

## Review of Illinois Workers' Compensation

JANUARY 2010

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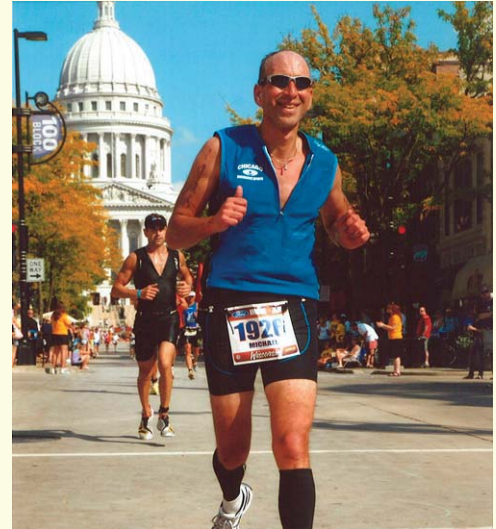
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#### AROUND THE OFFICE

- Great Decisions
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Happy New Year 2010. Good riddance to 2009. I don't know anyone who will pine for a repeat of last year. Bank failures, bankruptcies, and unemployment seemed to hit all-time highs. Tons of federal money was pumped into the economy, but that is hardly a long-term economic solution. At some juncture, it may occur to our politicians to decrease unnecessary employer costs as a way to improve our economy.

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# REVIEW OF ILLINOIS WORKERS' COMPENSATION

January 2010  
By Michael E. Rusin

## AROUND SPRINGFIELD

2010 is an election year in Illinois. We elect our state's Governor in non-Presidential election years. This year the run for Governor is a wide open event. The current Governor is Pat Quinn. Quinn served as the Lieutenant Governor under former Governor Rod Blagojevich who was elected to the Governor's position in 2002 and in 2006. Former Governor Blagojevich was impeached and removed from office almost a year ago on January 29, 2009.

Governor Blagojevich is currently pending trial on charges of conspiracy, mail fraud, wire fraud, and solicitation of bribery. One of the main charges against him is that he tried to sell the right to appoint the Senate seat vacated by the election of Senator Barack Obama to the Presidency. His trial date is currently scheduled to start on June 3, 2010.

Current Governor Quinn faces a tough primary battle against Illinois Comptroller Daniel Hynes. Hynes is a popular statewide office holder. He has held the position of Illinois Comptroller for the past 11 years.

On the Republican side, there are seven announced candidates. The front runner is Jim Ryan, a former Illinois Attorney General and the 2002 Republican nominee for Governor. He probably would have had a good chance to defeat Rod Blagojevich in 2002 but for the fact that the outgoing Republican Governor, George Ryan, was a criminal and left a bad impression of Republican candidates by the time he left office. At this juncture, it appears that Mr. Ryan will have a good chance to repeat as the Republican candidate in 2010.

The gubernatorial race will be hotly contested and likely very close. Republicans should be encouraged by the fact that former Governor Blagojevich's trial will occur during the summer, shortly before the election. The trial should make many voters unhappy with Democratic leadership.

Former Governor Blagojevich's trial will undoubtedly result in a media circus. Staunchly proclaiming his innocence, former Governor Blagojevich continues to be a faux celebrity. He continues to use his notoriety to garner public appearances. He was denied the right to travel to Costa Rica to participate in the show, "I'm a Celebrity, Get Me Outta Here!" However, he will appear in Season 9 of the "Celebrity Apprentice" in Spring 2010. This will give me yet another reason to never watch reality TV shows, especially those involving men with big hair.

## AROUND THE COMMISSION

All of the current commissioners and the acting Chairman were appointed by Governor Blagojevich prior to or during 2008. With the change in Governor, it is expected that some of the commissioners will be replaced. Amy Masters has been acting Chairman since November

2008. The chairman's term of office does not expire until January, 2011. However, since Chairman Masters has never been submitted for Senate approval, a permanent replacement could be named at any time.

Furthermore, the following commissioners' terms have already expired. Therefore, they could be replaced at any time: Employer Commissioners Mario Basurto and Nancy Lindsay, Public Commissioners James DeMunno and Paul Rink, and Employee Commissioner Barbara Sherman. The terms of Commissioners Kevin Lamborn and Molly Mason expire in January 2011. The term of Commissioner Yolaine Dauphin expires in January 2013. I have heard many rumors as to which commissioners will be replaced and who the new Chairman will be, but I don't publish rumors. Political rumors tend to be very unreliable.

### **Benefit Rates**

Maximum benefit rates in Illinois have increased every six months for more than 30 years. Attached to this newsletter is a schedule of rates through July 14, 2010. Incredibly, for the first time in state history, there is no increase in rates because the State's Average Weekly Wage actually decreased in 2009. Therefore, the rates in effect from July 15, 2009 through January 14, 2010 will remain the same for the time period January 15, 2010 to July 14, 2010.

Similarly, the maximum rate for permanent partial disability also remains the same for another year. The maximum PPD rate covering the period July 1, 2009 to June 30, 2010 remains at \$664.72.

Of course, many of you will ask why rates haven't decreased since the State Average Weekly Wage decreased. The answer is simple but frustrating. The Act provides that the maximum rates increase annually if there is an increase in the State's Average Weekly Wage. However, the statute does not correspondingly provide for a decrease in the maximums to the extent that there is a decrease in the State's Average Weekly Wage. Consequently, the maximums can only go up, but they can never go down without a statutory amendment. Please print out this attachment and save it for your reference.

The minimum TTD and PPD rates will undergo one further increase this summer as the state's minimum hourly wage will increase for the last time from \$8.00 an hour to \$8.25 an hour. This increase will occur on July 1, 2010.

