. 2005).

Compensation Act<sup>48</sup> (LHWCA) are implicated.<sup>49</sup> Questions affecting the employer-employee relationship typically arise when dealing with independent contractors, such as cab drivers, trucking companies, or construction workers.

#### A. Jurisdiction—Accidents Outside the State

In *Mahoney v. Industrial Commission*,<sup>50</sup> the appellate court evaluated a Commission decision which had dismissed the claimant's application on the ground that Illinois lacked jurisdiction over the claim. The claimant, who had entered into an employment contract with United Airlines in Chicago, Illinois, was voluntarily transferred to Orlando, Florida, where he was subsequently injured.<sup>51</sup> The claimant filed for workers' compensation benefits in Illinois and the Commission, applying a totality of the contacts standard, found that the claim resided in Florida.<sup>52</sup>

The appellate court held that, in cases where the accident occurred outside the State of Illinois, the site of the contract of hire is the exclusive test for determining the applicability of the Illinois Act. The court's decision overruled two prior cases—*Carroll v. Industrial Commission*<sup>53</sup> and *United Airlines v. Industrial Commission*<sup>54</sup>—which had applied a multi-factored test that examined a host of contacts with the forum.<sup>55</sup> Under *Carroll* and *United Airlines*, the *situs* of the employment contract was just one of several considerations, which also included: (1) the continuity of the employment between the time of the contract and the time of injury; (2) whether the employment transfer from Illinois was voluntary; (3) the length of time between the employee's departure from Illinois and the injury; and (4) the significance of the employee's contact with Illinois following his departure from Illinois.<sup>56</sup> Because the claimant had entered into his employment contract in Illinois, the court found that the Illinois Act applied.

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48. 33 U.S.C.A. § 901 (West 2009).

49. See, e.g., *Federal Marine Terminals, Inc. v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 1117, 864 N.E.2d 838 (1st Dist. 2007).

50. *Mahoney v. Industrial Commission*, 355 Ill. App. 3d 267, 823 N.E.2d 110 (1st Dist. 2005).

51. *Id.* at 268, 823 N.E.2d at 111–12.

52. *Id.* at 268, 823 N.E.2d at 112.

53. *Carroll v. Indus. Comm'n*, 205 Ill. App. 3d 885, 563 N.E.2d 890 (1st Dist. 1990).

54. *United Airlines v. Indus. Comm'n*, 252 Ill. App. 3d 972, 627 N.E.2d 1104 (1st Dist. 1993).

55. *Mahoney*, 355 Ill. App. 3d at 269, 627 N.E.2d at 112.

56. *Id.*



## B. Injuries on Waterways

Three cases during the survey period addressed a claim potentially arising under both the Illinois Workers' Compensation Act and the federal Longshore and Harbor Workers' Compensation Act<sup>57</sup> ("LHWCA"). In such cases, the critical question is often whether the employee's state workers' compensation claim is preempted by the federal legislation. In *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Commission*,<sup>58</sup> the claimant injured his left knee while tripping over a piece of wood in a dark warehouse. The claimant worked for Federal Marine as a warehouse manager. The issue presented was whether the doctrine of conflict preemption applied and resulted in the LHWCA preempting application of the Illinois Act.<sup>59</sup>

Under the conflict preemption doctrine, federal law applies over state law where application of the state act results in the employer facing greater liability than under the federal law.<sup>60</sup> Federal Marine, relying on the doctrine of conflict preemption, maintained that the claimant's right to recover benefits in this case rested exclusively in the Federal courts under the LHWCA. Federal Marine asserted that conflict preemption may be applied in situations where state law acts as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting a Federal statute.<sup>61</sup> It argued that, if the claimant is allowed to recover under the Workers' Compensation Act in this case, its liability would be increased due to an inability to avail itself of the benefits of the Federal Second Injury Fund.<sup>62</sup> Moreover, according to Federal Marine, its ability to obtain relief under the Illinois Second Injury Fund created pursuant to section 7(f) of the Act is far more difficult than its ability to obtain relief under the Federal Second Injury Fund.<sup>63</sup>

The appellate court held that the preemption doctrine did not apply simply because Federal Marine might not have the ability to fully recoup the payments from a Second Injury Fund.<sup>64</sup> The court held:

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57. 33 U.S.C.A. § 901 (West 2009).

58. *Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Commission*, 371 Ill. App. 3d 1117, 864 N.E.2d 838 (1st Dist. 2007).

59. *Id.* at 1123, 864 N.E.2d at 843.

60. *Id.*

61. *S. Pac. Transp. Co. v. Pub. Utility Comm'n of the State of Oregon*, 9 F.3d 807, 810 (9th Cir. 1993).

62. *Federal Marine Terminals*, 371 Ill. App. 3d at 1123, 864 N.E.2d at 843.

63. 820 ILL. COMP. STAT. ANN. 305/7(f) (West 2009).

64. *Federal Marine Terminals*, 371 Ill. App. 3d at 1124–25, 864 N.E.2d at 844–45.

We, however, reject the notion that permitting recovery under the Act for a land-based injury, even under circumstances where an employer is unable to avail itself of the LHWCA's more liberal second injury fund benefits, would in any way act as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the 1972 amendments to the LHWCA.<sup>65</sup>

Failing to find either doctrine applicable, the court found that there was no jurisdiction under the Illinois Act and that the LHWCA had exclusive jurisdiction.<sup>66</sup>

In *Uphold v. Worker's Compensation Commission*,<sup>67</sup> the court addressed the analysis for determining whether the LHWCA applied to an employee for land-based injuries. According to *Uphold*, in determining whether the LHWCA applies to a particular employee, a dual inquiry is used. First, a court must determine if the employee was working on navigable waters at the time of his injury.<sup>68</sup> If so, and the employee establishes the remainder of the LHWCA's requirements, jurisdiction falls under federal law. If the worker was not injured on navigable waters, he must then meet the "situs" and "status" requirements established in the post-1972 version of the LHWCA to obtain coverage under federal law. An employee meets the "situs" requirement by establishing that his injury occurred at one of the locations enumerated in section 903(a) of the LHWCA;<sup>69</sup> he likewise satisfies the "status" requirement by showing that he was engaged in "maritime employment" at the time the injury was sustained.<sup>70</sup>

Federal law sets forth a multi-part test to determine whether an employee is injured upon the actual navigable waters under the pre-1972 version of the LHWCA.<sup>71</sup> In order to satisfy the test, the employee must show: (1) that he did not fall within the category of employees excluded from coverage; (2) that his injury arose out of and in the course of his employment; (3) that he was employed by an employer who had at least one worker employed in maritime employment upon the navigable waters of the United States; and (4) that his disability or death resulted from an injury occurring upon the navigable waters

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65. *Id.* at 1125, 864 N.E.2d at 845.

66. *Id.*

67. *Uphold v. Indus. Comm'n*, 385 Ill. App. 3d 567, 896 N.E.2d 828 (5th Dist. 2008).

68. *Id.* at 580, 896 N.E.2d at 840.

69. 33 U.S.C.A. § 903(a) (West 2009).

70. 33 U.S.C.A. § 902(3) (West 2009).

71. *Uphold*, 385 Ill. App. 3d at 580, 896 N.E.2d at 840.

of the United States.<sup>72</sup> According to the appellate court, the claimant satisfied the federal requirements<sup>73</sup> and established jurisdiction under the LHWCA.

The more crucial question, the court noted, was whether the employee was covered under the Illinois Act. The claimant argued that his claim fell within the “twilight zone” doctrine because, although he was injured while on navigable waters, his position was “maritime but local.” Accordingly, jurisdiction would be proper under either federal law or state law. As the appellate court explained, the “twilight zone” doctrine applies to areas in which there are “doubtful and difficult factual questions.”<sup>74</sup> The boundaries of the “twilight zone” are defined by exclusion and the doctrine “does not apply to employees who are engaged in traditional maritime employment and are injured over navigable waters.”<sup>75</sup> In contrast, a claim falls within the “maritime but local” doctrine if the worker's injury occurs upon the navigable waters of the United States, the injured worker's employment has no direct connection to navigation or commerce and the application of local law would not materially affect the uniformity of maritime law.<sup>76</sup>

The appellate court concluded that the claimant's employment did not fall within either the “twilight zone” doctrine or the “maritime but local” doctrine. First, because the case was not a “doubtful” case, it did not fall within the “twilight zone.”<sup>77</sup> Employees injured over navigable waters fall outside the “twilight zone” and jurisdiction under the LHWCA is exclusive.<sup>78</sup> At the time of his injury, the claimant was engaged in ship repair upon navigable waters, which is a traditional maritime activity. The fact that the claimant was merely preparing the ship for repair did not convert this matter into a “twilight zone” case.

Second, the court rejected application of the “marine but local” doctrine because the claimant failed to establish that his employment lacked a direct connection to navigation or commerce and that the application of local law

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72. *Id.* at 580, 896 N.E.2d at 840–41.

73. According to the opinion, the claimant was not excluded from coverage under the LHWCA and the arbitrator determined that the claimant's injury arose out of and in the course of his employment. Moreover, the claimant was employed by an employer who has at least one worker employed in maritime employment upon the navigable waters of the United States. Finally, the claimant's injury occurred upon the navigable waters of the United States because at the time of the accident, the claimant was aboard a vessel floating in the Mississippi River. *See Wells v. Indus. Comm'n*, 277 Ill. App. 3d 379, 660 N.E.2d 229 (1st Dist. 1995).

74. *Uphold*, 385 Ill. App. 3d at 580, 896 N.E.2d at 841; *Wells*, 277 Ill. App. 3d at 383, 660 N.E.2d 229.

75. *Uphold*, 385 Ill. App. 3d at 580, 896 N.E.2d at 841–42 (citing *Wells v. Indus. Comm'n*, 277 Ill. App. 3d at 383).

76. *Id.* at 581–82, 896 N.E.2d at 841–42.

77. *Id.*

78. *Id.* at 582, 896 N.E.2d at 842.

would not materially affect the uniformity of maritime law.<sup>79</sup> Although the claimant was not a longshoreman, ship repair has also been classified by the United States Supreme Court as a traditional maritime activity.<sup>80</sup> Similarly, the fact that the vessels upon which the claimant worked were somehow connected to land did not make his employment land based.<sup>81</sup> Finally, there is no requirement that the vessel upon which the employee works be moving. It is sufficient that the claimant worked upon the navigable waters of the United States.<sup>82</sup>

Most recently, in *National Maintenance & Repair v. Illinois Workers' Compensation Commission*,<sup>83</sup> the appellate court evaluated whether the claimant's accident, which occurred on a "plant barge," was compensable under the LHWCA or the Illinois Act.<sup>84</sup> There, the claimant injured his hand when an I-beam fell on his hand while working on a "plant barge" on the Mississippi River. According to the evidence, the "plant barge" was held in place by mooring lines connected to the shore and a "spud," which was a two-foot-square tube that ran vertically through the barge and into the bottom of the river.<sup>85</sup> Electrical power was supplied to the barge by lines run from the shore and a ramp permitted vehicles to be driven onto the barge. The barge floated on the river, but had no motor or navigational system. While it was possible to tow the barge, it had not been moved since it was put in place five or six years earlier.

The Commission found that the barge was a land-based facility and awarded benefits.<sup>86</sup> On appeal, the appellate court affirmed, finding that, while the injury took place in the course of maritime activities, it did not occur on a navigable body of water. The appellate court noted that "a watercraft will be considered a vessel within the meaning of the LHWCA so long as it is capable

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79. *Id.* at 582, 896 N.E.2d at 843.

80. *Id.*

81. *Id.*

82. *Id.*

83. *National Maintenance & Repair v. Workers' Comp. Comm'n*, 395 Ill. App. 3d 1097, 918 N.E.2d 581 (5th Dist. 2009).

84. Pursuant to article III, section 2, of the United States Constitution, federal courts have jurisdiction over "all Cases of admiralty and maritime Jurisdiction." U.S. CONST., art. III, § 2. In 1917, the United States Supreme Court declared that this provision of the federal constitution bars states from applying their workers' Comp. statutes to longshoremen injured on the seaward side of the line between the land and the sea. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217, 37 S.Ct. 524, 529, (1917). Following the *Jensen* decision, longshoremen injured on board a vessel in navigable waters were left without a Workers' Comp. remedy, while longshoremen injured on land were protected by the Workers' Comp. laws of the various states. *State Indus. Comm'n of New York v. Nordenholt Corp.*, 259 U.S. 263, 272-73, 42 S.Ct. 473, 474, (1922).

85. *National Maintenance & Repair*, 395 Ill. App. 3d at 1099-1100, 918 N.E.2d at 583-84.

86. *Id.* at 1100, 918 N.E.2d at 584.

of being used as a means of transportation on water, as opposed to being permanently moored or otherwise rendered incapable of transportation.”<sup>87</sup> Moreover, the court concluded that, while the “plant barge” could conceivably be moved by towing it to another location, it was nevertheless permanently moored and, therefore, not a vessel.<sup>88</sup> “Rather, the ‘plant barge’ is similar to a floating dock permanently affixed to the shore, a structure traditionally considered an extension of land.”<sup>89</sup>

### C. Independent Contractor or Employee?

An employment relationship is a prerequisite for an award of benefits under the Act and the question of whether a person is an employee continues to be “one of the most vexatious ... in the law of compensation.”<sup>90</sup> The difficulty arises not from the complexity of the applicable legal rules, but from the fact-specific nature of the inquiry. Accordingly, no rule has been, or could be, adopted to govern all cases in this area.<sup>91</sup> The question of whether a claimant is truly an employee or working as an independent contractor is frequently litigated in the workers’ compensation setting. Most common of these settings are those involving taxi cab drivers, truck drivers, and construction workers.

The Illinois Supreme Court spoke on the issue of independent contractors in its March 2007 decision of *Roberson v. Industrial Commission*.<sup>92</sup> In *Roberson*, the claimant filed for workers’ compensation benefits after sustaining an injury while delivering a load of steel coils for P.I. & I. Motor Express. The claimant worked under a detailed independent contractor agreement and, further, owned his own tractor. The arbitrator denied his claim, finding him to be an independent contractor, but the Commission reversed.<sup>93</sup> The circuit court then reversed the Commission, only to see the appellate court reverse and reinstate the Commission’s decision to award benefits as an employee.

The Supreme Court accepted the case on a Rule 315(a) petition and affirmed the Commission’s decision, finding that its conclusion that the claimant was an employee was not against the manifest weight of the

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87. *Id.* at 585.

88. *Id.*

89. *Id.*

90. *O'Brien v. Indus. Comm'n*, 48 Ill. 2d 304, 307, 269 N.E.2d 471, 472 (1971).

91. *Id.*

92. *Roberson v. Industrial Commission*, 225 Ill. 2d 159, 866 N.E.2d 191 (2007).

93. *Id.* at 172, 866 N.E.2d at 198–99.

evidence.<sup>94</sup> In evaluating the claim, the court noted that there were various factors that helped determine when a person is an employee. Among these factors are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment.<sup>95</sup>

Additionally, the courts have considered whether the employer's general business encompasses the individual's work:

[B]ecause the theory of [worker's] compensation legislation is that the cost of industrial accidents should be borne by the consumer as part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act.<sup>96</sup>

*Roberson* made it clear that no single factor is determinative and the significance of these factors will change depending on the work involved.<sup>97</sup> The determination rests on the totality of the circumstances. Regardless, the right to control the manner of the work is often called the most important consideration.

Applying these principles to the facts of the case, the *Roberson* court affirmed the Commission's decision to award benefits based on the finding that the claimant was an employee at the time of his injury. The Court noted that the facts were well-balanced. For example, while the claimant owned his own truck, he leased his trailer from the employer. Moreover, the claimant's work fell entirely within the scope of the employer's work. "P.I. & I., for economic reasons, used independent contractor drivers almost exclusively and

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94. *Id.* at 172, 866 N.E.2d at 198–99.

95. *Id.* at 172–73, 866 N.E.2d at 199; *see also* *Wenholdt v. Indus. Comm'n*, 95 Ill. 2d 76, 81, 447 N.E.2d 404, 407 (1983) (*quoting* *Morgan Cab Co. v. Indus. Comm'n*, 60 Ill. 2d 92, 97, 324 N.E.2d 425 (1975)).

96. *Roberson*, 225 Ill. 2d at 175, 866 N.E.2d at 200 (*quoting* *Ragler Motor Sales v. Indus. Comm'n*, 93 Ill. 2d 66, 71, 442 N.E.2d 903 (1982)). The problem with giving great weight to this quote from *Ragler* is that in that case, the claimant therein was clearly in no position to provide any insurance and was truly an employee. It seems unwise to apply this rule of law to other situations, such as those involving a trucker or taxi driver, who may truly be operating a mini-cab company or trucking outfit and can absorb the cost of the insurance.

97. *Luby v. Indus. Comm'n*, 82 Ill. 2d 353, 358–59, 412 N.E.2d 439 (1980).

Roberson [the claimant] was primarily leased to P.I. & I. for nearly eight months before his accident."<sup>98</sup> Given the state of the record, the Court upheld the Commission's findings.

Likewise, in *West Cab Co. v. Industrial Commission*,<sup>99</sup> the appellate court held that the lessee of a taxi cab was not an employee of the leasing company, but was rather an independent contractor, and therefore, not entitled to benefits under the Act. In *West Cab Co.*, the decedent Michael Gray was shot and killed by an assailant while driving his cab.<sup>100</sup> A claim was filed by Gray's dependents against three cab companies for whom he drove. Although the arbitrator denied the claim, the Commission found that Gray was an employee of West Cab and awarded death benefits.

