

Review of Illinois Workers' Compensation

DECEMBER 2010

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GREAT DECISIONS AROUND THE OFFICE

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Happy Holidays! It is hard to believe that another decade has passed when I still remember being worried about what was going to happen to my computer, watch and every other electrical device when we reached the year 2000.

The challenges that were presented in January, 2009 still plague us as we approach January, 2011. We are still heavily engaged in wars abroad and a national economic solution is still not apparent. Many of the problems we face are not nearly as easy to solve as politicians claim during campaigns. At least, the mid term elections are over and hopefully there will be some governing rather than campaigning for at least a few months.

Surprisingly, there is furious action here on a workers' compensation reform bill favoring employers. It is hard to say whether this will be a Christmas present or just a lump of coal.

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REVIEW OF ILLINOIS WORKERS' COMPENSATION

December 2010
By Michael E. Rusin

AROUND THE STATE CAPITOL – THE VOTES ARE IN

The November 2010 midterm elections are finally over. After the November 2008 Democratic landslide, it was expected that the November 2010 elections would be a settling out process. Since last summer, it had been highly anticipated that the Republicans nationwide would do well, and the predictions proved to be accurate.

Nationally, the biggest surprise was the change of power in the U. S. House of Representatives. Currently, Democrats control the U. S. House of Representatives by a margin of 256 to 179. However, in January 2011, Republicans will take over control of the U. S. House of Representatives by a margin of 242 to 193.

Republicans were not able to gain control of the United States Senate, but the margin of control retained by the Democrats is a slim one. Currently, Democrats hold a 57 to 41 majority with 2 Independents in the Senate. In January 2011, that margin will decrease to 51 Democratic senators to 47 Republican senators with 2 Independents.

The trickle down effect in the states was significant as well. Many states chose Republican Governors. Democrats currently control 26 Governorships compared to 24 for Republicans. In 2011, that number will shift dramatically and Republican Governors will total 29 to only 20 Democratic Governors and 1 Independent.

In the State of Illinois, the Democrats have had a stranglehold on all statewide offices for the past eight years. The biggest contested races in the state were for Governor and U. S. Senator. The U. S. Senate race was particularly important because it involved the seat vacated by President Obama. The race pitted Republican U.S. Representative Mark Kirk against Democrat Alexi Giannoulias, the Illinois State Treasurer. The race proved to be an extremely close one, but Kirk won by slightly more than 70,000 votes.

The Governor's race on the other hand proved much closer. On the Democratic side the candidate was Pat Quinn, the former Lieutenant Governor who took over for disgraced Rob Blagojevich when he was impeached from office. The Republican candidate was State Senator William Brady from Bloomington, IL who narrowly won the primary race against several other higher profile Republican challengers.

Most of the pollsters had Brady winning this race, but in fact Brady lost by less than 20,000 votes. The fact that he lost came as a surprise to many since Quinn was running under the shadow of Blagojevich's tainted administration. Not long before the election, Blagojevich's criminal trial was completed. However, the prosecution of Blagojevich proved mostly unsuccessful. Blagojevich was convicted on only one of 23 counts with the jury not reaching a decision on the remaining counts. A more definitive jury verdict likely would have helped

Brady, but instead Blagojevich's case merely drags on like a bad soap opera and he will be retried sometime in 2011. Currently, Blagojevich attempts to remain high profile and can be seen on TV commercials locally hawking pistachios.

We were particularly interested in Brady's winning because he was pro-business and had promised workers' compensation reform. Quinn, on the other hand, didn't promise anything to help business and was recommending an income tax increase.

Statewide, Illinois is a relatively conservative state, but voters in the Chicagoland area including the Chicago suburbs are primarily liberal to moderate. Quinn was able to portray Brady as being extremely conservative. His views on abortion and same sex marriage doomed his ability to win the statewide election.

In addition to the Democrats winning the Illinois Governor's race, the Democrats also retained control of both the Illinois State Senate and the Illinois State House. Currently, Democrats control 37 seats in the Illinois State Senate to the Republicans' 22. After the election, the Republican net gain was only one seat.

In the Illinois House of Representatives, Republicans did slightly better, but still could not take control of the House. Currently, Democrats hold 70 seats compared to Republicans' 48. Republicans picked up only six seats in the Illinois House and after the election, the Democrats controlled 64 seats to Republicans' 54.

WORKERS' COMPENSATION REFORM

The Republican gubernatorial candidate, Bill Brady, had promised workers' compensation reform. He was a business owner who had investigated our workers' compensation system and determined that it was unfavorable to business. He had promised changes in the workers' compensation system, recognizing that many employers had moved out of the State of Illinois or had chosen not to move into the State of Illinois because of high workers' compensation costs.

Governor Quinn, on the other hand, was strongly supported by unions and plaintiff lawyers who want no changes in the system. Therefore, with Quinn's election, we didn't expect any push for workers' compensation reform for the next two years at least or even the next four years until Quinn was up for re-election. However, Quinn wants an income tax increase. The state's finances are terrible. Quinn knew that he had to get an income tax increase or else he was going to be forced to make major cuts in state spending, especially education. Quinn recognized that in order to get his income tax increase, he would need to compromise on something. Quinn needs Republican votes in order to get his income tax increase.

In return for supporting an income tax increase, Republicans have demanded workers' compensation reform. It is somewhat surprising that Republicans would demand workers' compensation reform as their primary bargaining chip for supporting the Governor's income tax increase. It is further surprising that Democrats would be so willing to take up the issue of workers' compensation reform.

We had rather startling changes in the Workers' Compensation Act in 2006. At that time, Governor Blagojevich with a strong Democrat majority pushed through significant changes in benefits, significantly increasing employer indemnity costs and adding a medical fee schedule which was to help employers. The medical fee schedule has done nothing to reduce employers' costs for medical expenses. The medical fee schedule essentially keeps employer costs high and has escalators which are designed to further increase employers' costs.

However, that may all change during the current legislative veto session. Both the House and Senate have hastily scheduled meetings to discuss workers' compensation reform. The Senate special committee met November 29 and December 8, 2010. The House committee had its first meeting on December 3, 2010 with further meetings scheduled December 15 and 16, 2010. The goal of these committees is to come up with legislation that can be voted on by January 2011.

Not surprisingly, the testimony so far from the unions and the medical providers is that there should be no changes. Alternatively, if any changes are to take place, they should be the result of the "agreed bill" process.

Employers, on the other hand, have argued that the Illinois workers' compensation system is dramatically unfair to employers. They have pointed to several different studies. Importantly, they pointed to the 2010 Oregon workers' compensation premium rate report showing Illinois as the third most expensive state in the U. S. According to the Oregon study, in 2008, Illinois was ranked as the 10th most expensive, but in 2010, we moved up to number three, a dubious improvement in our ranking. Correspondingly, compared to our neighboring states, Wisconsin is ranked 19, Missouri 33, Iowa 36, and Indiana 50th.

Several top Democrats, including State Senate President John Cullerton, have indicated a willingness to drastically reform Illinois workers' compensation. Workers' compensation costs are a significant determining factor in companies deciding where to place their businesses. The costs are a significant drain on employers who are forced to be in Illinois such as municipalities and municipal organizations that are all struggling with their individual budgets.

The time is certainly ripe for change. It is certainly possible by January 2011 we will have a workers' compensation reform bill. If we do, we will also have a personal income tax increase from the current 3% on individual income up to 4%. Corporate income tax rates would move from 4.8% to 5.8%.

AROUND THE COMMISSION

At the Commission level

We are finally seeing some personnel changes at the Commission. Commissioner Sherman, a labor commissioner, resigned effective October 25, 2010. She had over 20 years of service at the Commission. However, her term as a commissioner had expired long ago. It was not expected that she was going to be reappointed.

Governor Quinn has not appointed a successor for Commissioner Sherman. Consequently, the Commissioner is continuing to operate by having the one of the current labor commissioners substitute in on oral arguments before Commissioner Sherman’s panel.

Further, the Commission panels are being realigned effective January 1, 2011. As of that date, the panels will be as follows:

Labor	Public	Management
Panel A – Mason	Panel A – Donohoo	Panel A - Lamborn
Panel B -	Panel B – Dauphin	Panel B - Lindsay
Panel C - Gore	Panel C – DeMunno	Panel C - Basurto

Panel B will not schedule oral arguments in January 2011 because of the vacancy. Apparently, the Commission expects that a new labor Commissioner will be appointed by January 31, 2011.