Conversely, the medical fee schedule rates have decreased slightly. Section 8.2(a) of the 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. Because the CPI-U decreased 1.48% between August 2008 and August 2009, all scheduled medical fees decreased 1.48% for treatment on or after January 1, 2010. I am still trying to figure out why our medical insurance rates still went up.

## BEFORE THE SUPREME COURT OF ILLINOIS

### **Severely Injured Truck Driver Whose Accident Resulted in Paralysis of Both Legs, Left Arm Paralysis and Right Arm Amputation Awarded Permanent and Total Disability Plus Permanent Partial Disability for His Arm Injuries**

*Beelman Trucking v. Illinois Workers' Compensation Commission (Jack G. Carson)*, Docket No. 106680, filed May 21, 2009.

On April 19, 2005, petitioner was involved in a motor vehicle accident and suffered devastating injuries to his arms and legs. As a result of the accident, petitioner suffered paralysis in both of his legs, paralysis in the left arm below the shoulder, and he underwent surgical amputation of the right arm above the elbow. Petitioner sought a double award from the Commission. In addition to claiming statutory permanent and total disability under §8(e)(18), he also claimed 100% loss of use of the left arm and 100% loss of use of the right arm. The Commission granted this award. Petitioner was awarded lifetime permanent and total disability benefits. In addition, petitioner was awarded 100% loss of use of his left and arm and 100% loss of use of his right arm.

The employer appealed, contending that petitioner was entitled to permanent and total disability on a statutory basis because he had 100% loss of use of two members. The employer argued that the maximum award petitioner could get was statutory permanent and total disability. Even though petitioner had injuries beyond two members, the employer argued that petitioner couldn't get both permanent total disability and permanent partial disability for a single accident.

The circuit court confirmed the Commission's award, but the appellate court reversed. The appellate court found petitioner was entitled to statutory permanent total disability but not permanent partial disability as well. Petitioner appealed to the Supreme Court, and the Supreme Court reversed. The Supreme Court reinstated the Commission's decision granting both statutory permanent total and permanent partial disability benefits. The court analyzed the statute at great length and concluded that an individual who loses two members and is therefore entitled to statutory permanent total disability benefits is not precluded from seeking benefits for other injuries. The court found this would not necessarily be true in a case of permanent total disability under §8(f) which is premised on the conclusion that a claimant cannot return to work. In a case of statutory total disability under Section 8 (e)(18), an individual could lose the use of two legs and still return to work. Therefore, the court found it acceptable for the Commission to award statutory permanent total disability for petitioner's loss of both of his legs and then award permanent partial disability for the losses of both arms.

Comment: The severity of petitioner's injuries in this case caused special scrutiny. Petitioner suffered very severe injuries to all four limbs. Petitioner's attorney was inventive in claiming that he was entitled to more than permanent total disability. The attorney's inventiveness paid off with an award beyond which we thought the Commission had the ability to make. This particular case presented an extremely sympathetic claimant, but now establishes a precedent of expanding the law. We knew that a claimant who was entitled to statutory permanent and total disability was also entitled to make a claim for permanent partial disability for any subsequent

injuries he sustained beyond the loss of the two members that resulted in the award of statutory permanent total disability. Now this claim can be made for multiple injuries in the same accident. This is not a circumstance which will occur frequently. However, it does show the penchant of the court to be sympathetic to severely injured claimants.

**BEFORE THE APPELLATE COURT OF ILLINOIS – NON WORKERS’  
COMPENSATION DIVISION**

**Employer Ordered To Pay Past Medical Bills Despite Settlement Contract Closing Out  
Medical Rights – Settlement Contracts Must Explicitly Waive the Right to Past Due  
Medical**

*Thomas Hagene v. Derek Polling Construction*, No. 5-07-0025, Fifth District, filed February 24, 2009.

Petitioner suffered an undisputed work injury on June 16, 2003 when he fell from scaffolding at a construction site. He injured his left arm and shoulder and underwent surgery.

The parties negotiated a settlement which was approved on July 5, 2005. The front of the settlement contract indicated that the employer had paid all the medical bills. The back of the contract closed out all medical rights.

After the settlement contract was approved, petitioner learned that medical bills were unpaid. Petitioner filed a §19(g) action in the circuit court claiming entitlement to reimbursement for the three unpaid medical bills.

The employer filed a motion to dismiss based on the terms of the settlement which closed out all rights under §8(a) of the Act relating to medical bills. The trial court dismissed the claim based on the terms of the settlement.

Petitioner appealed and the appellate court reversed. The appellate court found that the employer is obligated to pay all related medical bills as a result of the Workers’ Compensation Act. The court found that the right to payment of past medical bills is an important right, but it is a right that can be closed out by settlement contract. However, in order for the right for payment of medical bills to be closed out, the waiver of the right must be explicit.

After reviewing the entire contract, the court found that the parties did not intend to discharge the employer’s obligation to pay past work-related medical bills. The court found that the settlement was premised on the assumption that the employer had in fact paid all medical bills incurred. Therefore, the action for payment on the medical bills was to be granted.

Comment: Disputes as to settlement contract terms are common. As a general rule, when any case is settled, the right to medical expenses is closed out. It is important that the terms of settlement on both the front and back of the settlement contract are consistent and explicit. The front of the settlement contract asks whether the employer has paid all the medical bills. If the settlement contract is completed showing on the front that the employer has paid all medical bills

and stating on the back that petitioner is responsible for any outstanding bills, the contract is going to be found ambiguous. Therefore, it is important to make sure that both the front and back of the settlement contract are consistent. The court fails to recognize that the claimant is in a much better position to know whether or not medical bills are unpaid because the claimant is the one who sought the medical treatment. Frequently, an employer will not know that a claimant even sought treatment with a physician and a medical bill will be discovered long after settlement. Employers should not be held responsible for medical bills that were never known or previously submitted at the time the settlement contract was approved.