On appeal, the appellate court reversed, finding that the Commission's decision was against the manifest weight of the evidence.<sup>101</sup> In reviewing the law, the appellate court reiterated the general principles applicable to the employee/independent contractor analysis, stating that because no one factor determines the nature of the relationship between the parties, a variety of factors must be considered, including the right to control the manner in which the work is done, the method of payment, the right of discharge, the skill required in the work to be done and who provides tools, materials, or equipment.<sup>102</sup> Of these factors, the right to control the manner in which the work is done is considered paramount in determining the relationship.<sup>103</sup>

Noting that the case involved a taxi cab company, the court referenced one of its prior decisions, *Yellow Cab Company*,<sup>104</sup> which held that, in cases involving taxicab drivers, particular weight should be given to the following factors in determining the issue of control over the manner in which the work is done: (1) whether the driver accepted radio calls from the company; (2) whether the driver had his radio and cab repaired by the company; (3) whether the vehicles were painted alike with the name of the company and its phone number on the vehicle; (4) whether the company could refuse the driver a cab; (5) whether the company had control over work shifts and assignments; (6) whether the company required that gasoline be purchased from the company; (7) whether repair and tow service was supplied by the company; (8) whether the company had the right to discharge the driver or cancel the lease without

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98. *Roberson*, 225 Ill. 2d at 186-187, 866 N.E.2d at 207.

99. *West Cab Co. v. Indus. Comm'n*, 376 Ill. App. 3d 396, 876 N.E.2d 53 (1st Dist. 2007).

100. *Id.* at 397, 876 N.E.2d at 54.

101. *Id.* at 398, 876 N.E.2d at 54-55.

102. *Id.* at 404, 876 N.E.2d at 60; *see also Morgan Cab*, 60 Ill. 2d at 97-98, 324 N.E.2d 425 (1975).

103. *Id.* at 405, 876 N.E.2d at 60.

104. *Id.*

cause; and (9) whether the lease contained a prohibition against subleasing the taxicab.<sup>105</sup>

After reviewing these and the evidence in *West Cab*, the appellate court observed that of the nine factors enumerated in *Yellow Cab*, only two were present—the cab was painted with company's logo and phone number and the lease contained a prohibition against sub-leasing.<sup>106</sup> The court found:

Here, the lessee was not required to respond to radio dispatches from the company; the lessee did not pay for maintenance of the vehicle; while the car was painted to the lessors specifications, the lessor could not and did not install advertising in the car; the lessor did not have the right to inspect the vehicle; the lessor could not refuse to provide the driver with a cab; the company had no control over work-shifts or assignments; the company did not require lessees to purchase gasoline from the company; there was nothing in the record to establish that the company provided towing and road service; there was no right to discharge a driver or cancel the lease unless such discharge or cancellation was for cause.<sup>107</sup>

Based upon the evidence, the appellate court held that the Commission's finding of an employer-employee relationship was against the manifest weight of the evidence.<sup>108</sup> That the cab was painted according to company specifications and the claimant was restricted from sub-leasing, when compared against the overwhelming weight of contrary evidence simply could not support the conclusion reached by the Commission. Moreover, the appellate court stated that, to the extent that its decision may be at odds with the holding in *Yellow Cab*, “we now overrule that holding.”<sup>109</sup>

#### D. The Impact Of A Release Or Waiver

Section 23 of the Act provides that “[n]o employee, personal representative, or beneficiary shall have power to waive any of the provisions of this Act in regard to the amount of compensation which may be payable to such employee, personal representative or beneficiary hereunder except after approval by the Commission.”<sup>110</sup> In *P.I. & I. Motor Express, Inc. v. Industrial*

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 405, 876 N.E.2d at 61.

110. 820 ILL. COMP. STAT. ANN. 305/23 (West 2009).



*Commission*,<sup>111</sup> the appellate court held that section 23 prevented an employer and employee from entering into any agreement that deprived the Commission of jurisdiction. In that case, the parties had executed a form in Ohio stating that the claimant had elected the Ohio workers' compensation statute as his exclusive remedy.<sup>112</sup> The court ruled that the agreement violated section 23, even though it was under the Ohio system.

The appellate court also held that, generally speaking, the receipt of benefits in one state does not bar a subsequent award in a second state with concurrent jurisdiction.<sup>113</sup> A claimant is deemed to have elected his remedy in a particular jurisdiction where: (1) double compensation is threatened; (2) the employer has been misled by the claimant; or (3) *res judicata* applies.<sup>114</sup> The claimant in *P.I. & I. Motor Express* was held to have not elected a remedy in Ohio because the recovery sought would not result in double compensation, the employer was not misled, and *res judicata* did not apply because the Ohio ruling was not a final order.<sup>115</sup>

In a similar case, *Maxit, Inc. v. Van Cleve*,<sup>116</sup> an employer filed a complaint against its employee alleging that he breached a settlement release by continuing to pursue his workers' compensation claim against the employer. The circuit court granted summary judgment in favor of the employee, holding that the release encompassed and therefore, barred the employee from continuing with his workers' compensation claim. Applying section 23 of the Act, the appellate court reversed and ruled that the release did not bar the employee from pursuing his workers' compensation claim in Illinois.<sup>117</sup>

## V. COMPUTATION OF THE AVERAGE WEEKLY WAGE RATE

Average weekly wage is an important figure in workers' compensation cases because it serves as the foundation of all benefits, whether temporary or

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111. *P.I.&I. Motor Express, Inc. v. Indus. Comm'n*, 368 Ill. App. 3d 230, 857 N.E.2d 784 (5th Dist. 2006).

112. *Id.* at 236, 857 N.E.2d at 790.

113. *Id.* at 239, 857 N.E.2d at 792.

114. *Id.*; *Goldblatt Bros., Inc. v. Indus. Comm'n*, 86 Ill. 2d 141, 146, 427 N.E.2d 118 (1981).

115. *P.I. & I. Motor Express, Inc.*, 368 Ill. App. 3d at 232, 857 N.E.2d at 787.

116. *Maxit, Inc. v. Van Cleve*, 376 Ill. App. 3d 50, 875 N.E.2d 690 (2nd Dist. 2007).

117. At least one Illinois court has ruled that a purported settlement or release, while not a bar to recovery under the Act, might constitute a credit against the final Workers' Comp. recovery. *LaGrassa v. Panozzo*, 168 Ill. App. 3d 355, 522 N.E.2d 752 (1st Dist. 1988). Also, it is important to note that a release or settlement might be deemed effective if the agreement is presented to and approved by the Workers' Compensation Commission. Section 23 specifically requires Commission approval of all settlement agreements. 820 ILL. COMP. STAT. ANN. 305/23 (West 2009).

permanent.<sup>118</sup> Although section 10 of the Act<sup>119</sup> sets forth the methodology for determining average weekly wage, the provision is not easily understood and leads to a significant amount of litigation. Section 10 reads as follows:

The compensation shall be computed on the basis of the “Average weekly wage” which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.<sup>120</sup>

Five cases decided during the survey period addressed various aspects of the average weekly wage calculation.

#### A. The Meaning of “Lost Time”

In *Farris v. Industrial Commission*,<sup>121</sup> the employer appealed a Commission determination of average weekly wage that subtracted from the “days worked” those days that the claimant had missed for personal reasons. According to the record, the claimant had worked a total of 181.25 days during

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118. The average weekly wage (“AWW”) rate is then used to calculate the employee’s total temporary disability (“TTD”) and permanency (“PPD”) rates, which are set at 66 2/3 and 60 percent of the claimant’s AWW. Wage differentials are paid at the rate of 66 2/3 percent of the difference between what the employee earned and earns (or could earn), and death benefits are paid at the rate of 66 2/3 percent. 820 ILL. COMP. STAT. ANN. 305/7, 8(b) (West 2009).

119. 820 ILL. COMP. STAT. ANN. 305/10 (West 2009).

120. *Id.*

121. *Farris v. Indus. Comm’n*, 357 Ill. App. 3d 525, 829 N.E.2d 372 (4th Dist. 2005).

the 52-week period prior to his accident and had earned \$21,039.95.<sup>122</sup> The claimant testified that he typically worked a five-day/40-hour work week, but acknowledged that he had missed some days due to slow work and also because of caring for his critically ill infant.<sup>123</sup>

The arbitrator determined the average weekly wage to be \$478.18 and arrived at that amount by dividing the total earnings by 44 weeks, the number of weeks that the claimant was available to work.<sup>124</sup> The Commission modified the average weekly wage, instead of dividing the total earnings by 36.25 weeks, the Commission divided the 181.25 days worked by 5 (representing a five-day work week).<sup>125</sup> The resulting average weekly wage equaled \$595.37.<sup>126</sup> The difference in the denominator represented the number of days that the claimant was absent while caring for his child.

The appellate court affirmed the Commission's decision, finding that when using the second prong of section 10, the denominator represented only those weeks actually worked.<sup>127</sup> "Lost time," it was held, is synonymous with off time, unless caused by the fault of the employee.<sup>128</sup> The court determined that missing work to care for a sick child did not constitute lost time due to one's own fault. Using the Commission's methodology, the claimant's yearly wage equaled \$30,959.24 despite the fact that his actual earnings were only \$21,039.95.<sup>129</sup>

#### B. Overtime Included?

In *Airborne Express, Inc. v. Illinois Workers' Compensation Commission*,<sup>130</sup> the appellate court addressed the topic of overtime and how it factored into the notion of average weekly wage. While section 10 specifically states that overtime is not to be included when calculating an employee's average weekly wage, the Act is nevertheless silent as to what constitutes

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122. *Id.* at 526–27, 829 N.E.2d at 373.

123. *Id.*

124. *Id.* at 527, 829 N.E.2d at 373–74.

125. *Id.* at 527, 829 N.E.2d at 374.

126. *Id.*

127. *Id.* at 529, 829 N.E.2d at 375.

128. *Id.*

129. To illustrate the effect of this decision on a potential permanency award, if the claimant were entitled to 60 percent of a person (500 weeks times 60 percent), his permanency award would be \$107,166 under the Commission's calculation and \$86,070.00 under the arbitrator's calculation; approximately a \$21,100 windfall in favor of the claimant.

130. *Airborne Express, Inc. v. Workers' Comp. Comm'n*, 372 Ill. App. 3d 549, 865 N.E.2d 979 (1st Dist. 2007).

overtime.<sup>131</sup> After reviewing prior case law concerning overtime, the court defined overtime as follows:

Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not a part of a set number of hours consistently worked each week.<sup>132</sup>

Applying that statement of law to the facts before it, the appellate court reversed the Commission's determination of average weekly wage, finding that while the claimant had consistently worked the additional hours, there was no evidence that he was compelled to do so as a condition of his employment.<sup>133</sup> The court concluded that, if merely working overtime on a regular, voluntary basis was sufficient to include the overtime hours worked in the average weekly wage calculation, the overtime exclusion would be rendered meaningless.<sup>134</sup>

### C. *Per Diem* Payments

In *United Airlines, Inc. v. Illinois Workers' Compensation Commission*,<sup>135</sup> the appellate court tackled the issue of whether an employee's *per diem* payments are to be included in the average weekly wage calculation. There, the claimant worked for United as a flight attendant and as part of her compensation received a *per diem* expense allowance of between \$1.80 and \$1.85 per hour.<sup>136</sup> The *per diem* amounts were included in her regular paychecks and were subject to federal and state income tax when she was not required to stay overnight while working.

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131. *Id.* at 553, 865 N.E.2d at 982.

132. *Id.* at 554, 865 N.E.2d at 984. The appellate court referenced the decisions of *Edward Hines Lumber Co. v. Indus. Comm'n*, 215 Ill. App. 3d 659, 575 N.E.2d 1234 (1st Dist. 1990); *Ogle v. Indus. Comm'n*, 284 Ill. App. 3d 1093, 673 N.E.2d 706 (1st Dist. 1996); *Edward Don Co. v. Indus. Comm'n*, 344 Ill. App. 3d 643, 801 N.E.2d 18 (1st Dist. 2003), and *Freesen, Inc. v. Indus. Comm'n*, 348 Ill. App. 3d 1035, 811 N.E.2d 322 (4th Dist. 2004).

133. *Id.* The claimant had testified that his regular work week consisted of daily eight-hour shifts. For the 32-week period prior to the injury, the claimant worked 1,200 hours during his regular shifts and 538.70 hours of overtime. While the overtime was worked in 31 of the 32 weeks, the evidence showed that he was not required to work the overtime hours, but rather did so on his own and as a benefit of his seniority.

134. *Id.* at 555, 865 N.E.2d at 984.

135. *United Airlines, Inc. v. Workers' Comp. Comm'n*, 382 Ill. App. 3d 437, 887 N.E.2d 888 (1st Dist. 2008).

136. *Id.* at 438, 887 N.E.2d at 890.

In calculating the average weekly wage, the arbitrator included the taxable *per diem* payments in the claimant's average weekly wage, but excluded the non-taxable portions, finding that they constituted actual reimbursement and not real economic gain.<sup>137</sup> On review, the Commission, in a two-to-one decision, modified the calculation, including the entire *per diem* payment as economic gain, and therefore as part of the average weekly wage.

The appellate court reversed the Commission majority and remanded for a further determination of the percentage of *per diem* payments that were actually expense reimbursements.<sup>138</sup> The court noted that amounts paid as reimbursement for travel expenses are typically not part of a claimant's earnings and are merely reimbursement of her employment-related expenses.<sup>139</sup> The court concluded that the claimant's *per diem* payments should be included in her average weekly wage calculation only if she had no expenses.<sup>140</sup>

#### D. Teachers' Salaries

An interesting issue arose in *Washington District 50 Schools v. Illinois Workers' Compensation Commission*,<sup>141</sup> which involved determining the appropriate average weekly wage for a school teacher who worked 39 weeks (a regular school year), but had elected to be paid over the entire 52-week period. The claimant did not work for the district during the summer months but instead worked 30–32 hours a month as a pharmacy technician.<sup>142</sup> The Commission calculated the claimant's average weekly wage as \$1,036.32, by dividing her salary of \$40,416.48 by the number of weeks she actually worked, 30.<sup>143</sup> The school district argued that the average weekly wage should have been \$777.24, which it arrived at by dividing the salary by 52 weeks.

Relying on the Arkansas case of *Magnet Cove School District v. Barnett*,<sup>144</sup> the appellate court affirmed, holding that the claimant's weekly income was based on the date she earned her pay, rather than the date she received her pay. Furthermore, the court looked to the language of section 10, which states that, "[w]here the employment prior to the injury extended over

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137. *Id.* at 439, 887 N.E.2d at 891.

138. *Id.* at 441, 887 N.E.2d at 892.

139. *Id.* at 441–42, 887 N.E.2d at 892–93.

140. *Id.* at 442, 887 N.E.2d at 893.

141. *Washington Dist. 50 Sch. v. Workers' Comp. Comm'n*, 394 Ill. App. 3d 1087, 917 N.E.2d 586 (3rd Dist. 2009).

142. *Id.* at 1088, 917 N.E.2d at 587–88.

143. *Id.*

144. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003). See *Washington Dist. 50 Sch.*, 394 Ill. App. 3d at 1090, 917 N.E.2d at 589.

a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed.”<sup>145</sup> Thus, the claimant received the \$1,036.32 average weekly wage based on her 39 weeks.<sup>146</sup>

#### E. Method Three

In *Greaney v. Industrial Commission*,<sup>147</sup> the appellate court considered the appropriate means for calculating average weekly wage under the third method of section 10,<sup>148</sup> and specifically considered how one calculated “the number of weeks and parts thereof,” which served as the denominator. In that case, the claimant’s actual earnings for the year were \$9,451.18. The dispute was over how to calculate the “number of weeks and parts thereof,” which would then yield the average weekly wage.<sup>149</sup> After reviewing the significant case law, the court held that the methodology for method three should be the same as that used in the other portions of section 10.<sup>150</sup> Moreover, there was no authority for simply dividing the total number of hours worked by the numbers of a full workweek to arrive at the denominator.

The court held, “[w]hen, as in this case, a claimant is a fulltime employee, scheduled to work a full workweek, and his average weekly wage is to be determined by applying the third method set forth in section 10, the number of days that a claimant worked prior to his injury should be divided by the number of days in a full workweek to arrive at the ‘number of weeks and parts thereof’ by which the claimant’s pre-injury wages are to be divided.”<sup>151</sup> Applying that rule of law to the case, the court noted that the claimant had worked 59 days in the 17 weekly pay periods prior to his injury and that he had been scheduled to work five days a week. The court divided 59 days by 5, the number of days in a full work week, and concluded that the claimant

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145. 820 ILL. COMP. STAT. ANN. 305/10 (West 2009).

146. *Washington Dist. 50 Sch.*, 394 Ill. App. 3d at 1089, 887 N.E.2d at 589. It might be interesting to know whether this employee was hired pursuant to an annual contract or was a tenured teacher. It seems rather strange to treat a salaried employee on the same level as a construction worker, who truly works and is paid based on the hour. A teacher is typically paid on a yearly basis.

147. *Greaney v. Indus. Comm’n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331 (1st Dist. 2005).

148. The third method of section 10, “[w]here the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed.” 820 ILL. COMP. STAT. ANN. 305/10 (West 2009).

149. *Greaney*, 358 Ill. App. 3d at 1015, 832 N.E.2d at 344.