As of January 2011, virtually all of the commissioners will be serving on expired terms. Only 3 of the 10 Commissioners have terms that extend until 2013. If Governor Quinn wanted, he could make a major change with respect to all of the commissioners. However, he hasn’t done anything yet, and he has had the power to do so for quite some time. Consequently, it is unlikely that we will see a major change at the Commission in 2011.

At the Arbitration Level.

We had one arbitrator retire. Arbitrator Leo Hennessy retired in December 2010 after 20 years of the service at the Commission. A former school teacher, Arbitrator Hennessy was good hearing officer who was fair and even handed in his decisions. He will be missed. A new arbitrator was not hired to replace him. Instead, Arbitrator Kinnaman took over the entire Geneva call. This is not favorable to employers as Arbitrator Kinnaman is generally pro-claimant in her decisions. Arbitrator Fratianni, another well respected arbitrator took over Arbitrator Hennessy’s case in Joliet. Here is the list of downstate arbitrators and their assignments effective January 1, 2011:

- | | |
|----------------------|--|
| Arbitrator Akemann | Rockford |
| Arbitrator Andros | DeKalb, Wheaton |
| Arbitrator Dibble | Whittington/Herrin |
| Arbitrator Erbacci | Waukegan |
| Arbitrator Falcioni | Joliet |
| Arbitrator Fratianni | Joliet |
| Arbitrator Giordano | Kankakee, Ottawa |
| Arbitrator Holland | Clinton, Danville, Galesburg, Rock Falls,
Rock Island |
| Arbitrator Kinnaman | Geneva |
| Arbitrator Lee | Rockford, Woodstock |
| Arbitrator Mathis | Peoria |
| Arbitrator Nalefski | Collinsville |
| Arbitrator Neal | Carlinville, Decatur, Urbana |

Arbitrator O'Malley
Arbitrator Teague
Arbitrator Tobin
Arbitrator White

Wheaton
Belleville, Mt. Vernon
Winchester, Quincy, Springfield
Bloomington, Mattoon

This changes the *pro se* settlement system in Chicago. Instead of Arbitrator Fratianni being in charge of *pro se* settlements on a daily basis, one of the Chicago arbitrators is assigned on a rotating basis to handle *pro se* settlements. A *pro se* settlement arbitrator is available in Chicago daily, but it's a different one every day.

I have compiled a summary of Chicago status call dates and downstate status call dates and this document is attached to the end of this newsletter for a reference guide.

2011 Medical Fees. Medical fees will increase 1.01% in 2011. Section 8.2(a) of the Illinois Workers' Compensation Act provides that each year fee schedule rates shall increase or decrease by the percentage change in the Consumer Price Index – U in the previous year. Since this index increased, medical fees are allowed to increase. This is yet another example of how the medical fee statute is of no help to employers in controlling medical costs.

Further, the Commission withdrew its emergency rules on implants and ambulatory surgery centers effective October 28, 2010. Those emergency rules went into effect July 6, 2010. Therefore, for any medical treatment which took place July 6, 2010 through October 28, 2010, the employer is entitled to pay fees pursuant to the emergency rules. Those emergency rules provided that reimbursements for medical implants were to be at no more than 25% over the manufacturers' invoice price less rebates plus actual and customary shipping costs. In the ambulatory surgical treatment center fee schedule, facilities are credited for surgical treatment by either the AAASF, AAAHC, or JCAHO were specifically deemed eligible for the payment of ASTC facility fees. With the repeal of those emergency rules, the default of 76% of the charge again applies. This is a perfect example of where employers are being required to pay extremely high and unfair medical costs without any reasonable justification.

BEFORE THE SUPREME COURT OF ILLINOIS

Court Rules That Medical Providers or Their Designees May Charge a Minimum of \$20.00 for Handling Charges for Processing Medical Record Requests -- \$20.00 Fee is *Per Se* Reasonable

Walter Solon et al. v. Midwest Medical Records Association, Docket No. 107719, filed March 18, 2010.

Plaintiff and others filed a class action lawsuit against Midwest Medical Records Association (MMRA), claiming that MMRA charged a minimum of \$20.00 to process all medical records requests. MMRA is a company that contracts with medical providers to process medical records requests made by patients pursuant to state law. In 2001, the Illinois legislature for the first time enacted a medical record fee schedule. They enacted a statute which limited the amount of fees

medical providers could charge for medical record requests. The statute provided “the health care provider shall be reimbursed by the person requesting patient medical records at the time of such copying for all reasonable expenses including the costs of independent copy service companies, incurred by the health care provider in connection with such copying not to exceed a \$20.00 handling charge for processing the request for copies, and 75¢ per page through 25 pages, 50¢ for the 26th through 50th pages, and 25¢ per page for all pages in excess of 50 . . . and actual shipping costs.”

The plaintiffs argued that MMRA violated the statute because they charged \$20.00 plus copy charges for each record request. Plaintiffs argued that MMRA was required to charge only reasonable costs and not \$20.00 for each request.

MMRA filed a motion to dismiss in the circuit court and the motion was denied. MMRA appealed to the appellate court and the appellate court ruled that the \$20.00 charge for all records requests was not *per se* reasonable. MMRA appealed to the Supreme Court and the Supreme Court reversed.

The Supreme Court ruled that MMRA was entitled to charge \$20.00 for each records request response. The Court examined the legislative history associated with the statute and found that the \$20.00 charge represented a compromise among the various interests. Even though the statute stated that MMRA could not charge more than \$20.00 for each records request response, the statute did not prohibit MMRA from charging \$20.00 for each request. Therefore, the case was remanded back to the circuit court. The circuit court should have thereafter dismissed this class action lawsuit.

Comment: This is clearly a correct decision from the Supreme Court. It is surprising that neither the trial court nor the appellate court ruled in MMRA’s favor. Prior to the enactment of the medical records fee schedule (735 ILCS 5/8-2001, 8-2003 (West 2004), there was no limit on what health care providers and independent copy service companies could charge in response to requests for patient records. The results were ridiculous and many independent copy service companies were charging exorbitant fees to process medical record requests. The legislature finally acted and imposed limits on the amounts that medical providers and independent copy service companies could charge.

The statute allows a maximum \$20.00 fee to process the requests. It was clear from the legislative history that this \$20.00 fee was a compromise among the various parties engaged in the legislative process. The plaintiffs in this case wanted the health care provider or independent copy service to charge a different amount for each request, whatever was reasonable. The plaintiffs’ demand would have placed an unreasonable and unnecessary burden on medical providers and copy service companies. It is certainly much more reasonable for the providers to be able to charge a flat fee. The legislature set the flat fee at a level which is reasonable and will avoid unnecessary litigation.

BEFORE THE APPELLATE COURT OF ILLINOIS, NON-WORKERS' COMPENSATION DIVISION CASES

Court Holds That Doctor Must Comply with Workers' Compensation Commission Subpoenas for Records. Court Rules That Party Can't Be Charged 15¢ Per Page But Also Rules That Doctor Is Not Required To Make Copies of the Records.

Holtkamp Trucking Co. v. David J. Fletcher, M.D., d.b.a. Safeworks Illinois, No. 4-09-0857, 4th District, filed 6-24-10.

Holtkamp Trucking Co. had a workers' compensation claim filed against it by one of its employees. Holtkamp's employee treated with Dr. David Fletcher. Holtkamp issued a subpoena for records from Dr. Fletcher and demanded that Dr. Fletcher copy and mail the records to the employer.

Dr. Fletcher on the advice of Attorney Eugene Keefe refused to copy and mail the records. Keefe claimed that Fletcher was not required to copy and mail records to Holtkamp. Keefe claimed that Fletcher wasn't even required to produce the records to Holtkamp. He claimed the only thing the doctor needed to do was show up with the records at the workers' compensation hearing and allow the original records to be inspected by the arbitrator. Alternatively, Keefe claimed that Dr. Fletcher would copy and mail the records if Holtkamp paid the fees imposed by the Medical Records Copying Act.

Holtkamp objected to Dr. Fletcher's position and moved to enforce the subpoena. The arbitrator granted leave to enforce the subpoena and an action was filed in the circuit court. After a hearing before the circuit court, the court ruled the Fletcher did not properly comply with the subpoena. The court found Dr. Fletcher to be in contempt and ordered him to provide copies of the records to Holtkamp. The court ordered Holtkamp to pay 15¢ per page for a copy of the records.