**Employer Denied the Right to Intervene Pursuant to Section 5(b) of Workers' Compensation Act and Denied the Right to Object to Plaintiff's Settlement of Claim**

*John Pederson v. Mi-Jack Products, Inc., Terex, Inc., and Henkels and McCoy, Inc.*, Case Numbers 1-07-2327 and 10-07-3228 (First District), filed March 10, 2009

This case involves a very complicated set of facts especially as it relates to the legal action. Petitioner was a Henkels employee and on March 23, 1999 he was injured when a boom jib from a truck-mounted crane fell on him. Henkels paid workers' compensation benefits and all parties knew or should have known that a civil lawsuit would also be filed.

On March 23, 2001, two days before the statute of limitations was going to run, petitioner filed a civil lawsuit against MiJack, the crane lessor, and Terex, the alleged manufacturer of the crane.

Several months later, the plaintiff filed an amended complaint naming a different company (Terex-Ro) as the actual manufacturer of the crane. Since this new defendant was named after the statute of limitations had run, the actual manufacturer was dismissed from the lawsuit.

Petitioner then fired his attorneys and attempted to proceed with his lawsuit *pro se*. He then filed a legal malpractice claim against his attorneys for failing to name the proper parties to the lawsuit prior to the running of the statute of limitations.

Petitioner knew his civil case was going nowhere and he settled it for the nominal amount of \$50,000.00. Henkels, the employer, objected. They petitioned to intervene and objected to the settlement. The trial court granted the right to intervene but still allowed petitioner to settle his case for \$50,000.00 stating that the employer would be protected with respect to its lien rights to the extent there was any money to reimburse the employer's lien.

The employer appealed and the appellate court ruled that the employer had no standing to intervene in the lawsuit and no right to object to the settlement. The appellate court noted that under §5(b) of the Act, an employer has the right without petitioner's consent to file its own lawsuit to protect its lien rights in the three months prior to the running of the statute of limitations. That meant that from December 23, 2000 until March 23, 2001, the employer could have filed its own civil suit against the proper parties to protect its workers' compensation lien. However, Henkels did not file its own lawsuit. The court ruled that by not filing its own lawsuit, the employer lost the right to object to petitioner's agreement to settle his civil suit.

Although the employer argued that petitioner was simply settling his civil suit for a nominal amount in order to maximize his recovery in his malpractice case against his attorneys, the court ignored that argument, stating that the trial court did not abuse its discretion and circumvent the employer's lien rights.

Comment: This case provides a good illustration that employers should be more diligent in pursuing their lien rights on their own. Employers frequently rely on petitioners to file civil suits and obtain recoveries. Employers believe that petitioners will be self-motivated to file lawsuits and obtain recoveries thereby insuring lien recovery when others are at fault.

However, there are many reasons why petitioners are unable to procure civil judgments and settlements adequate to protect the employer's lien rights. This case provides the example of where petitioner's attorney did a poor job of representing petitioner and the civil case was essentially lost. Petitioner is going to pursue a civil case against his attorneys for malpractice. However, even if he recovers from the malpractice suit, the employer can't file a lien against the malpractice claim.

Employers should more diligently pursue their lien rights. In the event a petitioner files a civil lawsuit, the employer should intervene early to protect its lien rights and to monitor the lawsuit to make sure that petitioner's attorney adequately and promptly pursues the case so that the case isn't lost on various technical bases.

Moreover, employers should more frequently consider filing their own lawsuits simply to protect their lien rights. Disasters frequently happen when a civil suit is not filed until the very last minute and it is subsequently discovered that the wrong parties have been named. That's the danger with doing anything at the very last minute. The employer has the right in the last three months prior before the statute of limitations runs to file its own lawsuit. It is somewhat expensive for the employer to file its own lawsuit. Further, if petitioner then chooses to file his own lawsuit, he has the right to control the litigation. However, the filing of the lawsuit by the employer at least will protect the employer's lien rights. This should be done more often, especially in cases involving large liens.

### **Retaliatory Discharge Claim – Trial Court Summary Judgment for Employer Reversed - Claimant Who Was Laid Off Because of Medical Restrictions and Then Not Rehired When Released Was Entitled to Pursue Claim for Retaliatory Discharge**

*William Herman v. Power Maintenance & Constructors, LLC.*, No. 4-08-0509, Fourth District, filed February 18, 2009.

Petitioner was employed by the respondent as an apprentice boilermaker. On November 8, 2005, he sustained a work injury and promptly reported the injury to his employer. He received medical treatment and was released to return to work with restrictions. The employer laid off petitioner on November 15, 2005 on the basis that it did not have work available for petitioner within his restrictions.

After petitioner completed his treatment, he went back to his union hall and sought employment. The respondent had jobs available for boilermakers but they sent a note to the union refusing to accept petitioner on the basis that his work was substandard.

Petitioner then filed a civil lawsuit against the employer for retaliatory discharge. Petitioner alleged that the employer refused to rehire him solely because of his work injury. Petitioner's complaint was supported by affidavits from two other employees who also claimed that the employer refused to rehire them following work injuries. Petitioner proved that all of his performance evaluations while working for the insured showed that his work was average or better.

The trial court granted the employer summary judgment and the appellate court reversed. The appellate court found there was a genuine issue as to facts in this matter. The appellate court found that the employer's refusal to rehire petitioner based on substandard job performance was simply a pretext for retaliation against him because of his workers' compensation claim. The court noted that petitioner had received a full duty release to return to work as a boilermaker. Therefore, his termination in November 2005 could not support a refusal to rehire in March 2006. The matter was remanded back to the trial court and petitioner's lawsuit for retaliatory discharge was allowed to proceed. Petitioner would now need to convince a jury that the refusal to rehire was in retaliation for the workers' compensation claim.