150. *Id.* at 1018, 832 N.E.2d at 346–47.

151. *Greaney*, 358 Ill. App. 3d at 1018, 832 N.E.2d at 347.

worked 11.8 weeks prior to his injury. It then divided the \$9,451.18 by 11.8 and reached an average weekly wage of \$800.95.

## VI. WORK ACCIDENTS—"ARISING OUT OF" AND "IN THE COURSE OF" THE EMPLOYMENT

Once it is determined that the employee and the employer were operating under and subject to the provisions of the Act and that there was an employer/employee relationship at the time of the occurrence, the next step in the analysis of a workers' compensation case is to determine whether the accident "arose out of" and "in the course of" the employment.<sup>152</sup> Both elements are required and it is the employee's burden of proof to establish that each element exists.<sup>153</sup>

### A. "Arising Out Of" The Employment<sup>154</sup>

An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal connection between the employment and the accidental injury.<sup>155</sup> "Arising out of" is primarily concerned with causal connection to the employment and looks to facts showing an increased risk to which the employee is subjected as compared to the public at large. To qualify as "arising out of," the employee must be performing some task in the furtherance of the employer's business or at least incidental thereto.<sup>156</sup> A risk is considered "incidental to the employment" where it belongs to or is connected with what a worker has to do in fulfilling his duties.<sup>157</sup> The mere fact that the worker is at the place of injury because of the employment (the "in the course of" element) will not suffice. The Act does not insure employees against all injuries in the workplace.<sup>158</sup>

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152. *Central Rug & Carpet v. Indus. Comm'n*, 361 Ill. App. 3d 684, 690, 838 N.E.2d 39, 43 (1st Dist. 2005).

153. *Id.* at 690, 838 N.E.2d at 43-44.

154. Note that violation of a safety rule and its implications as to causation differs significantly from whether an employee continues to be entitled to TTD benefits after violating a company work rule. See section VI, A, 1 herein for a discussion of the latter scenario.

155. *Technical Tape Corp. v. Indus. Comm'n*, 58 Ill. 2d 226, 317 N.E.2d 515 (1974); *Tinley Park Hotel and Convention Center v. Indus. Comm'n*, 356 Ill. App. 3d 833, 839, 826 N.E.2d 1043, 1048 (1st Dist. 2005).

156. *Tinley Park Hotel and Convention Center v. Indus. Comm'n*, 356 Ill. App. 3d 833, 839, 826 N.E.2d 1043, 1048 (1st Dist. 2005).

157. *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 912 (2002).

158. *Quarant v. Indus. Comm'n*, 38 Ill. 2d 490, 231 N.E.2d 397 (1967).

### 1. *Violation of a Safety Rule*

A frequent area of litigation involves accidents which result from the violation of a company safety rule. In *J.S. Masonry, Inc. v. Industrial Commission*,<sup>159</sup> the claimant was working as a bricklayer's helper. As such, his primary duties were to relay bricks, blocks, and mortar to the bricklayers and to help assemble scaffolding. On the day of the accident, the claimant was working in this capacity on a scaffold some four meters off the ground. On one side was a safety gate, which had to be opened to receive bricks and was to be then latched with a safety pin once the bricks were unloaded. While working on the scaffold, the claimant tripped over a brick and fell against the gate, which snapped open, and he fell to the ground.<sup>160</sup> The evidence showed that the claimant had not replaced the safety pin in violation of company rules.

The Commission nevertheless awarded benefits, finding that the rule violation did not negate the employment risk.<sup>161</sup> The Commission's findings were affirmed by the appellate court, which took the opportunity to review the law of work rule violations. According to the appellate court, the key inquiry in such cases is whether the employee was, at the time of the accident, violating a work rule while still in the scope of his employment, or whether the alleged work rule violation took him outside its sphere.<sup>162</sup> The appellate court found that the claimant in *J.S. Masonry* was performing the duties for which he had been hired—assisting the bricklayers—and that he was not in an area in which he was forbidden to enter nor engaged in an activity which was unauthorized by his employer.<sup>163</sup> While the claimant may have been negligent in his work, he was nevertheless “doing exactly the thing he was employed to do.”<sup>164</sup>

### 2. *Intoxication*

Two intoxication cases were handed down during the survey period, both dealing with illicit drugs rather than alcohol. In *McKernin Exhibits, Inc. v. Industrial Commission*,<sup>165</sup> an employee was seriously injured while driving his

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159. *J.S. Masonry, Inc. v. Indus. Comm'n*, 369 Ill. App. 3d 591, 861 N.E.2d 202 (1st Dist. 2006).

160. *Id.* at 592, 861 N.E.2d at 204.

161. *Id.* at 596, 861 N.E.2d at 206.

162. *Id.* at 597, 861 N.E.2d at 208. *See also* *Heyman Distrib. Co. v. Indus. Comm'n*, 376 Ill. 90, 92–93, 32 N.E.2d 894, 895 (1941).

163. *J.S. Masonry, Inc.*, 369 Ill. App. 3d at 597, 861 N.E.2d at 206–07.

164. *Id.* at 598, 861 N.E.2d at 208.

165. *McKernin Exhibits, Inc. v. Indus. Comm'n*, 361 Ill. App. 3d 666, 838 N.E.2d 47 (1st Dist. 2005).



pickup truck during the course of his employment. The claimant had transported work-related materials to Chicago and was returning to his company when his truck struck the rear-end of an 18-wheeler. A urinalysis test taken at the hospital showed the presence of cocaine in the claimant's system. At arbitration, the claimant testified that he had used cocaine several weeks earlier. His supervisor, who had sent him to Chicago, also acknowledged that he had not noticed anything odd in how the claimant acted prior to his trip.<sup>166</sup> The Commission found that the intoxication did not bar the claimant's recovery and awarded workers' compensation benefits.

According to the appellate court, which affirmed the Commission's decision on manifest weight grounds, in order for compensation to be denied, the level of intoxication must be such that it can be said that "as a matter of law, . . . the injury arose out of his drunken condition and not out of his employment."<sup>167</sup> Moreover, the court noted that "[i]ntoxication which does not incapacitate a claimant from performing his work-related duties is not sufficient to defeat recovery of compensation under the Act although the intoxication may be a contributing cause of his injury."<sup>168</sup> The appellate court found that the Commission's conclusions were supported by evidence in the record showing that the claimant was not so intoxicated that he was removed from the scope of his employment or unable to perform his job. The Commission claimant exhibited no signs of intoxication and the medical evidence failed to show intoxication.<sup>169</sup>

Towards the end of 2009, the appellate court handed down the decision of *Lenny Szarek, Inc. v. Illinois Workers' Compensation Commission*,<sup>170</sup> which considered the defense of intoxication by marijuana. In that case, the claimant, a carpenter apprentice, was injured when he fell from the second floor, through a hole in the first floor, and into the basement of a home under construction.<sup>171</sup> Urinalysis performed at the hospital revealed the presence of marijuana and cocaine. The employer raised the defense of intoxication and obtained a medical opinion concluding that the claimant's drug levels showed a functional impairment due to intoxication. The IME did not opine that the intoxication so impaired the claimant so as to make him unable to perform his

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166. *Id.* at 671, 838 N.E.2d at 51–52.

167. *Id.*

168. *Id.* (citing *Dist. 141 Int'l Ass'n of Machinists & Aerospace Workers v. Indus. Comm'n*, 79 Ill. 2d 544, 558, 404 N.E.2d 787, 793 (1980)).

169. *McKernin Exhibits, Inc.*, 361 Ill. App. 3d at 600, 838 N.E.2d at 210.

170. *Lenny Szarek, Inc. v. Workers' Comp. Comm'n*, 396 Ill. App. 3d 597, 919 N.E.2d 43 (3rd Dist. 2009).

171. *Id.* at 600, 919 N.E.2d at 46–47.

duties. The Commission rejected the employer's intoxication defense and found the claim compensable.<sup>172</sup>

On appeal, the appellate court rejected the employer's argument to adopt a new test for marijuana intoxication. According to the employer, recovery should be denied all together if scientific evidence established that the claimant was marijuana impaired at the time of the accident.<sup>173</sup> The appellate court rejected the employer's argument, noting that the standard on intoxication was well-settled and could not be overturned other than by the Supreme Court or the General Assembly.<sup>174</sup>

Applying the established test of intoxication—that the employer had to demonstrate not only that the claimant was intoxicated, but that the marijuana use was the sole cause of the accident, or that the claimant had departed from the scope of his employment—the appellate court deferred to the Commission, which had rejected the opinions of the employer's expert and which had further concluded that the claimant's usage could have occurred up to a day and a half prior to the accident.<sup>175</sup> Moreover, the Commission had determined that the hole in the floor through which the claimant fell was not something the general public would have been exposed to and therefore, constituted an increased risk to the claimant. According to the court, “even if the marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause.”<sup>176</sup>

### 3. *Increased Risk—Normal Daily Activity*

In one of the seminal cases decided during the survey period, the Supreme Court addressed the issue of causation and the so-called “normal daily activity” exception, which states that compensation under the Act will be denied “where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presented risks no greater than those to which the general

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172. *Id.* at 600, 919 N.E.2d at 47.

173. *Id.* at 609, 919 N.E.2d at 54.

174. *Id.*

175. *Id.* at 610, 919 N.E.2d at 55.

176. *Id.* at 610, 919 N.E.2d at 55. *Lenny Szarek, Inc.* also addressed a series of evidentiary rulings surrounding various questions posed to the claimant concerning his use of marijuana. The court found that questions concerning the affect of marijuana on the claimant on prior occasions as well as a question on whether he smoked marijuana the day prior were irrelevant to what happened on the day of the accident. Moreover, the court affirmed the Comm'n's refusal to permit questioning as to the claimant's use of marijuana on the day in question, since the claimant had denied smoking that date and his co-worker did not notice anything about the claimant suggesting he was intoxicated or impaired.

public is exposed . . . .”<sup>177</sup> The legal discussion began in 2003 in *Sisbro, Inc. v. Industrial Commission*,<sup>178</sup> when the Supreme Court held that a causal connection between the employment and the injury could not be negated simply because the injury might also have occurred as a result of some normal daily activity. Rather, “whether ‘any normal daily activity is an overexertion’ or whether ‘the activity engaged in presented risks no greater than those to which the general public is exposed’ are matters to be considered when deciding whether a sufficient causal connection . . . has been established in the first instance.”<sup>179</sup> The court continued, “[w]e have never found a causal connection to exist between work and injury and then, in a further analytical step, denied recovery based on a ‘normal daily activity exception’ or a ‘greater risk exception.’”<sup>180</sup>

In *Sisbro*, the claimant suffered from a degenerative condition in his right foot, which he had had since childhood. While working for *Sisbro*, the claimant injured his foot stepping out of a truck. The employer’s physician opined that the claimant’s injury was the result of his long-standing foot problem and that any activity could have aggravated it. The Commission rejected the employer’s arguments and held the claim was compensable. The appellate court majority, relying on the normal daily activity exception, reversed and denied compensation, finding that the claimant’s condition had so deteriorated that any activity could have caused his problems.<sup>181</sup>

In early 2005, the Supreme Court revisited *Sisbro* in *Twice Over Clean, Inc. v. Industrial Commission*,<sup>182</sup> and reasserted that any consideration of the normal daily activity exception was a function of the overall causation analysis and not an exception to established causation. In that case, the appellate court had held that the claimant’s heart attack was not compensable because the medical opinions showed that the claimant was equally susceptible to a heart attack outside of work. The Supreme Court reversed the appellate court and found the accident compensable because there was evidence that the claimant’s work activities contributed to his risk of heart attack and that his symptoms began while at work. The Court further held that the normal daily activity limitation, “while relevant to the question of causation, cannot be applied as a matter of law” to defeat an otherwise compensable claim.<sup>183</sup>

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177. *County of Cook v. Indus. Comm’n*, 69 Ill. 2d 10, 18, 370 N.E.2d 520, 523 (1977).

178. *Sisbro, Inc. v. Indus. Comm’n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003).

179. *Id.* at 211–12, 797 N.E.2d at 677.

180. *Id.* at 212, 797 N.E.2d at 676.

181. *Id.* at 210, 797 N.E.2d at 675.

182. *Twice Over Clean, Inc. v. Indus. Comm’n*, 214 Ill. 2d 403, 827 N.E.2d 409 (2005).

183. *Id.* at 416, 827 N.E.2d at 416.

Later that year, in *Swartz v. Industrial Commission*,<sup>184</sup> the appellate court applied both *Sisbro* and *Twice Over Clean* in a case where the claimant's decedent experienced some sort of cardiac event while driving, which resulted in his death. The question before the Commission was whether some aspect of the decedent's employment was a causative factor in his cardiac event.<sup>185</sup> The medical evidence, as offered from both parties, acknowledged that the decedent's condition could have occurred on its own at any given time. While the claimant's expert physician, Dr. Kamalesh, testified that the stress of driving may have caused or contributed to the cardiac event, the employer's expert, Dr. Fintel, testified that the decedent was not exposed to any type of stress.

The Commission adopted Dr. Fintel's opinions and concluded that while the decedent may have experienced stress from driving, it was not unique to the decedent's employment but instead, it was the same type any individual would experience when driving.<sup>186</sup> After reviewing the Supreme Court's decisions in *Sisbro* and *Twice Over Clean*, the appellate court concluded that the Commission did not find causation and then apply the normal daily activity exception to defeat it.<sup>187</sup> Rather, the Commission had considered the factors, weighed the evidence and relied upon the medical opinions it found to be the most credible.<sup>188</sup>

#### 4. Slip and Falls

Slip and fall accidents are always a concern in a climate such as that found in Illinois. Wet springs and harsh winters produce slippery conditions as well as wreak havoc on paved surfaces, leading to cracks and other defects. These conditions, when combined with normal business falls, lead to an even larger number of slip and fall accidents occurring in Illinois. In *Tinley Park Hotel and Convention Center v. Industrial Commission*,<sup>189</sup> the appellate court considered a case which at first blush appeared to present a simple trip and fall on new carpet. There, the claimant, a 66-year old hostess and waitress, was directing guests to their seats when she tripped and fell. The carpet had recently been installed and no defect could be identified. However, the claimant testified that she was required to wear "black, closed in, rubber soled

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184. *Swartz v. Indus. Comm'n*, 359 Ill. App. 3d 1083, 837 N.E.2d 937 (3rd Dist. 2005).

185. *Id.* at 1085, 837 N.E.2d at 939.

186. *Id.* at 1085, 837 N.E.2d at 940.

187. *Id.* at 1086, 837 N.E.2d at 941.

188. *Id.* at 1086, 837 N.E.2d at 942.

189. *Tinley Park Hotel and Convention Ctr. v. Indus. Comm'n*, 356 Ill. App. 3d 833, 826 N.E.2d 1043 (1st Dist. 2005).

shoes” because they were slide resistant.<sup>190</sup> The claimant also testified that she had seen other co-workers trip and stumble after the new carpet had been installed; those employees wore the same shoes.

The appellate court affirmed the Commission’s decision to award benefits, finding that the record supported the Commission’s conclusion that the employment increased the claimant’s risk of fall. While cases have held that simply walking on a regular surface is not a risk peculiar to employment,<sup>191</sup> the claimant here was walking with special shoes designed to resist slipping. The Commission, it was held, was within its power to conclude that the shoes and the newly installed carpet contributed to the claimant’s trip and fall.<sup>192</sup>

In *USF Holland, Inc. v. Industrial Commission*,<sup>193</sup> the claimant tripped and fell when he caught his work boot on a tin threshold leading into his company’s maintenance shop. The claimant, a truck driver, had testified that he entered the maintenance shop looking for his vehicle inspection book. When he reported the accident, he stated that he fell because he did not see the small step up at the door threshold and caught his toe. The Commission found the claim compensable, noting that the threshold was not flush to the concrete and that as a result, the claimant fell.<sup>194</sup> While the Commission did not specifically find the threshold defective, the appellate court found that the claimant was nevertheless on the employer’s property in an area that was not open to the general public.

The appellate court further rejected the employer’s contention that the employment presented no particular risk because employees routinely traverse doorways and stairs everyday.<sup>195</sup> The court reasoned that in this case, the evidence at least arguably demonstrated that the fall resulted from a defect, *i.e.*, the threshold. As the court noted, “[a] photograph revealed that a pen could fit in between the concrete threshold and the metal strip on top of it.”<sup>196</sup>

Another case decided during the survey period, *First Cash Financial Services v. Industrial Commission*,<sup>197</sup> involved a fall in a bathroom at work. There, the claimant was employed as a bank teller and near the end of the day,

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190. *Id.* at 835, 826 N.E.2d at 1045.

191. *Caterpillar Tractor v. Indus. Comm’n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989).

192. *Tinley Park Hotel and Convention Ctr.*, 356 Ill. App. 3d at 841, 826 N.E.2d at 1050.

193. *USF Holland, Inc. v. Indus. Comm’n*, 357 Ill. App. 3d 798, 800, 829 N.E.2d 810, 813 (1st Dist. 2005).

194. *Id.* at 802, 829 N.E.2d at 815.

195. The employer relied upon *Caterpillar Tractor Co. v. Indus. Comm’n*, 129 Ill. 2d 52, 541 N.E.2d 665 (1980), which denied benefits to a claimant who had fallen while stepping off a curb in the employer’s parking lot.

196. *USF Holland, Inc.*, 357 Ill. App. 3d at 804, 829 N.E.2d at 817.