Holtkamp filed an appeal to the appellate court, and the appellate court agreed with the circuit court that Fletcher did not properly comply with the subpoena. Fletcher was held in contempt of court, but no sanctions were entered against him. The appellate court majority ruled that there was no requirement that a workers' compensation litigant pay per page copy fees. However, the court also ruled that medical providers aren't required to copy and mail documents for free. In essence, the court ruled that a medical provider can comply with a workers' compensation subpoena by personally appearing at the Commission with original records and provide them to the party for copying. Alternatively, the medical provider can reach an agreement with the party who subpoenaed the records to copy and mail them for a fee.

The court recognized that its decision didn't resolve a difficult issue and stated, "Perhaps the Commission should consider promulgating a rule whereby a subpoena issued by the Commission could offer an alternative to appearing at a hearing with original records in hand. The alternative, for example, might be photocopying the records at a certain price per page which the Commission could specify and mailing the photocopied records by a certain date."

Comment: This is a bizarre decision from the 4th District Appellate Court. This decision is in contradiction to the prior 1st District Appellate Court decision in *Clayton v. Ingalls Memorial Hospital*, 311 Ill.App.3d 135, 724 N.E.2d 222 (2000). The *Clayton* court specifically held that a subpoenaed party in a workers' compensation claim was "not entitled to per page copy fees, retrieval fees, or any other claimed expenses."

This case presents an unusual situation whereby two parties engaged in extensive litigation in an effort to make a point and neither litigant's position was found to be justified. The *Clayton* case does give a significant boon to workers' compensation litigants in obtaining medical records. Based on *Clayton*, we do have the right to subpoena medical records and obtain them at the cost only of a subpoena fee (\$20.00) plus mileage. It would not be unreasonable for the Commission to enact a rule setting forth reasonable copy charges for records. There is a burden on medical providers in furnishing medical records pursuant to workers' compensation subpoenas.

On the other hand, medical providers always want to get paid for their services. Employers can't pay medical bills without documentation to justify the bills. Moreover, most medical records are kept electronically and the effort to produce them is significantly less than in the past.

Premises Liability Claim Arising out of Injuries Suffered in Fall by Workmen Demolishing a Porch – Claim for Damages Against Employer for Failure to Provide Workers' Compensation Insurance Pursuant to Section 4(d) of the Workers' Compensation Act Must Be Presented Before the Commission

Robert Keating v. 68th and Paxton, LLC et al. and Gonzon Construction Co., No. 1-09-1759, filed April 27, 2010.

The plaintiff suffered an injury while repairing a porch at an apartment building owned by the defendant, 68th and Paxton, LLC. Plaintiff alleged that he was employed by Gonzon. He alleged Gonzon was guilty of negligence. He also alleged that Gonzon, as his employer, was obligated to provide him with workers' compensation insurance. He alleged that pursuant to §4(d), since the defendants knowingly failed to provide him with workers' compensation insurance, he was entitled to sue his employer in circuit court.

Gonzon moved to dismiss those allegations, claiming that they were insufficient as a matter of law and that the Workers' Compensation Commission had to make the requisite findings that Gonzon was a statutory employer and knowingly failed to provide him with insurance in order for petitioner to even file a complaint.

The circuit court granted Gonzon's motion and ruled that the Commission had exclusive jurisdiction to determine whether Gonzon was a statutory employer and whether Gonzon knowingly failed to provide plaintiff with insurance.

Plaintiff appealed and the appellate court noted that this was a case of first impression involving interpretation of §4(d) of the Act.

Section 4(d) provides:

“ [1.] Whenever a panel of 3 Commissioners, with due process and after a hearing, determines that an employer has knowingly failed to provide coverage as required by paragraph (a) of this Section, the failure shall be deemed an immediate serious danger to public health, safety, and welfare sufficient to justify service by the Commission of a work-stop order on such employer, requiring the cessation of all business operations by such employer at the place of employment or job site

“ [5.] Employers who are subject to and who knowingly failed to comply with this section shall not be entitled to the benefits of this Act during the period of non-compliance, but shall be liable in an action under any other applicable law of this State. In the action, proof of the injury shall constitute prima facie evidence of negligence on the part of such employer and the burden shall be on the employer to show freedom of negligence resulting in the injury.”

The court ruled in favor of the employer. The court held, “When we read section 4(d) as a whole, together with the Commission’s broad grant of authority under sections 18 and 19, we find that the legislature intended for the Commission to determine whether employers subject to the Act have failed to comply with its regulations and, if so, what penalties apply.”

The court found that the Commission is entitled to review an employer’s conduct and make a determination whether the employer failed to obtain workers’ compensation insurance and whether the failure was intentional in order to justify the imposition of penalties associated with section 4(d). The court held, “We conclude that claims of an employer’s failure to provide workers’ compensation insurance must be presented to the Commission for a hearing before an action may be filed in the circuit court under section 4(d) of the Act.”

The complaint was therefore dismissed for lack of jurisdiction.

Comment: Plaintiff in this case espoused multiple theories of liability against the premises owner and the employer Gonzon. His strategy backfired in that he was unable to show negligence on the part of the premises owner. He erred in seeking a remedy in circuit court where it is clear that the jurisdiction for this dispute is in the province of the Commission.

The Commission is certainly willing to deal harshly with employers who fail to provide workers’ compensation insurance. The Act was amended in 2006 to impose significant criminal penalties against employers for both negligent and intentional failure to provide workers’ compensation insurance. Significant civil and criminal liability can be imposed on employers who don’t provide insurance. The intentional failure to have insurance allows employers to be subject to a civil verdict including both compensatory and possibly punitive damages. Employers must be wary. Plaintiff’s action in this case was ill-conceived. The court was right to deny plaintiff’s complaint and force him to seek a remedy before the Commission.

Employer’s Unilateral Decision to Cease Wage Differential Benefits Held Invalid – Section 19(g) Judgment Entered

Charles Dallas v. Ameren CIPS, No. 2010 Ill. App. Lexis 629, filed June 21, 2010.

Petitioner worked as a lineman for respondent and suffered a work injury to his back on December 14, 1998. He never returned to work for respondent as a lineman and claimed entitlement to wage differential benefits. Following a hearing before the arbitrator, petitioner was awarded TTD for approximately four years. He was awarded wage differential benefits starting January 9, 2003 at a rate of \$465.67. The arbitrator entered this award on June 24, 2004. Respondent did not file an appeal and the decision became final.

Respondent paid wage differential benefits covering the period from January 2003 until January 2009, a period of six years. Respondent allegedly developed evidence that petitioner had returned to work as a lineman at an hourly rate of pay higher than what he had been earning before. Respondent unilaterally stopped wage differential benefits on the basis that petitioner wasn’t suffering from wage differential anymore.

Petitioner filed a §19(g) complaint in the circuit court seeking enforcement of the arbitrator’s decision. Respondent filed a response to the petition claiming that it no longer was obligated to pay wage differential benefits because petitioner was no longer suffering from wage differential.

The circuit court rejected respondent’s arguments and entered the §19(g) award forcing respondent to continue to pay the arbitrator’s decision.

Respondent appealed to the appellate court and the appellate court affirmed. The appellate court ruled that respondent had no legal basis to simply stop petitioner’s wage differential benefits. The court ruled that there was no basis in the law for respondent to simply stop payment on a final decision from the Commission for wage differential benefits.

The court ruled that the only basis for terminating wage differentials was the filing of a petition to terminate benefits under §19(h) of the Act. According to §19(h), respondent had 30 months (now 60 months for dates of accident after 2/1/06) to file a petition to modify a wage differential award. Since respondent didn’t file a petition under §19(h) to modify the wage differential award within 30 months, its right to modify the wage differential award was lost. The court acknowledged that this might be an unfair result, but it was the only thing that the statute allowed.

The court distinguished this case for a permanent total disability award which could be modified at any time. The court states, “While this outcome seems unfair, this court is bound by the statute and *Cassens* to so rule and encourages the legislature to revisit the situation.”

Comment: This decision highlights the unfairness of the wage differential provisions of the Illinois Workers’ Compensation Act. The statute should be modified to permit an employer to challenge a wage differential award at any time and not just within 30 or 60 months after entry of the award. We are seeing far too many cases where claimants suffer an injury, have permanent

work restrictions and then return to work for low wages simply to get a wage differential award which will be difficult for an employer to modify in the future. This is an inherent statutory anomaly.