Comment: This decision shows that retaliatory discharge claims can be based not only by outright discharges but also refusals to rehire. It shows that construction companies that hire through union halls face the same risks as all other employers who employ individuals directly rather than through the union hall. A refusal to take a construction worker back to work is treated as a retaliatory discharge.

Employers who have written job performance evaluations must recognize that those evaluations will become significant evidence in any retaliatory discharge lawsuit. The evaluations must be carefully done. The evaluations cannot overlook an employee's faults or else they serve as damning evidence against the employer who later claims that an employee's work product was substandard.

### **Court Reverses Summary Judgment for Retaliatory Discharge – Discharge of Employees for Failure to Report to Work After Released by IME Physician Does Not Create Automatic Right to Retaliatory Discharge Claim**

*Fred Grabs and Rudolph Francek v. Safeway and Dominick's Finer Foods, LLC.*, No. 1-08-3007, First District, filed June 17, 2009.

Both plaintiffs claimed work injuries and filed workers' compensation claims. Both claimants were off work and treating with their own chosen physicians. Both claimants were seen by IME doctors and released to return to work with no restrictions.

The employees disputed the IME conclusions that they were able to return to regular work.

Respondent had a no fault attendance policy in which an employee may be terminated for job abandonment if he does not come in to work or call in his absences for three days in a row (i.e., attendance coding “code 10 – no call/no show”). After receiving the IME doctor reports, the respondent changed plaintiff’s accident coding from a work-related injury which did require them to call in their absences to require plaintiffs to return to work or call in their absences. Neither employee came in or called in for three days and both were terminated.

Both employees filed claims for retaliatory discharge. Initially, on May 2, 2008, the circuit court denied plaintiffs’ motions for summary judgment.

However, subsequently on July 7, 2008, the Commission issued its decision on both cases. In both cases, the Commission ruled in favor of petitioners and awarded TTD and medical. The Commission adopted the findings of the treating physicians and rejected the findings of the IME doctors.

Subsequently, on September 19, 2008, the circuit court granted petitioner’s motion to reconsider and granted summary judgment in favor of the petitioners on the issue of liability.

The employer appealed to the appellate court and the appellate court reversed the circuit court’s granting of summary judgment in favor of petitioners. The appellate court ruled that there was a genuine issue of material facts which prohibited summary judgment.

The appellate court reviewed prior case decisions concerning retaliatory discharge. They noted that pursuant to the *Clark* case, an employer who discharges a claimant prior to a Commission decision on the basis that the employer feels the claimant is malingering can be subject to a retaliatory discharge award. Similarly, an employer who terminates claimant based on a dispute between a treating physician and an IME physician is also subject to an award. In *Hollowell*, the appellate court stated:

“An employer cannot unilaterally rely on one physician’s favorable diagnosis while at the same time dismissing another physician’s unfavorable diagnosis. To do so would give the employer the ability to rely on his own medical evaluation as a reason to demand that employees return to work, even when that evaluation conflicts with that of the employee’s physician. . . . When there is a dispute between an independent medical examiner and an employee’s physician with no evidence of fraud, the employer cannot discharge the employee on the basis of suspected laziness and malingering. It is for the Industrial Commission to settle disputes such as this where there are conflicting medical opinions.”

Although an employer cannot terminate an employee solely based on an IME opinion allowing him to return to work, the appellate court ruled this does not create a *per se* rule of liability. In this case, the employer did not discharge the claimants based solely on the IME report. It based its termination on the employees’ failure to call in or show up to work for three straight days. Therefore, there was not an automatic right to a retaliatory discharge claim. There was a genuine issue of fact as to whether the termination was valid and the employer was entitled to present facts to a jury rather than being subject to summary judgment in favor of the petitioners. The

court held, “In the present case, it appears that the circuit court applied a *per se* rule of retaliatory discharge instead of considering whether there was a genuine issue of material fact as to the element of causation that would preclude summary judgment. While it would be improper for the defendants to discharge plaintiffs solely based on the IME reports where it is the role of the Commission to determine the extent of plaintiffs’ injuries, we decline to apply a *per se* rule of retaliatory discharge.”

Comment: Employers certainly have to be wary of retaliatory discharge lawsuits in Illinois. Courts continue to zealously protect the rights of employees and are continuing to expand the rights of employees who claim retaliatory discharge. Employers are certainly entitled to have reasonable policies with respect to employees who don’t return to work. However, employers should definitely be concerned about terminations where there are disputes concerning a claimant’s ability to return to work. It is definitely safer to delay termination until a favorable workers’ compensation ruling is obtained.

## **BEFORE THE APPELLATE COURT OF ILLINOIS – WORKERS’ COMPENSATION DIVISION**

### **Repetitive Trauma Case for City Electrician Ruled Compensable and Prospective Medical Award for Six Surgical Procedures Is Upheld**

*The City of Springfield, Illinois v. The Illinois Workers’ Compensation Commission and Kevin Magerl*, No. 4-08-0170WC, filed February 11, 2009.

Petitioner was employed by respondent as an electrician for approximately eight years. His job as an electrician required him to do a variety of different activities for the employer. He worked with a number of different tools including different hand tools, drills and occasionally pneumatically driven tools. Petitioner testified that he would use one of these tools, twisting and turning his hands and wrists for about five hours. However, sometimes he would use one tool for eight hours a day. He was also required to climb scaffolds and ladders and use his arms.