197. *First Cash Fin. Serv. v. Indus. Comm’n*, 367 Ill. App. 3d 102, 853 N.E.2d 799 (1st Dist. 2006).

had gone into the employee restroom to retrieve her lunchbox. The bathroom was strictly for employee use and was not open to the general public. When the claimant entered the bathroom, she slipped and fell. However, the evidence showed that she could not identify any cause for her fall and that she did not know why she fell. According to the claimant, there was nothing on the floor at the time of her fall. The Commission awarded benefits, finding that there was no evidence presented that the bathroom floor was dry, free of debris, or other substances. The Commission also relied upon photos taken of the bathroom floor nearly a month after the accident, which showed hair and other debris on the floor.

In a four-to-one decision, the appellate court reversed on the ground that the claimant failed to present any evidence that there was anything wrong with the floor. Moreover, the Commission improperly shifted the burden onto the employer to demonstrate that the floor was indeed clean. The majority reiterated that an injury from an idiopathic fall is compensable only where the employment conditions significantly contributed to the injury by increasing the risk.<sup>198</sup> The record contained no evidence from which an increased risk could be inferred. The majority dismissed the photographic evidence, taken nearly a month after the accident, noting that the claimant's own testimony indicated that she saw nothing on the floor on the day she fell.

In *University of Illinois v. Industrial Commission*,<sup>199</sup> the appellate court affirmed the Commission's decision to award benefits to a university employee who tripped over a metal strip in a doorway of a walkway that ran between the parking lot and the university hospital.<sup>200</sup> The court held that the "arising out of" requirement of the Act was satisfied because the employee was arriving for work in an area of her employer's premises that constituted the usual access route for employees and, therefore, qualified as a special risk.<sup>201</sup>

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198. *Id.* at 106, 853 N.E.2d at 805.

199. *Univ. of Ill. v. Indus. Comm'n*, 365 Ill. App. 3d 906, 851 N.E.2d 72 (1st Dist. 2006).

200. The claimant contended that she tripped on a metal strip measuring approximately 12 inches wide and three inches high located in the walkway doorway.

201. The court also discussed the sufficiency of the claimant's testimony concerning causation. According to the court, "[a] claimant's testimony standing alone may be sufficient to support an award of benefits under the Act." *Id.* at 912, 851 N.E.2d at 78. Moreover, medical testimony is not essential to support the conclusion of an accident caused by the employment; circumstantial evidence may suffice.

### 5. *Intervening Acts*

An intervening act can serve to break the causal connection between a work-related accident and the condition of ill-being presented at arbitration. Generally speaking, every natural consequence that flows from an injury that arose out of and in the course of the employment is deemed compensable unless caused by an independent intervening act.<sup>202</sup> Indeed, simply because other incidents, “whether work-related or not, may have aggravated the claimant’s condition is irrelevant.”<sup>203</sup>

In *Vogel v. Industrial Commission*,<sup>204</sup> the issue of whether the claimant had sustained an independent intervening injury was considered by the appellate court. There, the claimant injured his neck at work while dragging a hot tub into a client’s home and was subsequently involved in three automobile accidents. At the time of the first auto accident, the claimant was still treating and was not yet deemed to be at MMI. However, he acknowledged having no symptoms. The arbitrator and Commission concluded that the accidents constituted an intervening act and found that the claimant’s condition, as presented at arbitration, was not related to his work accident. The Commission relied on at least one medical opinion that stated the first auto accident played a major role in the worsening of the claimant’s condition.

The appellate court reversed, finding that the automobile accidents were simply an aggravation of the work condition and were not independent intervening accidents.<sup>205</sup> The court found it significant that the claimant had not yet fully recovered and had not yet been released to full-duty work. According to the court, when a claimant’s condition is weakened by a work-related accident, a subsequent injury that aggravates the claimant’s condition does not break the causal chain.<sup>206</sup>

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202. *Teska v. Indus. Comm’n*, 266 Ill. App. 3d 740, 742, 640 N.E.2d 1, 3–4 (1st Dist. 1994).

203. *Lasley Constr. Co. v. Indus. Comm’n*, 274 Ill. App. 3d 890, 893, 655 N.E.2d 5 (5th Dist. 1995).

204. *Vogel v. Indus. Comm’n*, 354 Ill. App. 3d 780, 821 N.E.2d 807 (2nd Dist. 2005).

205. *Id.* at 788, 821 N.E.2d at 813–14.

206. *Id.* at 789, 821 N.E.2d at 814.

## 6. Aggressor Doctrine

In *Bassgar, Inc. v. Illinois Workers' Compensation Commission*,<sup>207</sup> the appellate court addressed the so-called “aggressor defense,” which provides that even if a fight at work is work-related, an injury to the aggressor is not compensable.<sup>208</sup> The underlying rationale provides that the claimant’s own rashness negates the causal connection between the employment and the injury so that work is neither the proximate nor a contributing cause of the injury. Illinois law has long provided that an injury resulting from a fight between two co-workers involving a work-related issue is considered a risk incidental to the employment and is therefore compensable.

In *Bassgar*, the claimant was involved in a fight with his supervisor and was subsequently charged with and convicted of assault and battery in a criminal proceeding. Apparently there were two incidents, one in which the claimant was attacked and a second wherein he pursued his supervisor. The claimant nevertheless filed for workers’ compensation benefits, but his claim was denied by the arbitrator on the ground that his prior criminal proceeding had determined that he was the aggressor. The Commission reversed, but that finding was set aside by the circuit court.<sup>209</sup>

On review, the appellate court reinstated the Commission’s decision and found that the prior criminal proceeding did not bar his worker’s compensation claim because there was no similarity of parties between the two proceedings.<sup>210</sup> According to the appellate court, the criminal conviction was for the second portion of the incident, wherein the claimant pursued the supervisor, who had withdrawn from the incident. The court stated that there was nothing to show that the claimant’s criminal proceedings considered the first part of the incident, and that it could not be inferred that the criminal conviction encompassed the entire event. The claimant’s battery, it was reasoned, did not relate to the first act of aggression, but the second.<sup>211</sup>

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207. *Bassgar, Inc. v. Workers' Comp. Comm'n*, 394 Ill. App. 3d 1079, 917 N.E.2d 579 (3rd Dist. 2009).

208. *Franklin v. Indus. Comm'n*, 211 Ill. 2d 272, 279–80, 811 N.E.2d 684, 689 (2004).

209. *Bassgar*, 394 Ill. App. 3d at 1080, 917 N.E.2d at 581.

210. *Id.* at 1085–86, 917 N.E.2d at 585–86.

211. While it is not clear whether the transcript from the criminal proceeding was made available during the workers’ compensation trial, it seems odd that the claimant would not have tried to claim self-defense in the criminal action (or at least attempted to explain his actions), which would have included the first incident as well.



### 7. *Recreational Activities*

An interesting case involving an alleged recreational activity arose in *Elmhurst Park District v. Illinois Workers' Compensation Commission*.<sup>212</sup> There, the claimant worked as a fitness supervisor for the Elmhurst Park District. On the date of the accident, he was asked by a fellow worker to participate in a game of wallyball, because the participants (users of the park facilities) did not have enough players. The claimant declined at first, citing he was not feeling well, but then joined the game, and was subsequently injured. The issue became whether the claimant was participating in a voluntary recreational program, which if so, would bar his claim per the language of section 11.<sup>213</sup> According to that section, “[a]ccidental injuries incurred while participating in voluntary recreational programs including but not limited to athletic events, parties and picnics do not arise out of and in the course of the employment even though the employer pays some or all of the cost thereof.”<sup>214</sup> Section 11 continues, “[t]his exclusion shall not apply in the event that the injured employee was ordered or assigned by his employer to participate in the program.”<sup>215</sup>

The parties agreed that the claimant’s participation was voluntary, but argued over whether it was recreational. The Commission concluded that it was not and that section 11 did not bar the claimant’s recovery. On appeal, the court applied a *de novo* standard of review to interpret section 11 and held that the facts of the case showed that the activity, although recreational, was inherent in the claimant’s job duties as fitness instructor.<sup>216</sup>

The evidence adduced at the arbitration hearing established that claimant initially declined his co-workers’ invitation to participate in the wallyball game because he was not feeling well and he had other work to do. However, the co-worker persisted in her request and told claimant that without his participation, the game would be cancelled because there would not be enough participants. Thereafter, claimant decided to “help[] out” because “he felt [it] was part of [his] job” which was “to promote . . . different classes and programs.”<sup>217</sup> Based on this evidence, we conclude that claimant did not participate in the wallyball game for his own “diversion” or to “refresh” or

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212. *Elmhurst Park Dist. v. Workers' Comp. Comm'n*, 395 Ill. App. 3d 404, 917 N.E.2d 1052 (1st Dist. 2009).

213. 820 ILL. COMP. STAT. ANN. 305/11 (West 2009).

214. *Id.*

215. *Id.*

216. *Elmhurst*, 395 Ill. App. 3d at 409, 917 N.E.2d at 1057.

217. *Id.* at 410, 917 N.E.2d at 1057–58.

“strengthen” his spirits after toil.<sup>218</sup> Rather, claimant participated in the game to accommodate respondent’s customers. As such, we find that claimant was not engaged in a “recreational” activity as contemplated by section 11 of the Act at the time of his injury.<sup>219</sup>

Finally, the court distinguished its prior holding in *Kozak v. Industrial Commission*,<sup>220</sup> wherein the court denied recovery to an employee who suffered a heart attack while participating in a tennis round-robin tournament conducted to select a tennis team to represent the employer in a national invitational tournament. In that case, the court had stated that, “section 11 applies if an employee is injured while participating in a voluntary activity regardless of the purpose of the activity.”<sup>221</sup> Although the court claimed that its decision in *Elmhurst Park District* was consistent with *Kozak*, it appears that in *Kozak*, the purpose of the activity, competing to make a team which would represent the employer, was irrelevant, while in *Elmhurst Park District*, advancing the employer’s purpose of providing Park District programs was considered relevant.<sup>222</sup>

In *Gooden v. Industrial Commission*,<sup>223</sup> the employee was injured while participating in a company picnic. The arbitrator and Commission denied benefits on the basis of section 11 of the Act.<sup>224</sup> According to the Commission, the employers were told that they were free to attend or not and that the picnic was not mandatory. The appellate court affirmed, noting that the central question was whether the employee was “ordered or assigned by his employer to participate in the program.”<sup>225</sup> The court determined that the word “assigned” should have its normal meaning, *i.e.*, “[t]o set apart for a particular purpose; designate, ’ [t]o select for a duty or office; appoint, ’ or ‘[t]o give out as a task; allot.’”<sup>226</sup> The claimant did not face the prospect of losing pay or a lost personal day as a consequence of foregoing the picnic had he chosen not to attend, he could have simply worked the entire day and been paid just like

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218. *Id.*

219. *Id.* at 410, 917 N.E.2d at 1058. The court also declined to give credence to the employer’s rules prohibiting participation in activities, noting that the claimant had done so on three prior occasions without sanctions. Moreover, the claimant’s written job description stated that his responsibilities included promoting Elmhurst Park District programs.

220. *Kozak v. Indus. Comm’n*, 219 Ill. App. 3d 629, 579 N.E.2d 921 (1st Dist. 1991).

221. *Elmhurst Park Dist.*, 395 Ill. App. 3d at 410, 579 N.E.2d at 1058.

222. *Id.*

223. *Gooden v. Indus. Comm’n*, 366 Ill. App. 3d 1064, 853 N.E.2d 37 (1st Dist. 2006).

224. 820 ILL. COMP. STAT. ANN. 305/11 (West 2009).

225. *Gooden*, at 1066, 853 N.E.2d at 39.

226. *Id.* (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 79 (1969)).

any other day.<sup>227</sup> Accordingly, the claimant was not assigned to attend the picnic and the claim was properly denied.

In yet another case involving recreational activities, the appellate court in *Pinckneyville Community Hosp. v. Industrial Commission*,<sup>228</sup> upheld the Commission's determination that the claimant's attendance at a retirement dinner was a work activity and not a recreational activity under section 11. In that case, the claimant was a senior nurse who had been asked to give a speech honoring one of the retiring physicians. The claimant was nervous about giving the speech and was found by at least one physician as being stressed. During the speech, the claimant suffered a cerebral hemorrhage and collapsed.

According to the appellate court, the Commission properly concluded that the claimant had been "ordered or assigned" not only to the event, but to speak.<sup>229</sup> The claimant was on the committee for the event and there was testimony that it was suggested that she make the speech.<sup>230</sup> The claimant herself felt she had to give the speech or face repercussions. Moreover, the record supported the conclusion that the claimant did not want to give the speech and feared public speaking. The court also concluded that the stress faced by the claimant was unique to her employment.

#### 8. Assaults

In *Potenzo v. Illinois Workers' Compensation Commission*,<sup>231</sup> the appellate court addressed whether the Commission's denial of benefits was against the manifest weight of the evidence in a case where the claimant, a truck driver, was attacked while unloading his truck. The Commission had found that the claimant failed to establish that the area in which he was attacked was a high crime area or a dangerous neighborhood.<sup>232</sup> The appellate court reversed the Commission, finding that the truck driver, while arguably exposed to a neutral risk, was nevertheless so exposed at a higher degree than we members of the general public.<sup>233</sup>

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227. *Id.* at 1067, 853 N.E.2d at 40.

228. *Pinckneyville Cmty. Hosp. v. Indus. Comm'n*, 365 Ill. App. 3d 1062, 851 N.E.2d 595 (5th Dist. 2006).

229. *Id.* at 1071-72, 851 N.E.2d at 602.

230. *Id.* at 1071-72, 851 N.E.2d at 602-03.

231. *Potenzo v. Workers' Comp. Comm'n*, 378 Ill. App. 3d 113, 881 N.E.2d 523 (1st Dist. 2007).

232. *Id.* at 116-17, 881 N.E.2d at 527.

233. *Relying on Illinois Consolidated Telephone Co. v. Indus. Comm'n*, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49 (5th Dist. 2000), the court noted that "increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or qualitative, such as when the employee is exposed to a common risk more frequently than the general public." *Potenzo*, 378 Ill. App. 3d at 117, 881 N.E.2d at 527.

Moreover, the court determined that the claimant was a traveling employee, whose duties required him to travel the streets and unload in areas accessible to the public. The court observed, “[t]he risk of being assaulted, although one to which the general public is exposed, was a risk to which the claimant, by virtue of his employment, was exposed to a greater degree than the general public.”<sup>234</sup>

In a rather unusual fact scenario, the appellate court in *Rotberg v. Industrial Commission*<sup>235</sup> held that injuries sustained by a teacher while he was being arrested, handcuffed and incarcerated for an alleged battery on a student arose out of his employment as a school teacher and were therefore compensable. In *Rotberg*, the claimant, a third-grade teacher, intervened in a fight between two students and placed his hands on the wrist of one of the students, the alleged aggressor and then led the student to the end of the line. The student’s mother later accused the teacher of beating her child and officers arrived at the school to arrest the claimant for assault and battery. During the arrest and subsequent procedures at the police station, the claimant was injured and abused.

The Commission held that the claim was compensable. On appeal, the appellate court affirmed, noting that the risk of arrest was incidental to the fulfillment of the claimant’s duties as a teacher.<sup>236</sup> According to the court, it was “undisputed that the claimant was acting in his capacity as a teacher employed by the Board when he broke up the fight between [the two students].”<sup>237</sup> The appellate court further observed, “[t]he claimant was not arrested merely because he happened to be at work when the police arrived . . . he was arrested based on [the] accusation that he beat [a student].”<sup>238</sup> The court concluded, “when, as in this case, an employee is arrested for conduct committed within the scope of his employment and incidental to the performance of his duties and suffers an injury as a consequence of such an arrest, the injury arises out of the employment for the purposes of determining compensability under this Act.”<sup>239</sup>

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234. *Id.* at 119, 881 N.E.2d at 528–29.

235. *Rotberg v. Indus. Comm’n*, 361 Ill. App. 3d 673, 838 N.E.2d 55 (1st Dist. 2005).

236. *Id.* at 680–81, 838 N.E.2d at 62.

237. *Id.*

238. *Id.* at 681, 838 N.E.2d at 62.

239. *Id.*

## B. "In the Course Of" The Employment

The phrase "in the course of" refers to the "time, place, and circumstances" of the accident.<sup>240</sup> Only one significant case concerning "in the course of" arose during the survey period. In *Circuit City Stores, Inc. v. Illinois Workers' Compensation Commission*,<sup>241</sup> the claimant was injured while assisting a co-worker who was trying to retrieve a bag of chips from a vending machine. The Commission, in a two-to-one decision, found in favor of the claimant, applying the personal comfort doctrine.<sup>242</sup> The circuit court, on judicial review, reversed and adopted the reasoning of the dissenting Commissioner, who argued that the claimant's actions in aggressively trying to dislodge the bag of chips were unreasonable and unforeseen.

The appellate court reinstated the Commission majority decision, finding that the claimant's actions were incidental to his employment. Although rejecting application of the personal comfort doctrine because it applied to employees injured while seeking their own personal comfort, the court nevertheless determined that the actions fell within the course of the employment based on the Good Samaritan doctrine.<sup>243</sup> Discussing this doctrine, the court concluded that it was reasonable to assume that the claimant would come to the aid of his co-worker. While this case seems to dwell on the "in the course of" analysis, it offers no discussion of how the claimant's actions satisfied the "arising out of" requirement or how the risk related to the claimant's job as a car stereo installer.