There is a partial solution. The employer's right to challenge a wage differential award is sequential. We have the right to challenge the award on multiple occasions so long as the petition to challenge is filed within 60 months from any final decision. Consequently, if the employer believes that it may want to challenge a §8(d)(1) award in the future, it can file a petition to modify the award under §19(h) even if it won't be successful. Once another final decision is entered, the employer will still have another 60 months after a second decision is entered to file yet another petition under §19(h). These repeat §19(h) petitions can be presented indefinitely. It is not a great solution, but it is a temporary solution until the legislature changes the statute.

The employer's decision to simply stop benefits here was ill-advised but apparently the employer felt it had no other option.

Kentucky's Workers' Compensation Act Immunized Illinois Corporation from Negligence Action Arising out of Death of Illinois Resident in Kentucky

Maria Mendez, Executor of Estate of Jaime Mendez, Deceased, v. Atlantic Painting Co., Inc. No. 1-09-2888, 1st District – 3d Division, filed September 29, 2010.

The deceased, Jaime Mendez, was hired by Eagle Painting & Maintenance Co. Atlantic Painting Co. signed a contract with the State of Kentucky to clean and repaint a bridge across the Ohio River. Atlantic then signed a contract with Eagle to work as a subcontractor on the project. On July 15, 2005, the deceased was working in Kentucky on the bridge when he fell and was killed.

The widow, Maria, filed an Illinois workers' compensation claim against Eagle and was awarded death benefits at a rate of \$700.00 per week for 20 years.

In addition, the widow filed a negligence action against Atlantic Painting Co., claiming its negligence caused the deceased's accident.

Atlantic moved to dismiss the complaint on the basis that it was immunized under Kentucky's workers' compensation law. Under Illinois law, the widow is entitled to file a complaint for negligence against the property owner or contractor. However, under Kentucky law, the exclusive remedy protections of the Workers' Compensation Act apply not only to a subcontractor but also to the contractor who hired the subcontractor. This is known in Kentucky as "up the ladder" immunity.

The appellate court ruled in favor of Atlantic. The appellate court found that Kentucky law applied. The court analyzed the common law relating to conflicts of laws. The court ruled that Kentucky had more significant contacts in this case primarily because the accident occurred in Kentucky and any of the actions that Atlantic allegedly negligently performed was in Kentucky. The court held, "All of the alleged misconduct would have occurred only in Kentucky, except for

the training which could have occurred in either Illinois or Kentucky.” After reviewing case decisions from multiple other states, the court found that Kentucky had more significant contacts. Therefore, the Kentucky Workers’ Compensation Act immunized Atlantic, the contractor, from a civil suit for negligence.

Comment: This is a well analyzed and correctly decided decision from the appellate court. The decision highlights some of the differences between laws in other states and Illinois. Illinois’ exclusive remedy protections are much less significant than they are in other states. Kentucky extends the exclusive remedy protections not only to employers but also contractors who hire them. Under Illinois law, the subcontractor would be immunized from a direct lawsuit but still could be made a party to a lawsuit as a third party defendant for contribution. This statutory provision is something that certainly should be considered by the legislature in revising the Workers’ Compensation Act. Third party lawsuits against employers are common in Illinois but rare in most other states.

BEFORE THE APPELLATE COURT OF ILLINOIS, WORKERS’ COMPENSATION DIVISION CASES

Court Holds Employer Is Not Entitled to Request Income Tax Records from Claimant Who Has Been Awarded Permanent Total Disability Benefits

Boyd Electric v. Workers’ Compensation Commission and William Dee, No. 1-09-0766WC, filed July 13, 2010.

Petitioner sustained a work related injury on March 16, 2001 when he lifted a heavy object and injured his hip. He eventually had bilateral hip replacement surgery. He claimed he was permanently and totally disabled. After a hearing on September 7, 2006, petitioner was awarded permanent and total disability on October 10, 2006.

A year and a half later, on June 25, 2008, respondent filed a petition with the Commission to terminate petitioner’s permanent total disability benefits. The petition alleged that respondent had requested petitioner’s current earnings records and petitioner refused to provide them. Respondent alleged that it had a right to “reasonably inquire into either the medical status or earnings of the claimant.”

A hearing was held before the Commission July 14, 2008, but no evidence was presented and no transcript was prepared. After the hearing, the Commission denied respondent’s petition.

Respondent appealed to the circuit court who affirmed. The respondent then appealed to the appellate court. Respondent claimed that it had requested copies of petitioner’s income tax returns to verify petitioner’s employment status. Respondent claimed that the failure to provide these records justified a termination of the permanent total disability award.

The court rejected the appeal and denied respondent the right to terminate the permanent total disability benefits. Further, the court denied the respondent’s request that the claimant turn over

his income tax records. The court held, “The employer bears the burden to show that the employee’s award should be modified pursuant to the provisions of section 8(f).”

The court stated that pursuant to §12 of the Act, an employer could schedule petitioner for an independent medical evaluation. However, the right to get an IME does not reasonably require an employee to produce his income tax records upon request by the employer. The court noted there was no provision in the Act which established a basis for the employer’s request. Further, the court noted, “The procedural rules made and implemented by the Commission do not provide for pretrial discovery.”

Comment: This is an unfortunate decision from the court, but the petition was doomed by lack of evidence. Although respondent moved to vacate the permanent total disability award, respondent didn’t offer any evidence to justify its petition. Its petition was purely based on petitioner’s refusal to comply with the request for income tax records. There is no statutory provision to simply request income tax records. There is no indication that the employer even subpoenaed the income tax records.

Employers are entitled to challenge permanent total disability awards at any time. However, the employer must be prepared to prove that the claimant has the ability to work. The employer should be armed with some medical evidence and/or surveillance evidence documenting the physical capacity to perform work activities. Simply filing a petition to suspend a permanent total disability award without any evidence will never be sufficient.

Court Remands Wage Differential Award for Recalculation by the Commission – Court Rules that Overtime Should Not Be Included in a Wage Differential Calculation If It Would Not Be Included in the Average Weekly Wage

Copperweld Tubing Products Co. v. Workers’ Compensation Commission and Jose Santoyo, No. 1-09-1422WC, filed June 22, 2010.

Petitioner was employed by respondent as a mill operator, a heavy physical demand level job. On November 28, 2001, he was struck by a heavy object and felt left elbow pain. He developed left lateral epicondylitis. He underwent three surgical procedures on his left elbow which involved a submuscular transposition of his left ulnar nerve followed by subsequent neurolysis procedures. He eventually reached MMI January 13, 2005 and was released to return to work in the light-medium physical demand level. He was not physically able to return to his prior employment as a mill operator. He was interviewed by vocational counselors. Their testimony indicated that he could return to work in a limited duty position earning \$8 to \$12 per hour.

Petitioner eventually performed a self-directed job search and returned to work in February 2006 as a security guard making \$8 per hour. He worked that job for two and a half months and then voluntarily quit to stay at home and care for his children.

He claimed entitlement to wage differential. He presented evidence that a co-worker was earning \$78,000.00 a year. The co-worker testified that he earned this annual amount by

working regular and overtime hours. He stated some of the overtime hours were mandatory and some were voluntary.

Following a hearing, the Commission awarded the maximum wage differential at a rate of \$534.16 per week but calculated the differential by comparing petitioner's co-worker's total earnings of \$78,000.00 a year to petitioner's average weekly wage of \$320.00. The employer appealed and the circuit court affirmed. The employer appealed to the appellate court and the appellate court remanded the case to the Commission for a re-calculation.

The appellate court found that the Commission was justified in awarding wage differential based on the \$8 an hour petitioner was earning when he finally returned to work in 2006. The court found that petitioner's voluntary withdrawal from the labor market did not preclude the wage differential award. The court stated that the Commission was entitled to use the \$8 an hour earnings in calculating the wage differential rather than \$12 an hour that petitioner could potentially earn if he actually looked for work.

However, the court found that the Commission was wrong to use the co-employee's earnings at \$78,000.00 a year including overtime hours. The court found that as a general rule, overtime hours are not included in the average weekly wage calculation and the average weekly wage calculation is critical in determining a wage differential award. The claimant asserted that the calculation of the average weekly wage was irrelevant to a wage differential award. The court rejected that argument stating, "Although the claimant asserts that section 10 of the Act does not apply to a wage differential award, the express language of this section states that the definition of average weekly wage contained therein shall form the 'basis' for computing the compensation provided for in sections 7 and 8 of the Act." As a wage differential award is provided for under §8(d)(2) of the Act, the definition of average weekly wage found in §10 clearly applies to this issue.

The court did not reverse the Commission's award of wage differential, but did remand for a recalculation excluding the overtime hours.