He sought treatment with a family doctor and was referred to Dr. Trudeau, a well-known Springfield neurologist. Dr. Trudeau performed an EMG/NCV and found evidence of compression in the elbow and wrist bilaterally. Dr. Trudeau concluded that petitioner’s injuries were work-related.

Petitioner was referred to a surgeon, Dr. Neumeister. Dr. Neumeister diagnosed carpal tunnel syndrome, cubital tunnel syndrome, and pronator syndrome bilaterally. He recommended bilateral surgeries on the elbows and wrists for each of the conditions for a total of six different surgical procedures.

At the employer’s request, petitioner was examined by Dr. Rotman. He felt petitioner did not have entrapment neuropathy at the elbows and definitely recommended against pronator tunnel surgery as he expected those symptoms would dissipate after a carpal tunnel release. He did not offer an opinion as to causal connection.

The Commission found the case compensable. The respondent appealed to the circuit court and appellate court and the award of prospective surgeries was confirmed. The employer issued a series of questions for the Commission to answer primarily because the concept of six prospective surgeries seemed extremely unreasonable and the Commission failed to sensibly answer the questions. Nevertheless, the appellate court ruled the case compensable and deferred to the Commission as to which doctor they wanted to believe.

Comment: It is extremely difficult to dispute repetitive trauma cases especially with respect to hand tool intensive jobs like those of electricians, plumbers, carpenters, etc. An employer cannot hope to successfully defend such a case without strong evidence of especially an excellent job description and video and a strong medical opinion documenting an alternative cause for the injury. In this case, the employer's dispute was not supported by a strong medical opinion. Therefore, it was doomed to failure.

### **Court Affirms Permanent and Total Disability Award to a Thirty-Year Old Educated Account Executive**

*Ameritech Services, Inc. v. Illinois Workers' Compensation Commission and Bryan Dolk*, No. 1-08-1412WC, filed March 17, 2009.

Petitioner was employed by respondent as a universal account executive. His job duties included selling telephone equipment and services to business customers in Chicago. He would make up to five sales calls a day. His job required him to carry demonstration equipment weighing approximately 50 pounds along with a laptop computer and other equipment weighing about 25 pounds. He was hired June 12, 2000. He suffered an injury to his lower back carrying some heavy equipment on August 7, 2000. He treated with Dr. Gireesan who diagnosed bulging discs and a back strain and imposed work limitations. He was offered a light duty job, but initially refused it. He continued to receive conservative treatment.

On December 24, 2000, he was involved in a motor vehicle accident and complained of increased back pain. A subsequent MRI was done which didn't show any additional changes. His treating doctor continued to impose work restrictions. The employer questioned whether petitioner's work restrictions were the result of his work injury or his motor vehicle accident.

Over the next several years, petitioner saw various different doctors, some of whom recommended a spinal fusion because of his continued complaints of back pain. The employer's doctor felt that petitioner didn't have any significant objective findings and was at MMI.

While off work, petitioner went to school and obtained an MBA from Northwestern University. Petitioner reportedly had accommodations made for him during his schooling. Petitioner presented testimony from a vocational consultant that he was permanently and totally disabled because of his extreme limitations due to his pain.

The arbitrator ruled the case compensable and awarded four years of TTD followed by permanent and total disability benefits. The Commission and the circuit court affirmed.

Respondent appealed to the appellate court and the appellate court affirmed. The appellate court deferred to the Commission and ruled that the evidence supported the Commission's decision.

Most significantly, the court noted that petitioner claimed that he was unable to work and produced testimony from the vocational consultant which supported his claim that he was totally disabled. The evidence established that petitioner fell into the odd lot category of permanent total disability. Therefore, the burden shifted to the employer to prove that suitable work was regularly and continuously available to petitioner. However, the employer failed to produce testimony from a vocational rehabilitation expert to contradict petitioner's expert.

Comment: It is hard to believe that a 30-year-old individual suffering from some back pain is found to be permanently and totally disabled. It is much harder to believe when the evidence shows that this individual not only has a college degree, but also has a MBA from a top University. The Commission tends to punish large corporations for not offering jobs to claimants. In this case, the employer is a huge company with many employees. The Commission tends to expect that light duty job offers can be made by big corporations.

Moreover, it is difficult to understand how the employer chose not to present testimony from its own vocational consultant. If the claimant hires a vocational consultant who testifies that the claimant was permanently and totally disabled because no work was available for them, it was incumbent on the employer to get a contrary medical opinion and vocational opinion. It is not realistic to expect that the Commission will simply ignore the testimony of petitioner's expert no matter how ridiculous the opinion may be.

### **Court Awards Carpenter TTD, Past and Future Medical, and Penalties Even Though Petitioner Had Been Working for Twenty-Five Months After His Injury**

*Residential Carpentry, Inc. v. Workers' Compensation Commission and Douglas Tibbets*, No. 3-08-0122WC, filed May 8, 2009.

Petitioner was employed by respondent as a "back out" carpenter. His job involved building wooden structures such as door frames, soffits, and dropped ceilings. It was a heavy duty job which included lifting prefabricated stairs into place which weighed over 100 pounds. He initially suffered an injury October 13, 2003 when he tore his rotator cuff. He treated with Dr. Rezin and was prescribed conservative care. Surgery was recommended, but respondent refused to authorize the entire procedure. The doctor wanted to perform a distal clavicle excision and rotator cuff repair. The employer contended that the distal clavicle degeneration was a personal condition. Respondent was willing to pay for the rotator cuff repair but not the distal clavicle excision.