## C. Repetitive Trauma

Repetitive trauma claims are many times thought of as a separate topic, but in reality concern the risk of employment and as such are an extension of the "arising out of" analysis. Nevertheless, for clarity of discussion the topic of repetitive trauma is addressed here in its own subsection. During the survey period there were three decisions concerning repetitive trauma worthy of attention.

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240. *City of Springfield v. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 313, 901 N.E.2d 1066, 1079 (4th Dist. 2009).

241. *Circuit City Stores, Inc. v. Workers' Comp. Comm'n*, 909 N.E.2d 983 (2nd Dist. 2009).

242. *Id.* at 990.

243. *Id.* at 991. *See also* *Ace Pest Control, Inc. v. Indus. Comm'n*, 32 Ill. 2d 386, 388, 205 N.E.2d 453, 455 (1965) (holding that an employee's deviation to assist another does not remove him from the scope of employment).

In *City of Springfield v. Illinois Workers' Compensation Commission*,<sup>244</sup> the employer appealed the Commission's finding of a repetitive trauma where the evidence showed that the claimant did not perform any one task over and over, but rather worked at several varied jobs. The claimant, who had been diagnosed with bilateral carpal tunnel, bilateral cubital tunnel and bilateral pronator syndrome, worked a job which involved twisting wires, using pliers, and also frequent and repetitive hand usage during his entire work shift. The employer argued that a finding of repetitive trauma is not warranted if an employee's work does not involve performing a single task in a repetitive fashion on a daily basis.<sup>245</sup> The appellate court noted that the claimant's work was not repetitive in the sense that he worked on an assembly line and performed the same task over and over again; however, the medical evidence showed that he performed work that was sufficiently repetitive to support the Commission's finding.

This holding was similar to the result in *Edward Hines Precision Components v. Industrial Commission*,<sup>246</sup> where the court, in evaluating the repetitive trauma claim of a truck driver, held that there was no legal requirement that a certain percentage of the workday be spent on a task in order to support a finding of repetitive trauma. In that case, the evidence showed that the claimant spent less than 10 percent, and more likely two percent of his day tying down loads.<sup>247</sup>

In *Durand v. Industrial Commission*,<sup>248</sup> the appellate court held that a repetitive trauma injury manifested itself for the purpose of the statute of limitations and notice when the claimant knew that she was having problems with her wrists and believed that her condition, carpal tunnel syndrome, was work-related. Although appearing to be a sound decision, the appellate court's ruling was later reversed by the Supreme Court, which found that the manifestation date was that date on which the claimant sought medical treatment for her condition.<sup>249</sup> In its decision, the Supreme Court reiterated the appropriate standard for determining the manifestation date, the date on which it became plainly apparent to a reasonable person, but refused to apply it to the

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244. *City of Springfield v. Workers' Comp. Comm'n*, 388 Ill. App. 3d 297, 901 N.E.2d 1066 (4th Dist. 2009).

245. The employer relied on the decision in *Williams v. Indus. Comm'n*, 244 Ill. App. 3d 204, 614 N.E.2d 177 (1st Dist. 1993), which affirmed a Commission decision denying benefits where the claimant's work did not support a finding of repetitive trauma. The claimant in *Williams* did not perform the same tasks on a daily basis, but performed repetitive tasks on an irregular basis.

246. *Edward Hines Precision Components v. Indus. Comm'n*, 356 Ill. App. 3d 186, 825 N.E.2d 773 (2nd Dist. 2005).

247. *Id.* at 192, 825 N.E.2d at 780.

248. *Durand v. Indus. Comm'n*, 358 Ill. App. 3d 239, 831 N.E.2d 665 (3rd Dist. 2005).

249. *Durand v. Indus. Comm'n*, 224 Ill. 2d 53, 862 N.E.2d 918 (2006).

claimant's perceptions of herself, stating that to do so would be to rely on "expert medical opinions" from a layperson. According to the Court, "because repetitive-trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work."<sup>250</sup> The court then used the date of the conclusive diagnosis as the manifestation date and found the claimant's application for adjustment of claim had been timely filed.

## VII. INTERIM BENEFITS

Interim benefits are found in section 8 of the Act and consist of TTD, TPD, medical expenses, and rehabilitation or vocational training.<sup>251</sup> Interim benefits are generally payable from the date of the injury to the time when the claimant has reached maximum medical improvement ("MMI").<sup>252</sup> Although subject to a statutory minimum and maximum rate, TTD benefits are paid at the rate of 66 2/3 percent of the claimant's average weekly wage rate.<sup>253</sup>

### A. Temporary Total Disability ("TTD")

TTD benefits are those benefits payable to an employee from the date of the injury until such time as the employee reaches MMI.<sup>254</sup> Perhaps the most significant case during the survey was that of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*,<sup>255</sup> which involved the legal question of whether an employer may terminate TTD benefits of an employee who was terminated for volitional conduct. The appellate court grappled with the issue in 2008 and a majority of the court held that the TTD obligation ceased because the employee, by engaging in the volitional conduct, had

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250. *Id.* at 72, 862 N.E.2d at 929. The claimant had worked as a clerical worker for the employer since 1990 and in 1993, became a policy administrator. In that capacity, she scanned insurance policies and typed on a computer keyboard several hours each day. In January 1998, she informed her supervisor that she had pain in her hands and that she believed the pain was work-related. She continued working despite the fact that the pain in her hands increased. The claimant argued that her manifestation date was the date on which her physician conclusively diagnosed her with carpal tunnel syndrome.

251. 820 ILL. COMP. STAT. ANN. 305/8(a) (West 2009).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Interstate Scaffolding, Inc. v. Workers' Comp. Comm'n*, 385 Ill. App. 3d 1040, 896 N.E.2d 1132 (3d Dist. 2008), *rev'd*, 2010 WL 199914 (Ill. Jan. 22, 2010).

essentially removed himself from the workforce.<sup>256</sup> Two justices dissented, arguing that if such a rule was to be adopted, it should take into consideration whether the termination was legitimate or a sham, and further whether after the termination, the employee remained unable to work due to the work-related disability.<sup>257</sup>

In an opinion released in early 2010, the Supreme Court disagreed, and held that when an employee who is entitled to receive TTD benefits as a result of a work-related accident is later terminated for conduct unrelated to the injury, the employer's obligation to pay TTD benefits continues until the employee's medical condition has stabilized or reached MMI.<sup>258</sup> In reaching its conclusion, the Court reviewed the language of the Act and concluded that it clearly stated that benefits were payable "as long as the total temporary incapacity lasts."<sup>259</sup> Moreover, nothing in the Act justified termination of TTD payments where the employee has been discharged for volitional conduct.<sup>260</sup>

## B. Medical Expenses

In one of the more significant cases from the standpoint of employees, the appellate court in *Vulcan Materials Co. v. Industrial Commission*<sup>261</sup> held that medical expenses constituted "compensation" under the Act, and thus, section 19(n) interest could be recovered on an award of medical expenses. In *Vulcan Materials Co.*, the employer sought review of a Commission decision awarding the claimant interest on his award of medical expenses.<sup>262</sup> The appellate court agreed, finding that numerous cases, albeit in other contexts, had determined that the payment of medical expenses should be considered the payment of compensation.

Specifically, the appellate court relied upon the prior Supreme Court decision in *McMahan v. Industrial Commission*,<sup>263</sup> which had held that a delay in paying medical expenses could be the basis for awarding attorneys' fees and penalties under sections 16 and 19(k) of the Act, both of which referenced the unreasonable and vexatious delay in paying compensation. Moreover, the appellate court relied on the decisions in *Ahlers v. Sears, Roebuck Co.*,<sup>264</sup>

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256. *Id.* at 1048–49, 896 N.E.2d at 1140.

257. *Id.* at 1049, 896 N.E.2d at 1141.

258. 2010 WL 199914, \* 1, \*8 (Ill. Jan. 22, 2010).

259. *Id.* at \*7, (citing to 820 ILL. COMP. STAT. ANN. 305/8(b) (West 2009)).

260. *Id.*

261. *Vulcan Materials Co. v. Indus. Comm'n*, 362 Ill. App. 3d 1147, 842 N.E.2d 204 (1st Dist. 2005).

262. *Id.* at 1151–52, 842 N.E.2d at 207–08.

263. *McMahan v. Indus. Comm'n*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998).

264. *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259, 383 N.E.2d 207 (1978).



which held that claimants could recover medical expenses under section 19(g) of the Act<sup>265</sup> (actions in the circuit court to recover “compensation”) and *Legris v. Industrial Commission*,<sup>266</sup> which held that the payment of medical expenses amounted to the payment of compensation under section 6(d) of the Act (filing considered timely if filed within two years of the date of the last payment of medical expenses).<sup>267</sup>

*Vulcan Materials* was an important decision because it completed the analysis of medical benefits and what constituted “compensation” or “the payment of compensation” under the Act. Now, a failure to pay medical benefits can provide a basis for penalties and attorneys’ fees,<sup>268</sup> the payment of medical benefits can extend the time for filing a claimant’s application for adjustment of claim,<sup>269</sup> and claimants may obtain interest on any amounts of unpaid medical benefits.<sup>270</sup>

Another significant decision concerning medical bills came in *Land and Lakes Co. v. Industrial Commission*,<sup>271</sup> which considered the proper foundation for medical bills. According to the court, when evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is considered *prima facie* reasonable.<sup>272</sup> When a party seeks to admit into evidence a bill that has not been paid, reasonableness can be established by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services.<sup>273</sup> Once the witness is shown to possess the requisite knowledge and testifies that the bill is fair and reasonable, the reasonableness requirement for admission of the bill is established.<sup>274</sup>

In *Land and Lakes*, the only foundational evidence came from the claimant, who testified that he had received the bills and that most of the balances remained unpaid. The court observed that the claimant was not familiar with the medical providers’ business and could not testify as to what was reasonable.<sup>275</sup> Because the claimant’s testimony did not meet evidentiary

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265. 820 ILL. COMP. STAT. ANN. 305/19(g) (West 2009).

266. *Legris v. Indus. Comm’n*, 323 Ill. App. 3d 789, 792, 754 N.E.2d 402, 404 (4th Dist. 2001).

267. *Vulcan Materials Co.*, 362 Ill. App. 3d at 1151–52, 842 N.E.2d at 207–08.

268. *McMahan*, 183 Ill. 2d 499, 702 N.E.2d 545.

269. *Ahlers*, 73 Ill. 2d 259, 383 N.E.2d 207.

270. *Legris*, 323 Ill. App. 3d 789, 792, 754 N.E.2d 402, 404.

271. *Land and Lakes Co. v. Indus. Comm’n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2nd Dist. 2005).

272. *Id.* at 591, 834 N.E.2d at 590 (citing *Baker v. Hutson*, 333 Ill. App. 3d 486, 493, 775 N.E.2d 631 (5th Dist. 2002)).

273. *Id.*

274. *Id.*

275. *Id.*

standards, the case was remanded to the Commission for another hearing on the reasonableness of the medical expenses.<sup>276</sup>

### C. Other Expenses Under Section 8(a)

In *Beelman Trucking v. Illinois Workers' Compensation Commission*,<sup>277</sup> the Illinois Supreme Court addressed the issue of what other expenses might be recoverable under that portion of section 8(a) of the Act stating that 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."<sup>278</sup> In *Beelman*, the claimant was severely injured in a truck crash and suffered paralysis in both legs, paralysis below the shoulder in his left arm, and the surgical amputation of his right arm above the elbow. In addition to medical benefits, the Commission awarded the claimant full-time nursing care, modifications to his house, a motorized wheelchair, and modifications to his vehicle. While the claimant was unable to drive, modifications to his van were needed to accommodate the motorized wheelchair. Although these expenses were stipulated to by the parties, a dispute arose over whether two additional items of expenses were recoverable under the Act.

Specifically, the Commission awarded the claimant the cost of an elaborate voice-activated home computer system, one which not only provided Internet access but also to control the lights of his room, and reimbursement of the costs of the claimant's auto insurance premiums for his handicap-modified van. The Commission awarded both items based on medical testimony that each were necessary and on the fact that they were necessitated by the claimant's work accident.<sup>279</sup>

The appellate court affirmed the award of the additional expenses and the Supreme Court agreed. According to the Court, the Commission was justified in awarding the items because each was deemed medically necessary and reasonable. The Commission had emphasized that the computer was considered therapeutic by at least one of the claimant's physicians and that the claimant had lost almost the complete use of his body. Moreover, the Court noted that section 8(a) allowed an award covering all items necessary for mental rehabilitation.<sup>280</sup> The Court pointed out that the computer system

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276. *Id.* at 591, 834 N.E.2d at 591.

277. *Beelman Trucking v. Workers' Comp. Comm'n*, 233 Ill. 2d 364, 909 N.E.2d 818 (2009).

278. 820 ILL. COMP. STAT. ANN. 305/8(a) (West 2009).

279. *Beelman Trucking*, 233 Ill. 2d at 381-82, 909 N.E.2d at 828-29.

280. *Id.* at 382, 909 N.E.2d at 828.

provided the claimant his “only vestige of autonomy.”<sup>281</sup> Quoting the Commission, the Court stated, “[w]hen so much is taken away, the psychological value of any remaining independence is obviously magnified.”<sup>282</sup>

### VIII. PERMANENCY BENEFITS

The Act provides for a variety of permanency benefits, which range from statutory amounts for disfigurement<sup>283</sup> and fractures, to percentages of a body part under section 8(e),<sup>284</sup> percentages of a person under section 8(d)(2),<sup>285</sup> wage differential benefits under section 8(d)(1)<sup>286</sup> and permanent total disability under section 8(f).<sup>287</sup> Death benefits are also provided under section 8(h).<sup>288</sup> The claimant's degree of permanency is determined once his condition reaches MMI and the availability of a particular permanency award depends on whether the claimant is capable of returning to his former job.<sup>289</sup>

#### A. Section 8(d)(1) Wage Differential

In order to qualify as a wage differential award under section 8(d)(1) of the Act, a claimant must prove: (1) a partial incapacity which prevents him from pursuing his “usual and customary line of employment” and (2) an impairment of his earnings.<sup>290</sup> In *Greaney v. Industrial Commission*,<sup>291</sup> the appellate court upheld the award of a wage differential benefit on the ground that there was no evidence that the claimant had been released to return to his former job without restrictions. The claimant's physician had testified that his right hip pain was the main limiting factor in determining whether he could return to his former employment and that he was still experiencing hip pain. Once the court determined that the claimant was entitled to a wage differential,

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281. *Id.*

282. *Id.* at 382, 909 N.E.2d at 829.

283. 820 ILL. COMP. STAT. ANN. 305/8(c) (West 2009).

284. *Id.* at 8(e). For example, a person sustaining a leg injury on or after February 1, 2006, would be compensated as a percentage of a leg, which equals 167 weeks. Thus, a person sustaining a 30 percent loss of use of a right leg would receive 50.1 weeks of Comp. at the rate of 60 percent of their average weekly wage. A worker with an AWW of \$550 would then receive \$16,533 (50.1 x .6 (550)).

285. *Id.* at 8(d)(2).

286. *Id.* at 8(d)(1).

287. *Id.* at 8(f).

288. *Id.* at 8(h).

289. If an employee cannot return to his former employment, he then should seek a wage differential or permanent total disability benefits.

290. 820 ILL. COMP. STAT. ANN. 305/8(d)(1) (West 2009).

291. *Greaney v. Indus. Comm'n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331 (1st Dist. 2005).

it then proceeded to determine the appropriate amount of the differential. According to the court, a wage differential award should be calculated based upon the number of hours constituting full performance of the claimant's particular occupation.<sup>292</sup> The court also approved of using the claimant's replacement wages as evidence of what he would have been earning had he continued in full performance of his duties.<sup>293</sup>

In *Taylor v. Industrial Commission*,<sup>294</sup> the court considered the degree of certainty needed to determine what a claimant's wages would have been under section 8(d)(1). There, the claimant had worked as a truck driver prior to his accident, and after his injury, was only able to work as a dispatcher at a much lower wage. At arbitration, the claimant introduced the wage records of the driver who took over his routes as evidence of what he would be earning in the full performance of his duties as a truck driver. The employer objected on the ground that pay was determined by seniority and that the claimant had only obtained driver status because he had paired up with another more senior driver. The appellate court held that the Commission majority properly refused to use the replacement driver's wages and distinguished the case from *Greaney* on the ground that in that case, the sole question was the amount of the hourly wage.<sup>295</sup> Here, there were many variables, including whether the claimant would have continued to work the same route.

Finally, in *First Assist, Inc. v. Industrial Commission*,<sup>296</sup> the appellate court upheld the Commission's wage differential determination based on the difference between the earnings of the claimant's current salary as a staff nurse at a nursing home (at \$19 per hour) and that of an operating room nurse (at \$43 per hour). The appellate court noted that the Commission had narrowly construed the claimant's former job as a specialty and that it had further concluded that nurse was not a generic job, but rather one that encompassed a variety of tasks and, therefore, was not paid the same.<sup>297</sup> The employer had argued that "a nurse was a nurse" and that the claimant was not eligible for a wage differential because, although not an emergency room nurse, she was nevertheless still working as a nurse after the accident.<sup>298</sup>

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292. *Id.* at 1022, 832 N.E.2d at 349–50.

293. *Id.*

294. *Taylor v. Indus. Comm'n*, 372 Ill. App. 3d 327, 867 N.E.2d 1147 (4th Dist. 2007).

295. *Id.* at 330, 867 N.E.2d at 1150.