Comment: This is a good decision from the court on the issue of overtime and the fact that the average weekly wage calculation is an important calculation in analyzing wage differential awards. With the change in the Act in 2006, the potential for an extremely high wage differential award is greater than ever. Claimants frequently argue that overtime hours should be included in the wage differential calculation. This case specifically states that overtime hours should not be included in a wage differential calculation assuming that overtime hours are not included in the employee's average weekly wage. The average weekly wage is a critical calculation in all cases since it forms the basis of all workers' compensation rates. Case decisions clearly state that the average weekly wage calculation should exclude overtime if petitioner cannot prove that the overtime hours are both mandatory and consistent.

Employers are frequently placed in this position where a claimant seeking a wage differential award obtains a minimum wage job. In those circumstances, employers must be prepared to present strong evidence that the claimant is underemployed. In this case, the claimant was entitled to wage differential even though he voluntarily withdrew from the job market. The

employer should have presented as much evidence as possible that he could have been employed at a much higher rate of pay than \$8 an hour. This decision shows that the Commission is very likely to simply adopt whatever earnings petitioner has if he does find employment even if he is underemployed.

Court Dismisses Employer's Appeal for Inadequate Appeal Bond – Appeal Bond Filed by Employer's Insurer Held Insufficient

Vallis Wynngroff Business Forms Inc. v. Workers' Compensation Commission and Gail Forino, No. 1-09-0991WC, filed June 15, 2010.

Petitioner sustained a work injury December 19, 1997. After a hearing before the arbitrator, she was awarded over eight years of TTD benefits and then permanent total disability.

The employer appealed and the Commission affirmed. The employer appealed to the circuit court. The Commission set the bond in the case at \$75,000.00. The employer filed the \$75,000.00 bond and it was executed by Maria Basinski, the national claims administrator for Atlantic Mutual Insurance Company, the respondent's workers' compensation carrier. In addition to the bond, Basinski executed an affidavit stating that she was acting as an agent of Vallis. She averred that Vallis was believed to be out of business and no representative of the company could be found.

Petitioner filed a motion to dismiss the appeal on the basis that the bond didn't comply with §19(f)(2) of the Act. The circuit court granted the dismissal and the appellate court affirmed.

The appellate court demanded strict compliance with the statute. The court found that the bond was inadequate. The court stated, "Neither in the bond nor in the affidavit which was filed with it does Basinski state that she is an agent of Vallis. She alleges only that she is the national claims administrator for Atlantic, Vallis' workers' compensation insurance carrier. Although she avers that Atlantic has acted as the agent of Vallis in securing legal representation in this case, she does not allege that Atlantic has the authority to execute a bond on behalf of Vallis. Further, she does not even allege that she has the authority to execute a bond on behalf of Atlantic. Simply put, nothing in the record at the time of the filing of the bond ... establishes Basinski's authority, either express or implied, to bind Vallis to pay the bond."

Since the bond was inadequate, the trial court lacked the subject matter jurisdiction and the appeal was dismissed.

Comment: The time for filing an appeal from the Commission to the circuit court is extremely brief, only 20 days. The most crucial document to be filed is the bond. Respondent's counsel must file the bond signed by an officer of the respondent and executed by a surety within 20 days from receipt of the Commission decision. This can be a difficult task whether the company is a big one or a small one.

It becomes even more difficult where the respondent may no longer be in existence. The courts have been absolutely brutal in dismissing appeals for insufficient bonds. The court has been

overly technical in demanding strict compliance. They appear to find fault with every bond and/or affidavit submitted with a bond.

This is an extraordinary frustration for carriers who wish to appeal but are dealing with insureds who are no longer in business. A review of past court cases should give sufficient instruction to craft an affidavit signed by the employer's insurer to avoid a dismissal of the bond for lack of subject matter jurisdiction. It frequently falls to the insurance carrier to sign the bond because it is the real party in interest, but the bond and the affidavit must be carefully drafted.

Split Court Dismisses Petitioner's Appeal Because Petitioner Failed to File Proof of Payment for Record on Appeal

Heraldo Esquivel v. Workers' Compensation Commission and Truck County of Illinois, No. 2-09-0122WC, filed June 3, 2010.

Petitioner suffered a work injury on August 13, 2002 and filed a claim with the Commission. Multiple disputed issues included causal connection, TTD, medical expenses, and prospective medical. After a 19(b) hearing, petitioner was awarded limited TTD and medical bills. Prospective medical expenses and continuing TTD was denied.

Petitioner appealed to the Commission and on March 11, 2008 the Commission affirmed the decision of the arbitrator. The cost of the record was set at \$35.00. Petitioner received the decision March 24, 2008 and filed an appeal in the circuit court April 9, 2008, less than 20 days after receiving the decision.

Petitioner filed all the proper appeal documentation, but he didn't file a receipt showing that he had paid \$35.00 for preparation of the record on appeal. Even though the circuit court didn't receive a copy of the receipt or an affidavit that the cost of the record had been paid, the circuit clerk accepted the filing and issued summons for the appeal.

Respondent filed a motion to dismiss on the basis that the court lacked subject matter jurisdiction. Six months later, petitioner's attorney filed an affidavit stating that he in fact did mail a check to the Commission for \$35.00 for the cost of the record.

The circuit court dismissed the appeal and the appellate court in a 3-2 decision affirmed the dismissal. The court found that strict compliance with the statute was necessary and petitioner did not prove that he filed a receipt within 20 days from receipt of the decision in the circuit court. Therefore, the dismissal for lack of subject matter jurisdiction was justified.

The dissent judges concluded that petitioner had substantially complied and substantial compliance is sufficient. The dissent felt this was an unfair result for the claimant.

Comment: It is interesting to note that in the prior case, a unanimous court dismissed an employer's appeal, but in this case a divided court dismissed the claimant's appeal. Therefore, it appears that strict compliance is much more strict when an employer appeals than when an employee appeals. In the prior case, the employer filed a bond, but the bond was held to be

insufficient. In this case, petitioner did not file a receipt documenting payment for the record. It wasn't that he filed a defective receipt, he simply didn't file a receipt at all. This should have been an easier case for dismissal of the appeal than the prior case. Nevertheless, the decision continues to show that it is critical that circuit court appeal documents be checked and double checked prior to filing to make sure that strict compliance with the statute is followed.

Court Affirms Commission Decision Which Reversed an Arbitration Decision Favoring the Employer – Commission Ignores Quality Medical Physicians in Favor of Unreliable Physicians.

R & D Thiel v. Workers' Compensation Commission and Manuel Robledo, No. 1-08-3666WC, filed February 9, 2010.

Petitioner was employed by respondent as a laborer. He fell from a ladder January 5, 2004 and suffered a back strain. He started treating with an aggressive chiropractor. His complaints were limited to low back pain. He had an MRI of the lumbar spine which according to the chiropractor showed a small annular tear at L4-L5. Two weeks later petitioner started complaining to the chiropractor that his knee hurt as well.

Intelligently, the employer arranged for an IME with Dr. Mercier, an orthopedic surgeon, January 27, 2004. Petitioner didn't complain of any knee problems to Dr. Mercier. Dr. Mercier diagnosed a lumbosacral strain and felt petitioner would be able to return to work in six weeks. He felt 12 chiropractic treatments were sufficient.

Of course, the chiropractor continued to treat petitioner excessively. He arranged for an MRI of the knee. The MRI of the knee didn't show any torn ligaments or menisci. However, there was a questionable contusion or a transchondral fracture of the medial facet of the patella.

The chiropractor then referred petitioner to Dr. Freedberg, an orthopedic surgeon. Dr. Freedberg accepted all of petitioner's complaints and prescribed continued chiropractic care. He also recommended an arthroscopic surgery with debridement of petitioner's osteochondral fragment.

Dr. Mercier re-examined petitioner May 18, 2004. He disputed the conclusion that petitioner's knee condition was related. He stated petitioner was at MMI.

The chiropractor then referred petitioner to Dr. Montella, another orthopedic surgeon, who started seeing petitioner monthly. Dr. Montella changed his diagnosis on many occasions without any change in petitioner's physical findings. He gave petitioner a release to return to work July 9, 2004 because petitioner asked for it. He then gave petitioner work restrictions in August 2004 because petitioner asked for them. He then authorized petitioner off work October 22, 2004 because petitioner asked him to authorize him off for his back and knee pain even though his primary complaint at the time was unrelated neck pain and headaches.