Petitioner continued to work and reinjured the shoulder June 9, 2004. Dr. Rezin re-examined petitioner and imposed work restrictions. Petitioner continued to work. He didn't have surgery because it wasn't authorized. The employer continued to honor petitioner's work restrictions until December 2005 when petitioner was allegedly laid off because the employer didn't have any more light duty available.

At the time of the layoff, petitioner was under work restrictions. He attempted to seek re-employment with respondent and was refused. He attempted to seek employment with other contractors and was refused.

After a hearing before the arbitrator seeking TTD and medical, the arbitrator awarded TTD through the date of the hearing plus past and future medical and penalties.

The respondent appealed and the Commission affirmed. The respondent appealed to the circuit court and to the appellate court and the decision was affirmed. The court found that the fact that petitioner worked for 25 months after his accident did not justify not paying TTD. The fact that the petitioner's termination in December 2005 might have been the result of an economic layoff didn't preclude an award of TTD. The employer did not prove that petitioner was employable or that there were jobs available within his restrictions.

Further, the court found that the respondent's refusal to authorize petitioner's complete surgery was unjustified. The court deferred to the Commission and concluded that the Commission's decision awarding medical was not contrary to the manifest weight of the evidence. It wasn't reasonable for the employer to authorize surgery on one part of the shoulder but not on another part. The Commission's award of penalties and attorney's fees was determined to be justified.

Comment: The employer here took a very hard position from a medical and legal standpoint. The employer's workers' compensation carrier was WRAMSCO. This carrier is known by the Commission as taking very hard positions on cases sometimes unreasonably. The employer's refusal to authorize surgery back in 2003 and 2004 extended the case to this tortured conclusion.

The facts didn't support the employer's position and led to an unfavorable court decision. Respondents must expect that claimants who have light duty restrictions will be awarded TTD if they are terminated prior to obtaining a full duty release. If an employer is to avoid TTD in that scenario, they must be able to prove that an employee is employable even with restrictions. This means at least having a labor market survey done showing that an employee could find work within his restrictions if he chose to do so. Here, petitioner presented job search records and the employer presented nothing in response.

### **Court Denies Section 4(c) Petition for Alleged Practice of Unfairness in Handling Workers' Compensation Claim – Court Rules That Section 4(c) Requires More Proof Than An Isolated Incident of Unfair Action**

*Jasmin Burzic v. Illinois Workers' Compensation Commission, Dedicated Transportation, Inc. and Zenith Insurance Co.*, No. 1-08-2303WC, filed April 28, 2009.

Petitioner suffered a work injury to his back on May 28, 2002. The employer contended that it was a back strain only and petitioner was at MMI August 14, 2002. The arbitrator agreed and awarded 11 weeks of TTD but nothing further.

Petitioner appealed to the Commission and the Commission reversed the arbitrator. They found petitioner's continuing back condition was causally related to his accident and awarded 79 weeks

of TTD and over \$50,000.00 in medical bills. Neither party appealed, and the Commission's decision became final.

Subsequently, in October 2005, the employer provided vocational rehabilitation services and paid maintenance.

The vocational consultant found petitioner work and petitioner started work February 28, 2006. However, he was terminated almost immediately because of poor language skills. Nevertheless, the adjuster refused to continue to pay maintenance on the basis that petitioner wasn't cooperative with vocational rehabilitation.

Petitioner then filed a §4(c) petition against the employer, its insurance carrier, Zenith Insurance, and the adjuster, claiming unfairness in handling the claim and seeking discipline against the carrier and adjuster. Testimony was presented to the Commission by the petitioner, the adjuster, and the vocational consultant. The adjuster testified that petitioner wasn't being cooperative with vocational rehab. The vocational consultant testified that petitioner did do everything that was demanded but was generally cooperative. Consequently, the evidence tended to favor petitioner.

Subsequently, petitioner and the carrier settled the underlying worker's compensation case for \$175,000.00 on October 26, 2006. However, it appears the §4(c) petition was not resolved as part of the settlement contract. Apparently, the employer and carrier felt that the settlement contract would automatically close out the §4(c) petition.

The Commission subsequently issued a decision denying the §4(c) petition. Petitioner then appealed the denial to the circuit court which affirmed the denial and also to the appellate court. The appellate also confirmed the denial. The appellate court found that a §4(c) petition could not be granted based solely on an isolated incident where an employer or its carrier was unreasonable in its actions to petitioner. In order for a §4(c) petition to be granted, the petitioner has to prove a policy or practice of unfairness in the handling and processing of claims. An isolated incident is insufficient. In this case, petitioner may have proved that there was an isolated incident of unfairness in dealing with this petitioner, but there was no proof of a policy of unfairness so as to justify the granting of a §4(c) petition.

Comment: The employer and carrier should have realized that the §4(c) would survive the settlement contract. The §4(c) petition is not an action directly against the employer; it's an action against the carrier. It is separate from any specific workers' compensation case. The end result of a §4(c) petition, if granted, would be a disciplinary action against the carrier. The carrier should have negotiated a resolution of the §4(c) petition as part of the lump sum settlement contract.

Alternatively, once the Commission issued its decision denying the §4(c) petition, it is hard to understand why petitioner's counsel would have continued to pursue the action into the circuit court and appellate court. Clearly, insufficient evidence was offered before the Commission to justify the finding of a §4(c) petition. At best petitioner proved up a case for penalties and attorney's fees in his individual case, but the conduct of respondent in this isolated incident

certainly didn't merit a §4(c) decision. The court was absolutely correct to deny the 4(c) petition. The decision provides good instruction which will hopefully deter other claimants' attorneys from filing frivolous §4(c) petitions.

### **Benefits Awarded to Claimant Who Tipped Over a Defective Vending Machine Based on "Personal Comfort" Doctrine**

*Circuit City Stores, Inc. v. Illinois Workers' Compensation Commission and Clinton Dwyer*, No. 2-08-0722WC, filed May 21, 2009.