296. *First Assist, Inc. v. Indus. Comm'n*, 371 Ill. App. 3d 488, 867 N.E.2d 1063 (4th Dist. 2007).

297. *Id.* at 497, 867 N.E.2d at 1071.

298. *Id.* at 495, 867 N.E.2d at 1069.

## B. Section 8(f) Permanent Total Disability (“PTD”)

Permanent total disability benefits are available to an employee who, because of his work-related injuries, cannot return to his former employment and cannot work in any reasonably stable job market.<sup>299</sup> The most litigated issue with PTD involves those cases where the employee seeks to establish an entitlement to such benefits by showing he falls within the so-called “odd lot” status.

In *City of Chicago v. Illinois Workers' Compensation Commission*,<sup>300</sup> the employer contested the Commission's award of PTD benefits based on an “odd lot” basis. There, the claimant was a 55-year old pipe-fitter who was unable to return to his former employment. The claimant possessed a high school education. The appellate court found that the claimant had presented a *prima facie* case that he fell within the odd lot status and thus, the burden shifted to the employer to demonstrate that work was available to a person in the claimant's position.<sup>301</sup>

While the claimant did not present evidence of a diligent but unsuccessful job search, he did demonstrate that because of his age, skills, training, experience and education, he was not regularly employable in a well-known labor market. The claimant testified as to his own work experiences and also offered vocational testimony that no jobs were available to a person in his circumstances.<sup>302</sup>

## C. Awards For Injuries To Multiple Body Parts

In *Beelman Trucking v. Illinois Workers' Compensation Commission*,<sup>303</sup> the Supreme Court upheld an award of permanency benefits under two different portions of the Act, resulting from injuries sustained in a single accident. The claimant, a truck driver, sustained paralysis of both legs, paralysis below the shoulder of his left arm and suffered a surgical amputation of his right arm just above the elbow.<sup>304</sup> The Commission awarded statutory

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299. 820 ILL. COMP. STAT. ANN. 305/8(d)(2) (West 2009). An employee may prove an entitlement to non-statutory permanent total disability benefits by showing that he is obviously unemployable, that there is medical evidence that he cannot work, or that his disability is such that he is unable to perform any but the most limited services, and that no reasonably stable job market exists for those services.

300. *City of Chicago v. Indus. Comm'n*, 373 Ill. App. 3d 1080, 871 N.E.2d 765 (1st Dist. 2007).

301. *Id.* at 1089, 871 N.E.2d at 773.

302. *Id.* at 1091, 871 N.E.2d at 775.

303. *Beelman Trucking v. Workers' Comp. Comm'n*, 233 Ill. 2d 364, 909 N.E.2d 818 (2009).

304. *Id.* at 367, 909 N.E.2d at 821.

PTD benefits under section 8(e)(18) for the loss of the claimant's legs and scheduled benefits under section 8(e)(10) for the injuries to each arm.

Although the appellate court had set the awards aside on the ground that the Commission lacked authority to award both PTD benefits and scheduled benefits, the Supreme Court reversed and reinstated the Commission's decision. According to the Court, the Act permits an injured employee to recover for the loss of two members under section 8(e)(18) as well as for any additional scheduled losses beyond the two losses compensated under section 8(e)(18). The Court appeared to consider the statutory permanent total disability in a different light than a non-statutory permanent total disability, which would seem to prohibit multiple permanency awards.

#### D. Section 19(h) Petitions

Although permanency determinations are made at arbitration, section 19(h) of the Act permits either party to petition the Commission for a modification of benefits paid in installments on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.<sup>305</sup> Section 19(h) motions must be filed within 30 months of the award or agreement or in the case of a wage differential award under section 8(d)(1), within 60 months.<sup>306</sup>

In *Behe v. Industrial Commission*,<sup>307</sup> the appellate court held that the filing of a section 19(h) petition alleging change in circumstances did not start anew a second 30-month period unless the ruling on the initial section 19(h) motion resulted in a change in circumstances.<sup>308</sup> Thus, a denial of a section 19(h) petition does not toll the 30-month limitation requirement. In *Behe*, the claimant filed a section 19(h) petition on April 21, 1999, following a December 30, 1997, Commission decision awarding him 50 percent of a person as a whole. The Commission denied the petition on December 6, 2001. On July 22, 2002, the claimant filed a second section 19(h) petition, which was dismissed by the Commission as untimely.

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305. 820 ILL. COMP. STAT. ANN. 305/19(h) (West 2009).

306. *Id.*

307. *Behe v. Indus. Comm'n*, 365 Ill. App. 3d 463, 848 N.E.2d 611 (2nd Dist. 2006).

308. The *Behe* court distinguished the prior decision in *Hardin Sign Co. v. Indus. Comm'n*, 154 Ill. App. 3d 386, 506 N.E.2d 1066 (3rd Dist. 1987), which had permitted the filing of a second section 19(h) petition because the initial petition was allowed and a modification resulted. Thus, the Comm'n's ruling on the original section 19(h) petition constituted a "new award" from which a new 30-day period commenced.

In *Cassens Trans. Co. v. Industrial Commission*,<sup>309</sup> the employer filed a section 19(h) petition seeking to suspend the employee's wage differential award on the basis that the claimant's economic condition had changed and that he had refused to provide income tax returns, which would have revealed if he were earning additional income. No evidence was presented concerning a change in the claimant's physical condition. The appellate court upheld the Commission's order denying the motion, finding that the term disability necessarily referred to a physical disability and not an economic disability.<sup>310</sup> The court stated that the term as used in section 8(d)(1) had to be read consistently with its usage in other sections of the Act, notably, sections 1(b)(3), 8(d)(2), and section 12, all of which referred to a physical disability.

#### IX. PROCEDURAL ISSUES AFFECTING THE APPEAL

A variety of procedural issues can affect the appeal in a workers' compensation case. Most issues concern the judicial review process from the Commission to the circuit court and often involve the appeal bond. Other procedural issues concern what properly constitutes a Commission panel and the appropriate standard of review. Several cases were decided in these areas during the survey period.

##### A. Motions To Correct Or Recall Under Section 19(f)

Section 19(f) provides a 15-day small window for a party to seek recall of an arbitrator or Commission decision.<sup>311</sup> According to section 19(f), such a motion is limited in scope to correcting clerical errors or errors in computation.<sup>312</sup> In *Residential Carpentry, Inc. v. Kennedy*,<sup>313</sup> the appellate court considered the timeliness of the employer's section 19(f) appeal where the Commission's decision had been recalled and a corrected decision issued by the Commission. There, the Commission issued its original decision and the employer filed a timely appeal.<sup>314</sup> Shortly thereafter, but within the 15-day period, the employee moved to recall the decision. The petition to recall was allowed and a corrected decision was issued. However, the employer did not file a new circuit court review.

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309. *Cassens Transp. Co. v. Indus. Comm'n*, 354 Ill. App. 3d 807, 821 N.E.2d 1274 (4th Dist. 2005).

310. *Id.* at 808, 821 N.E.2d at 1276.

311. 820 ILL. COMP. STAT. ANN. 305/19(f) (West 2009).

312. *Id.*

313. *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 879 N.E.2d 439 (1st Dist. 2007).

314. *Id.* at 503, 879 N.E.2d at 443.

The claimant moved to dismiss], arguing that the issuance of the corrected decision voided the original circuit court review and required a new section 19(f) filing. The appellate court agreed and dismissed the appeal.<sup>315</sup> According to the court, in those situations where the Commission recalls a decision upon a motion to recall, the Commission's decision is not considered final and appealable until the Commission issues a corrected decision.<sup>316</sup> Thus, the time for review begins with the issuance of the corrected decision. Likewise, in *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Commission*,<sup>317</sup> the appellate court ruled that section 19(f) did not vest the Commission with the authority to reopen or set aside a prior final determination in the case, even on the discovery of fraud.<sup>318</sup> In that case, the issue of initial compensability was tried on a section 19(b) petition and found in favor of the claimant. The decision was not appealed and became final. Shortly thereafter, the employer discovered a fraud, which demonstrated that the claimant should not have received benefits under the section 19(b) motion. The employer brought the matter to the attention of the arbitrator and Commission as part of the claimant's second section 19(b) petition.

The Commission refused to consider the charge of fraud and the appellate court affirmed its ruling. According to the court, section 19(f)'s language concerning fraud did not give the Commission the authority to reopen a prior determination that was otherwise closed by the law of the case. Section 19(f) permitted recall or appeal of only final issues in the case before the Commission. A prior section 19(b) ruling, which had already become final, could not be revisited.<sup>319</sup>

## B. Appeal Bonds

Appeals from the decisions of the Illinois Workers' Compensation Commission are governed by section 19(f) of the Act and must be filed with the circuit court within 20 days of the receipt of the Commission's decision.<sup>320</sup>

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315. *Id.* at 503, 879 N.E.2d at 443. *See also* Int'l Harvester v. Indus. Comm'n, 71 Ill. 2d 180, 188, 374 N.E.2d 182, 185 (1978).

316. *Residential Carpentry, Inc.*, 377 Ill. App. 3d at 503-04, 879 N.E.2d at 443-44.

317. *Ming Auto Body/Ming of Decatur, Inc. v. Indus. Comm'n*, 387 Ill. App. 3d 244, 899 N.E.2d 365 (1st Dist. 2008).

318. *Id.* at 253-54, 899 N.E.2d at 158. Section 19(b) is an emergency procedure that permits a party to present a case for immediate hearing on all issues except permanency. 820 ILL. COMP. STAT. ANN. 305/19(b) (West 2009). Such motions usually involve disputes over accident, causation or entitlement to medical benefits.

319. *Ming Auto Body/Ming of Decatur, Inc.*, at 253-255, 899 N.E.2d at 158-59.

320. 820 ILL. COMP. STAT. ANN. 305/19(f) (West 2009). *See also* Brad A. Elward, *Workers' Comp. Reviews And Appeals: A Review And Suggestion For Change*, 22 N. ILL. U. L. REV. 493 (2002).



Section 19(f) requires the party seeking review to timely file a written request to commence proceedings, summons and tender. If the party seeking review is an employer, it must also file an appeal bond backed by a surety.<sup>321</sup> The requirements of section 19(f) are typically strictly construed and there is no provision for an extension of time. Compliance with the Act is considered jurisdictional. Judicial reviews to the circuit court are frequently the one area where an appeal can fall victim to oversight and error.

Several decisions during the survey period addressed the sufficiency of appeal bonds and other measures for perfecting a review from the Commission to the circuit court. In *Morton's of Chicago v. Industrial Commission*,<sup>322</sup> the appellate court addressed a challenge to jurisdiction on the ground that the appeal bond filed by the employer failed to perfectly track the statute and did not contain a provision stating that if the review was not successful, Morton's would pay the award and costs of the proceedings.<sup>323</sup> The employer had filed its circuit court review in Cook County and had used that court's forms, which were outdated and did not contain the requisite language from section 19(f)(1).<sup>324</sup>

The appellate court held that the absence of the language committing Morton's to pay the award and costs if the appeal were unsuccessful did not render the bond ineffective.<sup>325</sup> The court stated, "[w]hen a bond is required by statute, the statutorily mandated terms are read into the bond, regardless of whether the bond actually contains those terms."<sup>326</sup> Accordingly, the provision from section 19(f) is read into the bond as a matter of law and the motion to dismiss was properly denied.

In *Residential Carpentry, Inc. v. Kennedy*,<sup>327</sup> a case discussed earlier in regard to the timeliness of a section 19(f) review where there has been a motion to recall the Commission's decision, the court addressed the sufficiency of the appeal as an alternative ruling in the case. There, the original Commission decision had set the amount of the bond at \$4,800 less than the amount set in the corrected decision.<sup>328</sup> The employer had argued that

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321. 820 ILL. COMP. STAT. ANN. 305/19(f)(2) (West 2009). The appeal bond must be signed by someone on behalf of the employer with the authority to financially bind the employer, and also by the surety. Certain employers, including municipalities, are excluded from this requirement. The amount of the bond is fixed by the Commission at \$100 over the unpaid award. 50 ILL. ADMIN. CODE §7060.10(b).

322. *Morton's of Chicago v. Indus. Comm'n*, 366 Ill. App. 3d 1056, 853 N.E.2d 40 (1st Dist. 2006).

323. *Id.* at 1060, 853 N.E.2d at 44.

324. *Id.* at 1060, 853 N.E.2d at 45.

325. *Id.*

326. *Id.* (Citing *Rosewood Corp. v. Transamerica Ins. Co.*, 57 Ill. 2d 247, 254, 311 N.E.2d 673, 677 (1974)) and RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY §71 (1995)).

327. *Residential Carpentry, Inc. v. Indus. Comm'n*, 377 Ill. App. 3d 499, 879 N.E.2d 439 (1st Dist. 2007).

328. *Id.* at 503-04, 879 N.E.2d at 444.

the bond was nevertheless sufficient. The appellate court held that the appeal bond was of an insufficient amount, finding that the bond amount set in the corrected decision controlled.<sup>329</sup> The court also pointed out that the employer failed to make any effort to correct or supplement the bond within 20 days of receipt of the corrected decision.<sup>330</sup> Accordingly, *Residential Carpentry* stands for the proposition that a new set of review documents, including a new appeal bond, must be filed whenever the Commission issues a corrected decision on recall.

Another decision during the survey period addressed under what circumstances an attorney can sign the appeal bond on behalf of the employer. In *Unilever Best Foods North America v. Illinois Workers' Compensation Commission*,<sup>331</sup> one of the employer's attorneys, Echeveste, signed the appeal bond on behalf of the employer. The bond was challenged by the employee on the authority of *Deichmueller Construction Co. v. Industrial Commission*,<sup>332</sup> a case which held that an attorney could not sign a section 19(f)(1) appeal bond on behalf of an employer. The employer responded by presenting an authorization from the employer stating that attorney Mark F. Slavin, who also worked with Echeveste, had authority to sign the bond for the employer.<sup>333</sup> Moreover, it relied upon the court's prior decision of *First Chicago v. Industrial Commission*,<sup>334</sup> which had permitted the employer time to present evidence more than 20 days after receipt of the Commission's decision, that established the individual who signed the bond was a corporate officer with authority to sign the bond and bind the corporation.<sup>335</sup>

The appellate court ruled that attorney Echeveste's signature was insufficient and that the authorization given to attorney Slavin, while given to another attorney within his firm, was insufficient to authorize anyone other than Slavin to sign and bind the employer. Moreover, the court specifically limited application of the *First Chicago* decision to those cases where the unidentified individual signing the bond was indeed an officer or other person

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329. *Id.* at 504, 879 N.E.2d at 444. The court also refused to apply the lesser substantial compliance standard to appeal bonds, stating that the standard was limited in application to situations where the appeal bond was timely filed but irregular in form. *See Lee v. Indus. Comm'n*, 82 Ill. 2d 496, 498-99, 413 N.E.2d 425, 426 (1980).

330. *Id.* at 504, 879 N.E.2d at 444.

331. *Unilever Best Foods N. Am. v. Workers' Comp. Comm'n*, 374 Ill. App. 3d 314, 870 N.E.2d 1000 (1st Dist. 2007).

332. *Deichmueller Constr. Co. v. Indus. Comm'n*, 151 Ill. 2d 413, 414, 603 N.E.2d 516, 517-18 (1992).

333. The document filed was termed a "Statement of Authority in Support of Bond".

334. *First Chicago v. Indus. Comm'n*, 294 Ill. App. 3d 685, 689, 691 N.E.2d 134, 137 (1st Dist. 1998).

335. In that case, the individual signing the bond was a corporate officer and the supplemental filing identified him as such, and stated further that at the time he signed the bond, he had the authority to bind the company. *Id.*

at the employer's business.<sup>336</sup> *First Chicago* did not permit a party seeking judicial review to submit evidence after the expiration of the review period establishing that its attorney was authorized to execute the bond on its behalf.<sup>337</sup>

Most recently, *Securitas, Inc. v. Illinois Workers' Compensation Commission*<sup>338</sup> reemphasizes precisely why reform is needed in the area of surety bonds. In that case, the Commission set the surety bond at \$10,100. The employer filed a review, but its appeal bond was limited to \$10,000 and the official capacity of its signatory on behalf of the employer was not stated. The circuit court confirmed the Commission's award and on appeal, the appellate court dismissed the case for lack of jurisdiction. According to the court, the surety bond as filed was insufficient to confer jurisdiction. The court rejected any application of the substantial compliance doctrine, stating that it applied to scenarios where there were "irregularities in form." The amount of the bond, it declared, "is a matter of substance rather than form."<sup>339</sup>

As to the issue concerning the signatory, the court simply pointed to its prior decision in *First Chicago v. Industrial Commission*,<sup>340</sup> where it held that the person who signs the surety bond for the employer need not be identified on the face of the bond as an officer of the employer and stated that it had previously rejected such a requirement. The court did not discuss whether the employer had later provided identification for the bond signatory, as *First Chicago* required. *Securitas* reiterates the need for employers to ensure that they have followed all of the steps necessary to procure a proper bond.<sup>341</sup>

### C. Commission Proceedings

In *Piasa Motor Fuels v. Industrial Commission*,<sup>342</sup> the appellate court held that the Chairman of the Industrial Commission was not precluded by the Act from sitting on a dispositive panel. In *Piasa Motor Fuels*, the employer challenged the authority of Commission Chairmen Dennis Ruth to sit as a member of the three-person review panel. The court found that section 13 of

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336. *Unilever Best Foods N. Am.*, 374 Ill. App. 3d at 317, 870 N.E.2d at 1003.