Respondent arranged for another IME with Dr. Alexander Ghanayem, a well-respected orthopedic back surgeon at Loyola University Medical Center. Dr. Ghanayem saw petitioner March 17, 2006. He concluded that petitioner's MRI was normal. He found no evidence of a

disc herniation. He found the chiropractic care to be excessive. He felt petitioner was at MMI and could do full duty work.

The case was tried on a 19(b) petition. The arbitrator ruled in favor of respondent. The arbitrator awarded approximately 26 weeks of TTD but denied the excessive chiropractic treatment. The arbitrator found that petitioner failed to prove a causal relationship between his accident and his alleged current ill-being. Prospective medical care was denied.

Petitioner appealed to the Commission and the Commission reversed. The Commission found that there was a causal connection between petitioner's accident and his current ill-being. They awarded prospective medical care to include epidural steroid injections in the back and a right knee surgery.

The employer appealed to the circuit court and the appellate court. The circuit court affirmed and the appellate court in a lengthy decision affirmed also. The court expressed great concern over the Commission's reversal of the arbitrator, but they refused to apply any extra scrutiny to the Commission's decision. The court studied the Commission's decision and noting the inconsistencies between the physicians, ultimately ruled that it could not overturn the Commission's decision because the Commission's decision was supported by the opinions of petitioner's treating physicians.

Comment: This decision from the court documents an employer's extreme frustration with a system which ignores quality medical opinions in favor of physicians who make their decisions without objective medical evidence. Here, petitioner treated with a chiropractor whose treatments offered little relief but nevertheless petitioner visited the chiropractor over 130 times during a two-year period. The orthopedic doctors supported the chiropractor because the chiropractor represents a significant source of their referral business. The arbitrator carefully analyzed the evidence and found a reasonable solution, but the Commission completely ignored the arbitrator's decision and awarded benefits and medical expenses which clearly were not justified by any objective medical evidence.

The manifest weight of the evidence clearly justified the appellate court in reaching an opposite conclusion, but the court consistently refuses to protect employers' rights.

Accident Which Occurs While Petitioner Travels to IME Held Not Compensable

Mary Frances Menard v. Illinois Workers' Compensation Commission and Gateway Foundation, No. 5-09-0354WC, filed November 16, 2010.

Petitioner filed two cases with the Illinois Workers' Compensation Commission. First, she filed a case for an accident date of April 1, 1999. Petitioner claimed that she sustained a work-related injury as a result of anxiety/mental illness caused by conflicts at work. Several months later she was terminated by her employer. The case remained pending for several years and the employer arranged for petitioner to have an IME. The IME was scheduled for February 20, 2000. Petitioner lived in Carbondale, Illinois and the IME was scheduled in Chicago, Illinois. Petitioner traveled from Carbondale to Chicago. Because of the distance, she stayed overnight.

While leaving her hotel, she slipped on some ice and injured her back. She filed a second application for this back injury.

After a hearing, the arbitrator awarded petitioner compensation finding that petitioner sustained a work related accident on February 20, 2000 while attending the IME.

The employer appealed to the Commission and the Commission affirmed in a 2-1 decision. The employer then appealed to the circuit court and the circuit court reversed. The circuit court found that petitioner's second accident was not compensable because she wasn't employed at the time of the accident.

Petitioner appealed to the appellate court, and the appellate court affirmed the denial of compensation. The appellate court ruled that petitioner was not entitled to an award because at the time of the accident, she wasn't employed. Accidents which occur while a claimant attends an IME are not compensable. The fact that petitioner was attending an IME while she was unemployed does not make her case compensable. The appellate court based its decision on the Supreme Court's ruling in the case of *Skelgas Company v. Industrial Commission*, 400 Ill.2d 332 (1948). The *Skelgas* case is directly on point. The facts are almost indistinguishable. The court held that the *Skelgas* case mandated the ruling by the circuit court. The decision was unanimous.

Comment: This is clearly a correct decision from the appellate court. It is not surprising, but annoying, that petitioner would have been awarded compensation in the first place. This is not a case of first impression. The Supreme Court in the *Skelgas* case faced the same issue and ruled that the accident which occurred while attending the IME was not compensable. There is no justification for the arbitrator to award compensation and certainly no justification for the Commission to affirm. This provides another example of the Commission ignoring case law and substituting their own decision making process.

Pursuant to the “Law of the Case” Doctrine, the Commission Cannot Remand a Case to the Arbitrator to Consider Additional Evidence on the Issue of Causal Connection.

Help at Home v. Illinois Workers' Compensation Commission and Patty Lacksheide, No. 4-09-0977WC, filed November 16, 2010

Petitioner filed a claim against her employer alleging an accident of December 14, 2007. She claims that she injured her low back and right shoulder. She filed a petition for immediate hearing and the arbitrator awarded TTD and medical bills. The arbitrator found that petitioner injured both her back and right shoulder at the time of the accident.

The employer filed a petition for review and the Commission found that petitioner suffered an accident but reversed on the issue of causal connection with respect to the right shoulder. The Commission found that petitioner “failed to prove that her condition of ill-being as it pertains to her right shoulder is causally connected to the accident on December 14, 2007.” However, the Commission remanded the case back to the arbitrator and specifically provided, “on remand, the arbitrator may consider any additional evidence with respect to the causal connection of the right shoulder to the accident.”

The employer appealed to the circuit court and the circuit court confirmed the arbitrator's decision, stating that the Commission had the authority to remand the case to the arbitrator for the purpose of considering additional evidence with respect to causal connection of the right shoulder.

The employer appealed to the appellate court, and the appellate court reversed. The appellate court held, "Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action." This doctrine applies to proceedings before the Commission as well. In this case, the arbitrator found that petitioner's low back and right shoulder injury were causally related to the accident. However, on review, the Commission found that the right shoulder injury wasn't related to the accident. Therefore, that decision was final. The Commission did not have the authority to remand the matter back to the arbitrator to hear additional evidence on the issue of causal connection.

Comment: The appellate court's decision is clearly correct. The law of the case doctrine applies to Commission proceedings as well as court proceedings. Once the Commission makes a decision on an issue and that decision is not appealed, the finding becomes final. It applies to all subsequent proceedings in the case. If this didn't occur, we would constantly be relitigating cases before the arbitrator on the same issue.

The Commission has to do a better job of drafting its decisions. Because of poorly drafted decisions like this, claimants frequently argue that after a 19(b) decision, they can relitigate issues that have already been decided by the Commission. One of the biggest questions frequently is whether the petitioner's attorney can offer medical bills at a subsequent hearing which involve treatment received prior to the 19(b) hearing. We routinely object to the introduction of such bills on the basis that those issues were already litigated. However, the Commission frequently allows such claims. This case decision should help us in future 19(b) cases.

AROUND THE OFFICE

Dan Egan scored an excellent victory on behalf of Cottingham & Butler/SISCO in the case of *Arthur Ekberg v. Town & Country Distributing*, 08 WC 4764 and 10 WC 25277. This case involved an admitted hip injury which occurred on June 5, 2007. Petitioner was employed by respondent as a beer delivery driver. He made a delivery which included hauling a 200-pound cart up 18 stairs. He developed right hip pain. He was diagnosed with internal derangement and received conservative care. He was off work for six months but eventually returned to regular duty work in December 2007.

We arranged for an IME with Dr. Charles Mercier in October 2007. He felt petitioner's accident caused some tendinitis. However, he felt that petitioner had pre-existing personal degenerative arthritis which was unrelated to his accident.

A year and a half later petitioner started treating for his hip again. Eventually, petitioner was prescribed a total hip replacement surgery. We had petitioner re-examined by Dr. Mercier. He concluded that petitioner's condition was the result of his personal pre-existing degenerative arthritis and not his work injury. He agreed that petitioner needed a total hip arthroplasty.

Petitioner eventually had a total hip replacement. The operating surgeon found not only degenerative joint disease but also avascular necrosis. We proved that petitioner's avascular necrosis was the result of prednisone use for a personal condition of urticarial vasculitis.

The arbitrator ruled in our favor and denied causal connection. The arbitrator found that the total hip arthroplasty was secondary to petitioner's avascular necrosis. The arbitrator found that petitioner was at MMI for his work injury February 15, 2008 and all medical treatment thereafter was related to his personal condition.

Attorney Egan did a marvelous job here in investigating petitioner's personal condition and then arranging for IMEs and medical record reviews in support of our position on causal connection. His excellent investigation work led to favorable and convincing medical evaluation reports.