Petitioner was a 20-year-old young man employed by Circuit City installing car stereos. Near his installation bay is an employee break room which contains a snack vending machine. He used the machine two or three times a week and had some problems with products getting stuck. When products got stuck, he would shake the machine or make another purchase. Neither petitioner nor any other employee had ever been reprimanded for shaking the machine. There were no written instructions stating not to shake the machine.

On March 6, 2005, a co-employee bought something from the vending machine and it got stuck. The co-employee asked petitioner to help her. Petitioner took a few steps and jumped into the machine, striking it with his shoulder. When he did so, he suffered an injury to his hip. Medical records show that he had a pre-existing lesion in his right hip that was likely a bone cyst.

Respondent presented the store director to testify. She stated that if anyone ever lost money in the machine, they were reimbursed. She had no knowledge of any employees striking or shaking the machine. The store had no policy prohibiting employees from shaking the machine. The store director testified that petitioner violated company protocol by going to the machine when he was not on break.

The arbitrator ruled that the case fell within the confines of the personal comfort doctrine. The Commission affirmed in a 2-1 decision. Respondent appealed to the circuit court, and the circuit court reversed. The circuit court felt that the personal comfort doctrine did not apply and denied liability.

Petitioner appealed to the appellate court and the appellate court reversed and reinstated the Commission's decision. The appellate court ruled that the personal comfort doctrine did not apply. Instead, the court further found that the Good Samaritan rule applied to petitioner's action and that it was not unreasonable for him to go to the assistance of a co-employee. Further, the court found that the accident arose out of the employment because the employee vending machine had a defect. The defect was that the machine sometimes didn't dispense product thereby creating the need to dislodge the bag of chips. The court found that the Commission was not wrong in finding that petitioner did not voluntarily undertake an unreasonable risk even though there was conflicting testimony as to how the accident occurred.

Comment: This is a frustrating and difficult decision to accept. The employer was certainly right to continue to fight this case. Apparently the circuit court judge was the only one that

really analyzed this case properly. This accident did not arise out of petitioner's employment. There was no risk of employment associated with banging into a vending machine. Petitioner was asked by a girl to dislodge a bag of chips from a vending machine. Instead of simply telling the girl to get a refund from the office, he instead decided to leap into the machine to dislodge it.

There is no rational way to conclude that this accident had anything to do with petitioner's employment. This machine was not so defective that it needed a human catapult to dislodge the product. It was not reasonable or foreseeable for the employer to have a specific policy which prohibits employees from leaping into vending machines. Common sense dictates that. Petitioner should not have left his work station to go to the vending machine. This accident did not arise out of nor was it in the course of petitioner's employment. It is ridiculous to state that this falls under the Good Samaritan rule. A Good Samaritan helps someone in need of help. Was the girl going into a diabetic coma and she needed her snacks immediately? If anything, this was horseplay or a voluntary risk. Jumping into a vending machine to show off to a girl is just stupid. Compensation should have been denied.

### **Low Back Injury – Multiple Surgeries – Court Rules Claimant's Refusal To Stop Smoking Was an Insufficient Basis To Deny Benefits**

*Global Products v. Workers' Compensation Commission and John Hall, Jr.*, No. 1-08-1914WC, filed June 9, 2009.

Petitioner was employed by respondent as a laborer. He had a heavy job which required lifting hundred-pound bags and pouring them into a mixer. He also was required to carry wheel buffs. On August 31, 2000, while carrying wheel buffs, he slipped and fell. He suffered an injury to his low back and required surgery. He first had surgery December 2, 2000.

He continued to have back and leg pain. He treated with several physicians and eventually had a second back surgery on October 11, 2002 which included a disc excision and a lumbar fusion.

Petitioner's fusion was not successful and a third surgery was recommended. However, petitioner was a cigarette smoker and refused to stop smoking cigarettes. Respondent's expert testified that smoking caused the failure of petitioner's first spinal fusion. Both the treating physician and examining physician instructed petitioner to quit smoking prior to surgery.

The employer contended that it was not required to pay benefits or pay for a third surgery because of petitioner's continued smoking. The employer contended that the smoking was either an intervening cause of petitioner's condition of ill being or the smoking was an injurious practice which justified the termination of benefits.

Unfortunately, the arbitrator, Commission and circuit court all granted petitioner benefits. The appellate court confirmed the award of benefits. The appellate court found that smoking would not have been an intervening accident. The court stated that even if the smoking was an intervening incident, it would be insufficient to break the chain of causation to petitioner's original accident.

As to whether smoking constituted an injurious practice, the court noted that in the event an employee engages in injurious practice, pursuant to §19(d), the Commission **may in its discretion** reduce or suspend compensation. Therefore, the Commission is not obligated to reduce or suspend compensation even if it finds an injurious practice. Since a decision on injurious practice is within the Commission's discretion, the court can only overturn the Commission's decision if the Commission abused its discretion. The court found that the Commission did not abuse its discretion. The court noted that the employer must take his employees as he finds them. The court noted that petitioner was a smoker prior to his first surgery. The court found no evidence that petitioner smoked cigarettes for the purpose of retarding his recovery. Therefore, the award of benefits was confirmed. At least the award of penalties and attorney's fees was reversed.

Comment: It is truly frustrating to pay for multiple surgeries, especially fusion surgeries, when the likelihood of success is severely diminished by the fact that the claimant is a smoker. Many physicians will not even perform fusion surgeries if the claimant doesn't stop smoking for at least a period of time. It is senseless to demand that employers pay for surgeries that are doomed to failure by a claimant's actions.