337. *Id.*

338. *Securitas, Inc. v. Workers' Comp. Comm'n*, 395 Ill. App. 3d 1103, 918 N.E.2d 1291 (5th Dist. 2009).

339. *See Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 505, 879 N.E.2d 439, 445 (1st Dist. 2007).

340. *First Chicago v. Indus. Comm'n*, 294 Ill. App. 3d 685, 688, 691 N.E.2d 134 (1st Dist. 1998).

341. Moreover, it highlights why reform in this area is desperately needed. To dismiss an appeal where there is a bond filed, albeit \$100 short, is to place form over substance. In all likelihood the case involved coverage and there is no true risk of non-payment faced by the employee.

342. *Piasa Motor Fuels v. Indus. Comm'n*, 368 Ill. App. 3d 1197, 858 N.E.2d 946 (5th Dist. 2006).

the Act, which spoke to the composition of the Commission, specifically included the chairman as a Commissioner, and gave him “the final authority in all administrative matters relating to the Commissioners,” despite language in section 13 which purported to limit that authority “in the determination of cases under this Act.”<sup>343</sup>

In *Freeman United Coal Mining Co. v. Illinois Workers’ Compensation Commission*,<sup>344</sup> the court held that whether an arbitrator may reopen proofs after the conclusion of trial is a matter of discretion. In that case, the claimant moved to reopen proofs to file a physician’s affidavit to clarify his deposition testimony. The appellate court upheld the Commission’s ruling (which affirmed the arbitrator’s decision to reopen the proofs), and stated that such a ruling was reviewed under an abuse of discretion standard.<sup>345</sup>

#### D. No Jurisdiction For Lack Of Finality

In *St. Elizabeth’s Hosp. v. Illinois Workers’ Compensation Commission*,<sup>346</sup> the appellate court, on its own motion, addressed the finality of a Commission decision which failed to set an amount for TTD. According to the court, certain circumstances exist whereby such orders are considered interlocutory and therefore, appellate jurisdiction is lacking. After reviewing prior authorities, the appellate court concluded that the TTD rate in the case could be easily determined because the arbitrator had set the average weekly wage rate.<sup>347</sup> Given that value, the Commission on remand could perform a simple mathematical computation and arrive at the appropriate TTD rate.

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343. *Id.* at 1204, 858 N.E.2d at 954.

344. *Freeman United Coal Mining Co. v. Workers’ Comp. Comm’n*, 386 Ill. App. 3d 779, 901 N.E.2d 906 (4th Dist. 2008).

345. *Id.* at 785–86, 901 N.E.2d at 913. *See also* *Chicago Transparent Products, Inc. v. American Nat. Bank & Trust Co. of Chicago*, 337 Ill. App. 3d 931, 942, 788 N.E.2d 23, 32 (1st Dist. 2002).

346. *St. Elizabeth’s Hosp. v. Workers’ Comp. Comm’n*, 371 Ill. App. 3d 882, 864 N.E.2d 266 (5th Dist. 2007).

347. In *A.O. Smith Corp. v. Indus. Comm’n*, 109 Ill. 2d 52, 485 N.E.2d 335 (1985), the court did not dismiss the appeal because due to the parties’ stipulations concerning earnings and weekly benefits payable, the calculation of the award was a simple mathematical process. In *Williams v. Indus. Comm’n*, 336 Ill. App. 3d 513, 784 N.E.2d 396 (2nd Dist 2003), the court held that jurisdiction was lacking because the award of attorneys’ fees under section 16 of the Act did not state a specific amount. Because such an award is discretionary, an amount could not be easily determined and required remand.

### E. The Standard of Review

The focus of any appellate review in a workers' compensation case is the decision of the Commission.<sup>348</sup> While abuse of discretion<sup>349</sup> and *de novo*<sup>350</sup> standards of review are used in workers' compensation appeals for discretionary and legal questions, the far more common standard of review is that of manifest weight of the evidence, which applies to findings of fact. Illinois law is well-settled that a Commission's decision on a question of fact will not be overturned unless it is against the manifest weight of the evidence.<sup>351</sup> A decision is against the manifest weight of the evidence where an opposite result is clearly apparent.<sup>352</sup> Whether the appellate court would reach the same conclusion is not the test; rather, the test is whether there is sufficient evidence in the record to support the Commission's finding.<sup>353</sup> In reviewing fact findings by the Commission, the appellate court gives great deference to the Commission's determinations.

In 2008, a decision was handed down that suggested a possible move away from such a deferential treatment of the Commission's fact findings. In *S & H Floor Covering, Inc. v. Illinois Workers' Compensation Commission*,<sup>354</sup> the appellate court revisited the issue of whether deference should be given to an arbitrator's findings of credibility where the Commission reversed the arbitrator without hearing new evidence and without providing an explanation as to why. Noting that the Commission exercises original jurisdiction and is not bound by the arbitrator's findings, the court nonetheless noted that in its "role as reviewer of the record, the Commission is at a practical disadvantage as compared to the arbitrator."<sup>355</sup> Citing its prior decision in *Cook v. Industrial*

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348. *Weyer v. Workers' Comp.* Comm'n, 387 Ill. App. 3d 297, 900 N.E.2d 360 (1st Dist. 2008); *Pietrzak v. Indus.* Comm'n, 329 Ill. App. 3d 828, 769 N.E.2d 66 (1st Dist. 2002).

349. *Gotter v. Indus.* Comm'n, 152 Ill. App. 3d 822, 828, 504 N.E.2d 1277, 1281 (4th Dist. 1987).

350. *Ervin v. Indus.* Comm'n, 364 Ill. 56, 64, 4 N.E.2d 22, 26 (1936).

351. *Orisini v. Indus.* Comm'n, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1008 (1987); *Freeman United Coal Mining Co. v. Workers' Comp.* Comm'n, 386 Ill. App. 3d 779, 901 N.E.2d 906 (4th Dist. 2008).

352. *Univ. of Illinois v. Workers' Comp.* Comm'n, 365 Ill. App. 3d 906, 910, 851 N.E.2d 72, 76 (1st Dist. 2006). Several cases have defined "against the manifest weight of the evidence" as meaning that no rational trier of fact could have agreed with the agency. See *Durand v. Indus.* Comm'n, 224 Ill. 2d 53, 64, 862 N.E.2d 918, 924 (2007); *D.J. Masonry Co. v. Indus.* Comm'n, 295 Ill. App. 3d 924, 930, 693 N.E.2d 1201, 1205 (1st Dist. 1998). This is the same standard applied to an evidentiary ruling and suggests a higher standard than an opposite result is clearly apparent.

353. *Freeman United Coal Mining Co. v. Workers' Comp.* Comm'n, 386 Ill. App. 3d 779, 901 N.E.2d 906 (4th Dist. 2008).

354. *S&H Floor Covering, Inc. v. Workers Comp.* Comm'n, 373 Ill. App. 3d 259, 870 N.E.2d 821 (4th Dist. 2007).

355. *Id.* at 267–68, 870 N.E.2d at 827–28.

*Commission*,<sup>356</sup> the court continued, “[t]he arbitrator, having heard the live testimony, is actually in a better position to evaluate that evidence.”<sup>357</sup> The appellate court stated that, although not appropriate on the facts before it, “we will consider giving credence to *Cook*, which provides for ‘an extra degree of scrutiny’ to be applied to the record in determining whether there is sufficient support for the Commission’s decision, especially when the Commission makes credibility determinations regardless of the arbitrator’s findings.”<sup>358</sup>

Although the decision appeared to signal a change in the standard of review, the appellate court has since retreated from *S & H Floor Covering* and has declined to apply an alternative standard of review.<sup>359</sup> Looking back, it is certainly conceivable that the court was simply firing a proverbial shot across the bow of the Commission, which at the time seemed to be leaning heavily in favor of employees in its application of the Act.

In the final case reported during the survey period, the appellate court upheld the Commission’s denial of benefits in a case where the sole evidence of a work-related accident came from the claimant. In *Hosteny v. Illinois Workers’ Compensation Commission*,<sup>360</sup> the claimant argued that the Commission had ignored his unrefuted testimony concerning his alleged August 2, 2004, work accident. The appellate court rejected that argument, noting that while an employee’s testimony about an alleged unwitnessed accident might be sufficient in some cases, standing alone, to justify an award of benefits, it was “not enough where consideration of *all* facts and circumstances demonstrate that the manifest weight of the evidence is against it.”<sup>361</sup> Here, numerous factors supported the Commission’s decision, including evidence that indicated that: (1) the claimant did not report a work-related accident to his medical providers until September 28, 2008; (2) the claimant processed his initial treatment using a group insurance card, despite his knowledge of the workers’ compensation system; (3) the claimant did not report a work-related accident to his employer until September 22, 2008; and (4) the claimant was unable to point to a specific date of his injury.<sup>362</sup>

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356. *Cook v. Indus. Comm’n*, 176 Ill. App. 3d 545, 551–552, 531 N.E.2d 379 (3rd Dist. 1988).

357. *S&H Floor Covering, Inc.*, 373 Ill. App. 3d at 267–68, 870 N.E.2d at 827–28.

358. *Id.* at 268, 870 N.E.2d at 828.

359. *Hosteny v. Ill. Workers’ Comp. Comm’n*, 2009 WL 5174065, at \*8 (1st Dist., Dec. 29, 2009).

360. *Hosteny v. Ill. Workers’ Comp. Comm’n*, 2009 WL 5174065 (1st Dist., Dec. 29, 2009).

361. *Id.* at \*9 (emphasis in original).

362. *Id.*

## F. Appellate Court Practice

Although a minor point in the overall scheme of things, two cases did specifically caution counsel not to cite to or discuss decisions of the Illinois Workers' Compensation Commission in argument before the appellate court. In both *S&H Floor Covering, Inc v. Illinois Workers' Compensation Commission*,<sup>363</sup> and *Global Products v. Illinois Workers' Compensation Commission*,<sup>364</sup> the court stated unequivocally that “[d]ecisions of the Commission are not precedential and thus should not be cited.”<sup>365</sup>

## X. PROCEDURAL ISSUES AFFECTING THE CASE

### A. Notice of Injury—Section 6(c)

Notice is one of the more frequently litigated issues in all of workers' compensation. According to section 6(c) of the Act, an employee must give notice within 45 days of the accident.<sup>366</sup> Section 6(c) reads, in part:

Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident. . . . No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy.

Notice of the accident shall give the approximate date and place of the accident, if known, and may be given orally or in writing.<sup>367</sup>

Typically, notice will not bar a claim unless the employee fails to give any notice.

In *Kishwaukee Community Hospital v. Industrial Commission*,<sup>368</sup> the claimant was seeking compensation for a repetitive trauma injury while employed as a nurse's assistant. The appellate court upheld the Commission's

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363. *S&H Floor Covering, Inc. v. Workers' Comp. Comm'n*, 373 Ill. App. 3d 259, 266, 870 N.E.2d 821, 826–27 (4th Dist. 2007).

364. *Global Prod. v. Workers' Comp. Comm'n*, 392 Ill. App. 3d 408, 413, 911 N.E.2d 1042, 1047 (1st Dist. 2009).

365. *Id.* Indeed, this comment was recently emphasized at the January 2010 oral arguments before the Workers' Compensation Commission Division, where members of the court instructed counsel not to reference Commission decisions and to cite only judicial authority.

366. 820 ILL. COM. STAT. ANN. 305/6(c) (West 2009).

367. *Id.*

368. *Kishwaukee Cmty. Hosp. v. Indus. Comm'n*, 356 Ill. App. 3d 915, 828 N.E.2d 283 (2nd Dist. 2005).

ruling on notice. The claimant filled out an accident report approximately 17 days after she first sought treatment. According to the accident report, she complained of wrist pain, and did not specifically state that she was experiencing pain in her thumbs. The Commission found that the employer was not prejudiced by the claimant's failure to use the term "thumb." Further, the report of injury the claimant provided was sufficient notice under the Act.

In *Westin Hotel v. Industrial Commission*,<sup>369</sup> a claimant injured his knee while pushing a cart loaded with painting supplies. He felt pain immediately, but it was not severe. He did not initially report any injury to the Employer. He returned to work the next day, but ended up leaving work due to pain. The claimant testified that he told a secretary in the Employer's engineering office that he was injured and needed to see a doctor. He could not recall her name. A couple days later, the claimant began experiencing cutting of the knee. The appellate court held that oral notice is sufficient under the notice provision of the Act. The court further noted that the Employer did not present any evidence to contradict the claimant's testimony that he provided notice.

In *S&H Floor Covering, Inc. v. Illinois Workers' Compensation Commission*,<sup>370</sup> the appellate court found that the claimant had given proper notice to his employer under the Act even though he had not provided notification until 49 days after his injury. While the claimant was in Kansas installing flooring for a family member, he contacted the employer to advise them that he was having such bad knee pain that he was not able to return to Illinois. A foreman for another company that worked with the claimant and employer testified that the claimant had told him he had injured his knee while working for a relative in Tennessee. The owner of the employer company testified that he spoke to the claimant the day of the trip in an attempt to persuade him not to go. During that conversation, the claimant never reported any knee injury. The claimant's project manager also testified that the claimant's wife told him that the claimant had not returned from his trip because he had injured himself and couldn't drive back. The claimant's wife testified that she did not recall telling the project manager this, and the claimant was complaining of knee pain and limping before the trip.

Approximately 49 days after the claimant last worked for the employer, he reported a work related injury. The arbitrator found for the employer and noted that the claimant failed to comply with section 6(c) of the Act by failing to give notice to the employer within 45 days. The Commission overturned the arbitrator, finding that the Claimant "did sustain accidental injuries in the

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369. *Westin Hotel v. Indus. Comm'n*, 372 Ill. App. 3d 527, 865 N.E.2d 342 (1st Dist. 2007).

370. *S&H Floor Covering, Inc. v. Workers' Comp. Comm'n*, 373 Ill. App. 3d 259, 870 N.E.2d 821 (4th Dist. 2007).



form of a cumulative knee condition arising out of and in the course of his employment as a flooring installer.” With regard to notice, the Commission noted that the employer did not suffer any prejudice in the delay in reporting. They further noted that when the project manager spoke to the claimant’s wife, the employer had notice that the knee pain had worsened to the point that the claimant could no longer work. The appellate court affirmed because “no opposite conclusion is clearly apparent.”<sup>371</sup>

During the 45-day period, the employer's project manager spoke to the claimant's wife and was informed that the claimant was injured and was not able to drive back to Illinois. The claimant testified that in early September, he telephoned Sandy at the employer's office and informed her that he was having knee problems that were going to require surgery. “Although this notice was not perfect, [the] employer was possessed with the knowledge that claimant had suffered a knee injury that prevented him from returning to work and that surgery would be required. Further, [the] employer could infer from the nature of [the] claimant's injury and his position as a flooring installer that the injury was work-related. Because some notice was given to [the] employer, it was then incumbent upon [the] employer to show that it was unduly prejudiced.”<sup>372</sup>

## B. Evidentiary Matters

### 1. *Where And Expert Opinion Disclosure*

One of the more significant issues in workers’ compensation involves the disclosure of medical opinions. Although workers’ compensation has no discovery rules, section 12 of the Act provides some guidance concerning medical opinions. The pertinent part of section 12 states:

In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, or his representative, as soon as practicable but not later than 48 hours before the time the case is set for hearing. Such delivery shall be made

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371. *Id.* at 265–66, 870 N.E.2d at 826.

372. *Id.*

in person either to the employer, or his representative, or by registered mail to either, and the receipt of either shall be proof of such delivery. If such surgeon refuses to furnish the employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the hearing next following said examination.<sup>373</sup>

According to *Ghere v. Industrial Commission*,<sup>374</sup> section 12 applies to treating and examining physicians. The purpose of having the employee's physician send a copy of his records to the employer no later than 48 hours prior to the arbitration hearing is to prevent the employee from springing surprise medical testimony on the employer. Several cases during the survey period addressed *Ghere*.

In *Kishwaukee Community Hospital v. Industrial Commission*,<sup>375</sup> the Commission allowed claimant's treating physician to offer an opinion on causation, even though the physician failed to issue a report notifying the employer of the opinion. The Commission noted that the physician's records contained details about the claimant's condition, such that the employer could not have been surprised by the physician's opinion on causation. The Commission also noted that claimant's attorney had provided the employer's attorney with a letter indicating that he intended on inquiring about the causal connection between the injury and the claimant's conditions. In upholding the Commission's decision, the appellate court distinguished the case from *Ghere* on the ground that the treating physician's records contained details about his treatment about the claimant's condition.

In *Homebrite Ace Hardware v. Industrial Commission*,<sup>376</sup> the appellate court found that the employee's doctor could testify as to causation of the employee's neck injury, even though no medical report was tendered to the employer notifying the employer that the doctor would testify about the issue. In *Ghere*, the doctor had never treated the employee's heart condition, but in this case the doctor had treated the claimant's neck complaints. Furthermore since the employer received the doctor's records, the employer was deemed to be on notice that the doctor might testify as to a causal relationship between the neck condition and the employee's work accident.

In *Certified Testing v. Industrial Commission*,<sup>377</sup> the employer objected to the testimony from the claimant's treating physician. Prior to the physician's testimony the employer received a written report from the

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373. 820 ILL. COM. STAT. ANN. 305/12 (West 2009).