John Maciorowski scored an excellent decision from the Commission on behalf of Travelers Insurance in the case of *Drew Fischer v. Tazewell Machine Works*, 08 WC 40719, 10 IWCC 1124. In that case, petitioner was employed by respondent as a machine operator for over 20 years. He had a past history of left arm injuries for which he received settlements. He claimed an accident of May 22, 2008 for repetitive trauma. We proved that petitioner's ill-being was not caused by a repetitive trauma on May 27, 2008. We proved that petitioner's condition of ill-being was the result of his prior injuries. The claim for compensation was denied in its entirety.

John Maciorowski also achieved a very favorable decision from the Commission on behalf of State Farm Insurance in the case of *Robert Lewis v. Sherman's Place*, 08 WC 53330, 10 IWCC 1060, and 08 WC 53331, 10 IWCC 1061. This was an extremely complicated and complex case. It involved questionable medical treatment financed by Med Finance and performed by Dr. Blair Rhode. (watch out for this combination) Med Finance is a company that seeks out and agrees to finance questionable medical treatment and then issues excessive bills.

The claimant here alleged repetitive trauma and he eventually underwent surgery with Dr. Rhode. Dr. Rhode performed surgery for right medial epicondylitis, right cubital tunnel syndrome and right carpal tunnel syndrome. He then performed surgery on petitioner's left elbow for left cubital tunnel. The arbitrator awarded petitioner TTD, medical bills, and 25% loss of use of the right arm, 17.5% loss of use of the right hand and 17.5% loss of use of the left arm. We appealed to the Commission and the Commission severely reduced the arbitrator's award. With respect to the repetitive trauma case, the claim was denied. With respect to the specific loss case, the Commission found only that petitioner suffered from right deQuervain's tenosynovitis and awarded only 7.5% loss of use of the right hand.

Sarah Tripp received an excellent arbitration decision on behalf of PMA Management Corp. in the case of *Janice Goodson v. Tri City Canvas*, 09 WC 44269. Petitioner was claiming an accident of August 14, 2009 when she tripped and fell at work. Following the accident, she

complained of pain in her left shoulder and other body parts. She specifically denied any neck pain when first seen for treatment. Two months later, she started complaining of neck pain and sought treatment for neck pain. We disputed and denied the treatment for the neck pain. The arbitrator found that we were responsible for petitioner's shoulder injury, but the arbitrator denied liability for petitioner's neck problem. This allowed us to avoid liability for petitioner's cervical fusion.

Heather Boyer scored a significant victory from the Commission in the case of *Michael Gill v. Meany Electric*, 09 WC 24525. The carrier here was AmTrust North America. In this case, petitioner claimed an accident of June 19, 2007. The accident was accepted. Petitioner suffered an injury to his left shoulder and had surgery to repair a torn rotator cuff. However, petitioner recovered from his surgery and he returned to work. TTD was awarded for intermittent periods through December 30, 2008. Thereafter, petitioner returned to work for the employer and took a voluntary retirement May 29, 2009. At the time petitioner was 62 years old and he was entitled to get a pension.

Petitioner subsequently sought additional medical treatment and his treating doctor placed work restrictions on him. Petitioner hired an attorney and the attorney claimed that petitioner was entitled to TTD. The arbitrator denied TTD and petitioner appealed to the Commission. The Commission affirmed the denial of TTD after the date of petitioner's voluntary retirement.

Randy Stark obtained an excellent decision from Arbitrator Andros on behalf of West Bend Insurance in the case of *Craig Bergbauer v. Complete Mechanical Services, Inc.*, 08 WC 4778 and 4786. Attorney Stark tried this case under §19(p). Section 19(p) allows the parties to try cases before particular arbitrators where the parties agree that the decision of the arbitrator will be final. In this case, we admitted petitioner suffered an injury to his left shoulder, but we disputed liability for his cervical and right shoulder conditions. The arbitrator ruled in our favor. He approved benefits and treatment for petitioner's left shoulder, but he denied medical bills for treatment petitioner received for his cervical spine and right shoulder. This allowed the carrier to avoid liability for medical bills in excess of \$120,000.00.

John Maciorowski also received an excellent decision on behalf of State Farm in the case of *Henry Boyd v. Sherman's*, 08 WC 52850, 10 IWCC 856. Petitioner was employed by respondent as a warehouse worker. He loaded and unloaded merchandise and also performed some assembly work. He was selected by his employer to undergo a random drug test on November 15, 2008. He refused to go on the basis that he couldn't pass the test. On November 25, 2008 he was terminated for his refusal to undergo the drug test.

A day later, he saw an attorney and was sent to a doctor for treatment. He subsequently claimed an accident date of November 24, 2008 on the theory of repetitive trauma. Of course, he never reported any accident or sought any treatment while working. However, he claimed he was injured after his termination. Petitioner was again referred to Dr. Blair Rhode who performed a left cubital tunnel release in March 2009 and a right cubital tunnel release in July 2009. We arranged for an evaluation with Dr. Jay Pomerance. Dr. Pomerance concluded that petitioner's cubital tunnel syndrome was not causally related to his work duties. The arbitrator found that petitioner failed to prove that he sustained repetitive trauma, and he adopted the opinion of Dr.

Pomerance denying compensation in its entirety. Despite an appeal to the Commission, in a unanimous decision the Commission affirmed the denial of compensation.

Jigar Desai tried a case on behalf of Brentwood Services and obtained a good result from the arbitrator in the case of *Rebecca Lonergan v. Oregon Health Care Centers*, 08 WC 4587 and 08 WC 4588. Petitioner claimed an injury to her knee March 9, 2007 and her low back April 28, 2008. We admitted that petitioner was injured, but we contended that her injuries were minor and she wasn't entitled to any additional treatment or permanent partial disability. Several months after completing treatment and being back to work, petitioner started treating again for both her knee and her back. We had arranged for IMEs with Dr. Weiss. He stated in November 2008 that petitioner was at MMI and any further treatment wasn't causally related to her work injuries. The arbitrator ruled in our favor. The arbitrator found that the petitioner sustained accidents March 9, 2007 and April 26, 2008. However, he denied petitioner's claim for TTD and medical bills after November 5, 2008. We avoided liability for approximately \$7,000.00 in medical bills. We achieved settlement for the entire case of approximately \$2,700.00.

John Maciorowski obtained a great decision for AmTrust in the case of *Juan Galindo v. Filip Rotheimer*, 08 WC 38989. This claimant alleged an injury to his right knee while delivering lumber. He subsequently sought treatment two months later at the Neck and Back Clinic. His histories of injury we proved were extremely inconsistent. He was even incorrect about the date of his alleged accident. Although petitioner claimed to have suffered an accident on June 5, 2008, he didn't report any work injury for a month and performed his regular job duties. The arbitrator denied compensation in its entirety, finding that petitioner failed to prove that he sustained accidental injuries as alleged. We avoided liability for a large Neck and Back Clinic bill.

CONCLUSION

It is hard to believe that the legislature will enact meaningful workers' compensation reform within the next month. However, if the legislature is actually going to enact reforms, they must do it quickly because the new General Assembly will be sworn in on January 12, 2010. Governor Quinn certainly wants to get his income tax hike approved by then. If he waits until the new legislature comes in, he has to deal with more Republicans, especially in the House.

It is always a mistake to rush new legislation. If in fact there is an agreement to modify the Workers' Compensation Act, it would make sense for a draft bill to be reviewed by many individuals before passage. However, that appears unlikely. It appears that if in fact there is an agreement to enact major changes, the bill will only be presented and reviewed for less than two weeks before passage. This makes me skeptical that Democrats in the legislature who have long been supported by labor unions will willingly approve a workers' compensation overhaul which severely diminishes the benefits available to union members. Nevertheless, there is a strong impetus for reform and we may very well see significant statutory changes in January 2011.

The retirement of Commissioner Sherman and Arbitrator Hennessy is newsworthy simply because there are so few retirement/resignations at the Commission. It is very rare for an arbitrator to retire/resign. Many of the arbitrators have been serving for more than 20 years.

Similarly, many commissioners whose terms have expired have not sought alternate employment. It remains a mystery why Governor Quinn has not reappointed or replaced several of the commissioners whose terms have expired.

Absent statutory change, we continue to fight the unfairness in our current system. We continue to identify new players and old adversaries in the system. New players such as Med Finance seek to make money off the system by financing questionable cases and billing employers at the absolute maximum rates allowed by the statute. They seek to identify medical services that are not regulated in the medical fee schedule to charge even higher fees (i.e. Ambulatory Surgery Treatment Centers). Only a few cases involving this company have been litigated. We certainly hope that the Commission recognizes the inequities of organizations like this and puts a stop to their activities.