374. *Ghere v. Indus. Comm'n*, 278 Ill. App. 3d 840, 845, 663 N.E.2d 1046, 1050 (4th Dist. 1996).

375. *Kishwaukee Cmty. Hosp. v. Indus. Comm'n*, 356 Ill. App. 3d 915, 828 N.E.2d 283 (2nd Dist. 2005).

376. *Homebrite Ace Hardware v. Indus. Comm'n*, 351 Ill. App. 3d 333, 814 N.E.2d 126 (5th Dist. 2004).

377. *Certified Testing v. Indus. Comm'n*, 367 Ill. App. 3d 938, 856 N.E.2d 602 (4th Dist. 2006).

claimant's treating physician commenting on his examination of the claimant's knee, the severity of the injury and his doubts as to whether the claimant would be able to perform aspects of his job. In his deposition, the doctor was asked whether, based on his assessment of claimant's knee, he would recommend that claimant's work be restricted. The appellate court held that it was reasonable for the Commission to find that his deposition testimony was a natural continuation of the opinion in his narrative report. As such it did not come as a surprise to his employer and the Commission did not abuse its discretion in overruling the employer's objection to the testimony.

In *City of Chicago v. Illinois Workers' Compensation Commission*,<sup>378</sup> the appellate court held that the Commission committed reversible error by excluding the employer's independent medical examination ("IME") report from evidence. The Commission excluded the report because the IME was not provided to the claimant's treating physician before the physician's deposition. In reversing the Commission, the appellate court noted that the IME was not conducted until after the deposition. However, the report was tendered to the Claimant a few days after the examination and well before the arbitration hearing. Under the Act, IME reports are to be exchanged no later than 48 hours before a case is set for hearing in order to prevent surprise medical testimony at arbitration. Since the report was provided well before the 48 hours before arbitration, the IME report should have been admitted into evidence.

## 2. *Frye and Expert Witnesses*

In *Bernadoni v. Industrial Commission*,<sup>379</sup> the claimant filed an action under the Workers' Occupational Diseases Act alleging a condition called Multiple Chemical Sensitivity ("MCS"). The court noted that medical literature and the larger medical community did not recognize MCS. The employer further provided other cases which had addressed the validity of MCS, and which showed that MCS has not been recognized by the American Medical Association and several other medical organizations, including the American College of Physicians, the American Academy of Allergy and Immunology, and the American College of Occupational Medicine.<sup>380</sup> Since

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378. *City of Chicago v. Workers' Comp. Comm'n*, 387 Ill. App. 3d 276, 899 N.E.2d 1247 (1st Dist. 2008).

379. *Bernadoni v. Indus. Comm'n*, 362 Ill. App. 3d 582, 840 N.E.2d 300 (3rd Dist. 2005).

380. See *Alder v. Bayer Corp.*, 61 P.3d 1068, 1081 (Utah 2002); *Summers v. Missouri Pacific R.R. System*, 132 F.3d 599, 603 (10th Cir. 1997); *Gabbard v. Linn-Benton Housing Authority*, 219 F.Supp. 2d 1130, 1139 (D.Ore. 2002); *Coffey v. County of Hennepin*, 23 F.Supp. 2d 1081, 1086 (D.Minn. 1998); *Frank v. New York*, 972 F.Supp. 130, 136-37 (D.N.Y. 1997); *Minner v. American Mortgage & Guaranty Co.*, 791 A.2d 826, 850 (Del. 2000).

the medical community had not yet accepted MCS as a clinically valid diagnosis, the appellate court ruled that the Commission had properly excluded Claimant's expert's testimony on it.<sup>381</sup>

In *Greaney v. Industrial Commission*,<sup>382</sup> the employer objected to admission of records and reports from Dr. Brackett, Dr. Alvi, Dr. Lorenz, and LeGrange Hospital Work Rehabilitation. These physicians and entities were all hired by the employer to evaluate the claimant, or conduct FCEs. All of the records and reports were admitted over the employer's hearsay, authenticity and foundation objections. The Commission found that the claimant had proved a causal connection between his employment and his various medical issues. The appellate court overturned the Commission's decision and found that the records and reports from Dr. Brackett, Dr. Alvi, Dr. Lorenz and LeGrange were improperly admitted into evidence.

With regard to Dr. Brackett, the court found that his report could not be admitted into evidence as an admission against the employer's interest. The court noted that Dr. Brackett was not an agent of the employer, thus his report could not be admitted as an admission against the employer's interest. Furthermore, the report could not be used under the hearsay exception set forth in *Fencl-Tufo Chevrolet, Inc. v. Industrial Commission*,<sup>383</sup> because Dr. Brackett did not assist in the Claimant's treatment. The court further noted that Dr. Alvi and Dr. Loren's reports could not be admitted because an adequate foundation was not laid for these reports. Additionally, the court noted that the LeGrange records and Dr. Alvi's records were not properly authenticated. Merely subpoenaing documents is not enough to lay a proper foundation and authenticate the documents. These records did not contain a certification that these were true, accurate and complete copies of the documents relating to the claimant's care and treatment.

In deciding whether the Commission's improper admittance of these reports and documents resulted in error, the appellate court ruled that it did not. There was sufficient other evidence that was properly admitted to warrant the Commission's holding. The admission of these reports and records was deemed harmless, thus the Commission's decision was affirmed.

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381. *Bernadoni*, 362 Ill. App. 3d at 596, 840 N.E.2d at 312.

382. *Greaney v. Indus. Comm'n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331 (1st Dist. 2005).

383. *Fencl-Tufo Chevrolet, Inc. v. Indus. Comm'n*, 169 Ill. App. 3d 510, 523 N.E.2d 926 (1st Dist. 1988).

### 3. Testimony

In *Chicago Messenger Association v. Industrial Commission*,<sup>384</sup> the appellate court overturned the Commission's ruling. The court noted that even though a claimant's testimony standing alone can be enough to establish an accident, this claimant could not do so. The court highlighted the fact that the Commission referenced the fact that the claimant had given conflicting statements of how the injury occurred. During the hearing, under oath, the claimant testified that he told the testifying witnesses that he was injured lifting a box while making deliveries. Each of those witnesses testified that the claimant had not told them that, but rather said that he injured himself at home drinking coffee and sneezing. In reaching its decision, the Commission noted that it did not believe the claimant's sworn testimony during the hearing but instead believed the history he provided to his treating physicians. The appellate court stated "the Commission's findings here defy logic."<sup>385</sup>

### C. Abatement of Claims

In *Nationwide Bank & Office Management v. Industrial Commission*,<sup>386</sup> the court held that the workers' compensation claim for benefits that accrued prior to the injured worker's death did not come to a halt upon subsequent deaths of the injured worker and his widow. This ruling was affirmed even though the worker and his widow died without dependent children. Likewise, in *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Commission*,<sup>387</sup> a coal miner filed a claim under the Workers' Occupational Diseases Act. Before hearing, the coal miner died. The appellate court held that the claim was not abated at his death, as the Act provides for payment of benefits to a decedent's beneficiary when the decedent dies before receiving total compensation to which he was entitled.

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384. *Chicago Messenger Ass'n v. Indus. Comm'n*, 356 Ill. App. 3d 843, 826 N.E.2d 1037 (1st Dist. 2005).

385. *Id.* at 850, 826 N.E.2d at 1042.

386. *Nationwide Bank & Office Mgmt. v. Indus. Comm'n*, 361 Ill. App. 3d 207, 836 N.E.2d 120 (1st Dist. 2005).

387. *Freeman United Coal Mining Co. v. Workers' Comp. Comm'n*, 386 Ill. App. 3d 779, 901 N.E.2d 906 (4th Dist. 2008).

#### D. Two Physician Rule

In *Comfort Masters v. Illinois Workers' Compensation Commission*,<sup>388</sup> the claimant filed suit following two falls at work. The claimant had two chains of referrals from two physicians. During the hearing, he was asked whether he had visited any chiropractors, acupuncturists or doctors other than those previously identified. The claimant responded “no,” and the hearing was continued. The claimant then admitted that he had seen a Chinese acupuncturist who was friends with his wife. The claimant had gone to the acupuncturist’s home on two occasions for massages, but he had not been charged. The Commission ruled that the claimant did not exhaust his two physician rule by obtaining treatment with the acupuncturist because he was not charged for these services. Thus, since there were no medical bills, and no employer liability, the services provided did not fall within section 8(a).<sup>389</sup> The Court further noted that the statute applies to treatment from a “physician, surgeon, or hospital.” Since an acupuncturist is not a physician, surgeon or a hospital, the treatment does not exhaust the two doctor rule.

#### E. Injurious Practices—Section 19(d)

In *Global Products, Inc. v. Illinois Workers' Compensation Commission*,<sup>390</sup> the appellate court considered whether to apply the injurious practices exception of section 19(d) to reduce the recovery of a claimant who had experienced a failure of a cervical fusion. The employer’s motion was based on the fact that the claimant smoked heavily and that his smoking had contributed to the failed fusion. Section 19(d) of the Act vests the Commission with discretion to reduce a claimant’s award where the claimant engages in an injurious or unsanitary practice.<sup>391</sup> Unlike an intervening act, which requires a complete break in causation, there is no requirement that an injurious practice be the sole cause of a claimant’s condition of ill-being.<sup>392</sup>

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388. *Comfort Masters v. Workers' Comp. Comm'n*, 382 Ill. App. 3d 1043, 889 N.E.2d 684 (1st Dist. 2008).

389. *Id.* at 1046, 889 N.E.2d at 687.

390. *Global products, Inc. v. Workers' Comp. Comm'n*, 392 Ill. App. 3d 408, 911 N.E.2d 1042 (1st Dist. 2009).

391. 820 ILL. COMP. STAT. ANN. 305/19(d) (West 2009). Section 19(d) reads, in part: “If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee.”

392. 392 Ill. App. 3d at 412, 911 N.E.2d at 1046.

Under the section, an award may be reduced if the Commission, in its discretion, believes the claimant is doing things to retard his recovery.<sup>393</sup> While acknowledging that the claimant smoked and that his smoking may have hampered his recovery, the appellate court refused to set aside the Commission's decision, noting that there was no evidence that the claimant smoked for the purpose of retarding his recovery.<sup>394</sup>

#### F. Section 24

In *Rios v. Industrial Commission*,<sup>395</sup> the appellate court dealt with a little used provision of the Act. In *Rios*, the claimant was receiving a wage differential award and was concerned that the employer would be unable to pay the award due to financial conditions. The claimant filed a motion under section 24 of the Act, which permits, in certain extreme cases, the Commission to order the employer to deposit a sum of money in an account to ensure future payments under the Act.<sup>396</sup> The appellate court upheld the denial of the motion, finding that there was no showing made of financial difficulty.<sup>397</sup> The court also rejected the claimant's argument that section 24 was mandatory, noting that the section vested the Commission with discretion to determine whether such an order is appropriate given the employer's financial soundness.<sup>398</sup>

#### XI. ATTORNEYS' FEES AND PENALTIES—SECTIONS 16 AND 19<sup>399</sup>

In *Reynolds v. Illinois Workers' Compensation Commission*,<sup>400</sup> the appellate court affirmed the circuit court's reversal of an award of penalties and attorneys' fees, which had been predicated on the employer's refusal to pay a portion of the underlying alleged TTD and medical. In that case, the claimant injured his neck in the late spring. He underwent an MRI scan, which found internal disc disruption, a radial tear and a full thickness tear at various levels of the claimant's neck. The claimant was examined by two physicians, who questioned whether his neck problems were caused by the mechanism of

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393. *Id.*

394. *Id.*

395. *Rios v. Indus. Comm'n*, 361 Ill. App. 3d 694, 838 N.E.2d 52 (1st Dist. 2005).

396. 820 ILL. COMP. STAT. ANN. 305/24 (West 2009).

397. *Rios v. Indus. Comm'n*, 361 Ill. App. 3d at 695, 838 N.E.2d at 53.

398. *Id.* at 697, 838 N.E.2d at 54.

399. 820 ILL. COMP. STAT. ANN. 305/16, 19(k)(1) (West 2009). If an employer delays paying benefits, it is his burden to demonstrate that the delay was objectively reasonable. *Lester v. Indus. Comm'n*, 256 Ill. App. 3d 520, 524, 628 N.E.2d 191, 194 (1st Dist. 1993).

400. *Reynolds v. Workers' Comp. Comm'n*, 395 Ill. App. 3d 966, 918 N.E.2d 1098 (3rd Dist. 2009).

injury and whether they might have been the result of a pre-existing degenerative condition. The employer paid some TTD (associated with a neck strain/sprain) and made an advance of PPD benefits on those grounds. The claimant continued to treat through the fall, and at least one objective test, which failed to show any herniation, revealed degenerative changes.

In December, the claimant underwent further testing and saw an IME, who opined he had a herniated disc and needed surgery. The claimant was immediately examined by an IME selected by the employer, who opined that the condition was not caused by the accident, but rather was degenerative. The Commission awarded section 19 penalties and section 16 attorneys' fees, charging the employer with unreasonable and vexatious conduct in refusing to authorize medical treatment and pay additional TTD.<sup>401</sup>

The appellate court affirmed the reversal of penalties and fees, noting that the employer's reliance on its IME, coupled with the other medical providers' opinions and concerns "was relatively compelling, even if it did not ultimately persuade the Commission." The two company physicians relied upon by the employer had reviewed the original MRI film and the IME had reviewed a report of that film, and relied upon the opinions of the two company physicians. According to the appellate court, "the testimony was relatively compelling, even if it did not ultimately persuade the Commission."<sup>402</sup> Therefore, the appellate court noted, the "employer could rely on [the medical opinions] and no reasonable person could conclude that [the] employer was not entitled to do so."<sup>403</sup>

Although predominantly an intoxication case, the appellate court also addressed the issue of penalties in *Lenny Szarek, Inc. v. Illinois Workers' Compensation Commission*.<sup>404</sup> In that case, the appellate court, although affirming the Commission's decision to award benefits and further reject application of the intoxication defense, nevertheless reversed the award of penalties and attorneys' fees, finding that the employer had acted reasonably in believing that the claimant's marijuana intoxication, which had been documented by blood analysis, barred his workers' compensation claim.<sup>405</sup> According to the court, the claimant's urine tests "revealed what it terms 'severe marijuana intoxication' and Leikin's [the employer's IME] opinions were derived from them [the tests]."<sup>406</sup> Similarly, the employer was entitled

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401. *Id.* at 971, 918 N.E.2d at 1102-03.

402. *Id.* at 971, 918 N.E.2d at 1103.

403. *Id.*

404. *Lenny Szarek, Inc. v. Workers Comp. Comm'n*, 396 Ill. App. 3d 597, 919 N.E.2d 43 (3rd Dist. 2009).

405. *Id.* at 599, 919 N.E.2d at 46.

406. *Id.* at 613, 919 N.E.2d at 57.



to rely on its interpretation of two significant alcohol intoxication tests, which seemed to suggest that the claim would be barred. While the appellate court distinguished both cases as involving alcohol and not marijuana, “since we had not articulated this distinction with any degree of detail in the past, respondent was not unreasonable in seeking to analogize the present situation to those cases.”<sup>407</sup>

Both *Reynolds* and *Lenny Szarek* are positive cases for employers and reiterate the law that an employer can rely on reasonable medical opinions to deny claims or benefits, even where the medical opinions are contrary to those obtained by the claimant. Moreover, the employer may reasonably rely on the law as it exists at the time the case proceeds.

In *Greene Welding and Hardware v. Illinois Workers' Compensation Commission*,<sup>408</sup> the appellate court upheld an award of sanctions and attorneys' fees where the employer had withheld payment of amputation benefits on the ground that the claimant had not yet formally declared whether he was seeking statutory amputation benefits under section 8(e) or a wage differential under section 8(d)(1). The court held that amputation benefits are payable immediately upon the time when the employer reasonably knows the extent of the amputation and is capable of calculating the appropriate average weekly wage. If such benefits are immediately paid and the claimant later seeks a wage differential, the prior payments can serve as a credit against any future wage differential award.<sup>409</sup>

In *Central Rug & Carpet v. Industrial Commission*,<sup>410</sup> the appellate court evaluated a penalties scenario where two carriers for the employer disputed which was responsible for the claim. The parties did not dispute whether liability existed. The court affirmed the award of section 19 penalties and section 16 attorneys' fees, finding that there was no real dispute as to whether the employee was entitled to benefits. Moreover, it concluded that a dispute as to which of two carriers was responsible is not a “good faith” dispute as to liability and did not support a delay in payments while the issue was decided among the carriers.<sup>411</sup>

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407. *Id.*

408. *Greene Welding and Hardware v. Workers' Comp. Comm'n*, 396 Ill. App. 3d 754, 919 N.E.2d 1129 (4th Dist. 2009).

409. *Id.* at 758, 919 N.E.2d at 1132–33 (*citing* *Modern Drop Forge Corp. v. Indus. Comm'n*, 284 Ill. App. 3d 259, 266, 671 N.E.2d 753, 757–58 (1st Dist. 1996)).

410. *Central Rug & Carpet v. Indus. Comm'n*, 361 Ill. App. 3d 684, 838 N.E.2d 39 (1st Dist. 2005).

411. *Id.* at 693–94, 838 N.E.2d at 46.

## XII. CONCLUSION

Hopefully, this summary of the cases from 2005 through the end of 2009 has provided you with a good overview of how the appellate court has construed the various aspects of the Workers' Compensation Act. As with all summaries, please consult the actual decision and statute prior to rendering legal opinions to your clients.