Personal

My dream came true this year by qualifying for and competing in the Ironman World Championships in Hawaii on October 9, 2010. I qualified for participation at the Ironman World Championships by winning the Ironman Executive Challenge competition at Ironman Lake Placid in July 2010. Unfortunately, I had to recover from that race and immediately start training for another full distance race a mere 10 weeks later.

Fortunately, I am pleased to report that I competed well and my race was a successful one. I took Second Place Honors in the Ironman Executive Challenge competition. My total time was 13 hours 25 minutes. The race as expected proved to be extremely challenging. Although the race course is not hilly as it was in Lake Placid, the course is hard because of the extreme heat and strong winds. During the middle of the day, the temperature was at 90° with a real feel of 97°. The surface temperature on the roads was 129°. Black lava gets really hot in the sun. My feet were on fire.

The swim was difficult as the waves and current were powerful. After making it out of the water, I had a strong bike ride and an excellent run to finish. I was thrilled to have not only my wife on the course cheering me on, but also my 85-year-old mother along with my two sons and my daughter-in-law. Their participation and support during the race made it a memorable and unique event. If you want to catch a glimpse of me on TV, the race will be aired on NBC on December 18, 2010 at 3pm to 5pm (CST).

2010 proved to be an extremely challenging and competitive year for me as I competed in two half Ironman competitions and two full distance Ironman competitions. I feel like I should be more tired, but frankly, I love the competition. I haven't signed up for any full distance Ironman triathlon races next year, but I have at least four half Ironman races that I'm planning. After spending the last two years competing in and exploring New Zealand and Australia, this next year I am focused on Europe. I will start with a race on the island of Mallorca off the coast of Spain and then see where else the travel bug takes me.



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Chicago Arbitration Schedule 2011

In months where an arbitrator does not have status call, emergency motions can be presented to the Pro Se Arbitrator on his listed status call dates. Trial dates begin one week after the status call. Cases are continued on a 2 month cycle.

The Pro Se Arbitrator will review pro se settlement contracts daily in Room 8-205.

January 2011

12/27 Hagan
12/28 Galicia
12/29 Jutila
12/30 Dollison
1/3 Prieto
4 Cronin
5 Lammie
10 Pulia
11 Black
12 Williams
13 DeVriendt
14 Kane
18 Peterson
29 Carlson

April 2011

3/25 Hagan
3/28 Galicia
3/29 Jutila
3/30 Dollison
3/31 Prieto
1 Cronin
4 Lammie
5 Pulia
6 Black
7 Williams
8 DeVriendt
11 Kane
12 Peterson
13 Carlson

July 2011

6/24 Hagan
6/27 Galicia
6/28 Jutila
6/29 Dollison
6/30 Prieto
5 Cronin
6 Lammie
11 Pulia
none Black
none Williams
12 DeVriendt
13 Kane
14 Peterson
15 Carlson
7 *Pro Se Arbitrator*

October 2011

9/26 Hagan
9/27 Galicia
9/28 Jutila
9/29 Dollison
9/30 Prieto
3 Cronin
6 Lammie
7 Pulia
12 Black
13 Williams
14 DeVriendt
17 Kane
18 Peterson
29 Carlson

February 2011

1/24 Hagan
1/25 Galicia
none Jutila
1/27 Dollison
1/28 Prieto
none Cronin
8 Lammie
9 Pulia
10 Black
14 Williams
15 DeVriendt
16 Kane
17 Peterson
18 Carlson
1 *Pro Se Arbitrator*

May 2011

4/25 Hagan
4/26 Galicia
4/27 Jutila
4/28 Dollison
4/29 Prieto
2 Cronin
5 Lammie
6 Pulia
9 Black
10 Williams
11 DeVriendt
16 Kane
17 Peterson
20 Carlson

August 2011

7/25 Hagan
none Galicia
7/26 Jutila
none Dollison
none Prieto
1 Cronin
none Lammie
8 Pulia
9 Black
10 Williams
11 DeVriendt
none Kane
17 Peterson
18 Carlson
27 *Pro Se Arbitrator*

November 2011

10/25 Hagan
10/26 Galicia
10/27 Jutila
10/28 Dollison
10/31 Prieto
1 Cronin
7 Lammie
8 Pulia
9 Black
10 Williams
14 DeVriendt
15 Kane
16 Peterson
22 Carlson

March 2011

2/22 Hagan
2/23 Galicia
2/24 Jutila
2/25 Dollison
1 Prieto
2 Cronin
3 Lammie
8 Pulia
9 Black
10 Williams
11 DeVriendt
14 Kane
none Peterson
16 Carlson
15 *Pro Se Arbitrator*

June 2011

none Hagan
5/25 Galicia
5/27 Jutila
5/31 Dollison
1 Prieto
2 Cronin
6 Lammie
7 Pulia
8 Black
13 Williams
14 DeVriendt
15 Kane
16 Peterson
none Carlson
5/26 *Pro Se Arbitrator*

September 2011

8/25 Hagan
8/26 Galicia
8/29 Jutila
8/30 Dollison
8/31 Prieto
1 Cronin
2 Lammie
none Pulia
13 Black
19 Williams
none DeVriendt
20 Kane
22 Peterson
22 Carlson
6 *Pro Se Arbitrator*

December 2011

11/23 Hagan
11/28 Galicia
11/29 Jutila
11/30 Dollison
1 Prieto
2 Cronin
5 Lammie
8 Pulia
9 Black
12 Williams
13 DeVriendt
14 Kane
15 Peterson
16 Carlson

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DOWNSTATE ARBITRATION STATUS CALL SUMMARY
2011

***vacation month for initialed arbitrator but
an arbitrator will appear for emergency hearings/settlements**

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec
Belleville (Teague)	18	22	14	18	16	13*	18	15	19	17	21	19
Bloomington (White)	10	14	14	11	9	13	11	8	12*	11	14	12
Carlinsville (Neal)	11	8	8*	12	10	14	12	9	13	11	8	13
Clinton (Holland)	7	4	4	1	6	3	1*	5	2	7	4	2
Collinsville (Nalefski)	10	7	7	4	9	6	11	8	6	11	7*	5
Danville (Holland)	18	14	14	18	16	20	18*	15	19	17	21	19
Decatur (Neal)	24	22	28*	25	23	27	25	22	26	24	28	27
De Kalb (Andros)	20	17	17	21	19	16	21*	18	22	20	17	15
Galesburg (Holland)	27	24	24	28	26	23	28*	25	29	27	17	29
Geneva (Kinnaman)	4	1	1	5	3	7	5	2*	6	4	1	6
Joliet (Falcioni/Fratianni)	6	3	3	7	5	2	7*Fra	4*Fal	1	6	3	1
Kankakee (Giordano)	18	8	15	19	17	14	19	16	21	18*	8	13
Lawrenceville (Nalefski)	21	18	18	22	20	17	15	19	9	21	18*	16
Mattoon (White)	26	23	23	27	25	22	27	24	28*	26	30	28
Mt. Vernon (Teague)	4	1	1	4	3	7*	5	2	6	3	7	6
Ottawa (Giordano)	24	14	21	25	23	20	25	22	26	24*	14	19
Peoria (Mathis)	18	22	21	18	16	20	18*	15	19	17	21	19
Quincy (Tobin)	5	2	2	6*	4	1	6	3	7	5	2	7
Rock Falls (Holland)	25	22	22	26	24	28	26*	23	27	25	29	27
Rockford (Akemann/Lee)	11	8*Ak	8	12	10	14	12	9	13	11	8	13*L
Rock Island (Holland)	4	1	1	5	3	7	5*	2	6	4	1	6
Springfield (Tobin)	3	7	7	4*	2	6	5	1	6	3	7	5
Urbana (Neal)	19	16	16*	20	18	15	20	17	21	19	9	21
Waukegan (Erbacci)	7	4	4	12*	6	3	1	5	2	7	4	2
Wheaton (Andros/O'Malley)	3	7	7	4	2	6*O	6*A	1	7	3	7	5
Whittington/Herrin (Dibble)	10	14	7	11	9*	13	11	8	12	11	14	12
Winchester/Tobin	12	16	16	13*	11	15	13	10	21	12	16	14
Woodstock (Lee)	5	2	2	6	4	1	6	3	7	5	2	7*
	Jan	Feb	Mar	Apr	May	June	July	Aug	Sep	Oct	Nov	Dec

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Cases are continued on a 2-month cycle.