It is unreasonable not to give employers some relief in situations like this. Petitioner's continuing to smoke is an injurious practice. It puts him in a position where his next back surgery is likely doomed to the same failure as his prior back surgery.

Medical Studies will continue to demonstrate the adverse effects of smoking on the human body. The legal community should accept and adopt the science rather than continue to ignore it.

**Award for Permanent Total Disability Resulting from Stray Bullet Upheld. Claimant's Employment as a Bartender in a High Crime Area in Chicago Placed Her at a Greater Risk when a Stray Bullet From an Exchange of Gunfire Outside the Restaurant Struck Her.**

*Restaurant Development Group v. Hee Suk Oh*, No. 1-08-2143WC, filed June 16, 2009.

Petitioner was hired by respondent in August 1999 to work as a bartender at Coast Restaurant, a ground level restaurant located at the intersection of Damen and Shakespeare in Chicago, Illinois. This is in the Bucktown neighborhood of Chicago, a couple of miles north and west of the downtown area of Chicago. On September 4, 1999, at approximately midnight, petitioner was performing her regular duties as a bartender and she was struck by a stray bullet fired from outside the restaurant. The bullet was the result of a gang-related shooting. The men involved in the shooting were gang members living near the restaurant.

Petitioner filed a workers' compensation claim and presented testimony from a Chicago Police Department sergeant. The officer testified that the Bucktown area had probably the largest collection of multiple gangs within the city itself. He identified three different gangs involved in disputes over territory. He testified that the crime rate in his district was in the top quarter to third of all of the districts in the city for violent crime and gun-related crime. The employer

presented testimony from a private investigator who stated that petitioner was at the same risk as anyone in the restaurant or any passer-by.

The employer defended the case on the basis that petitioner was not exposed to any greater risk of injury than the general public.

After the hearing before him, the arbitrator ruled in favor of the claimant, finding her at an increased risk because of the place of her injury. The Commission and the circuit court affirmed. The employer appealed to the appellate court and the appellate court affirmed also. The appellate court noted that they would only reverse the case if the manifest weight of the evidence justified reversal. The court found that this case was very similar to the *Illinois Institute of Technology* case issued in 2000. Since the evidence in this case showed that the employer's restaurant was located in a high crime area with rival gangs feuding over turf, petitioner was at an increased risk. This was not a case of positional risk. Petitioner was at an increased risk because of the neighborhood.

Comment: Based on the prior court decision in the *Illinois Institute of Technology* case, this decision is not surprising. This area of the city was in the process of gentrifying in 1999. It is certainly safer there now than it was 10 years ago.

It is not true that any employee who gets struck by a stray bullet will be entitled to a compensable claim. However, as here, if evidence shows the area to be a higher crime area, the Commission and courts will not be reluctant to award disability. On the other hand, employers should try to develop evidence if possible that an area where a crime takes place is no different from other areas. In order for a claimant to successfully prove a compensable claim, the risk of crime in the area can't be the standard risk that all members of the general public are exposed to. The claimant needs to prove more than being the victim of a crime while at work. Otherwise, the positional risk theory of compensability would apply. This is not the law in Illinois.

## **GREAT DECISIONS AROUND THE OFFICE**

I obtained an excellent decision from the arbitrator and Commission for the Illinois Public Risk Fund in the case of *Jason Keeling v. Village of Forest Park*, 08 WC 21861, 09 IWCC 0557. Petitioner was employed as an eight-year veteran police officer. On April 26, 2008, petitioner was dressed in his full uniform including heavy shoes and a 30-pound police belt. He was walking in the office at the station. He entered the carpeted office of his sergeant from a tiled hallway. As he turned and stepped, he felt his right foot become planted in place and his right knee buckled. He twisted to the right and fell on the carpeted area near the doorway. Evidence was presented that prior to this incident, petitioner and a fellow officer were engaged in horseplay and goofing around.

We disputed the case on the basis that petitioner failed to prove any increased risk. We proved that the hallway and the carpeted area were free of defects. We argued that the acts of standing, turning, and walking do not constitute a risk greater than that to which the general public is exposed. The arbitrator sustained our position and ruled the case not compensable. Petitioner

appealed to the Commission and the Commission confirmed the arbitrator's decision. No appeal was filed and the Commission's decision became final.

**Additionally, I** obtained an excellent decision on behalf of St. Paul Travelers Insurance and their excess carrier Chartis Insurance in the case of Nancy Champion v. Marmon/Keystone, 01 WC 28551. This case involved an accident January 31, 2001 wherein petitioner injured her neck and back when she jumped down from a rack at work. She had a prior history of a lumbar fusion. A post accident x-ray showed a cracked screw in her back. However, we showed that his condition was pre-existing.

Despite fairly normal diagnostic studies, petitioner underwent extensive medical treatment from numerous different physicians. Our IME physician felt petitioner was at MMI by October 2002. This opinion was corroborated by one of petitioner's IME doctors. Nevertheless, petitioner continued to change doctors and continued to undergo extensive treatment. She eventually had a cervical fusion in addition to her lumbar fusion. She sought pain management care and underwent multiple injections followed by the insertion of permanent spinal cord stimulators in both the cervical and lumbar spine.

We disputed petitioner's entitlement to TTD and medical after 2002, but petitioner claimed continuing medical care and permanent total disability for life. Following trial, Petitioner submitted a proposed decision seeking benefits for accrued compensation in the amount of \$190,000.00 and future compensation in the amount of \$866,000.00. She sought an award of medical bills in the amount of \$130,000.00 plus penalties and attorney's fees in the amount of \$180,000.00. The total compensation that she sought from the arbitrator was \$1,366,000.00.

The arbitrator rejected the proposal and instead awarded 88 weeks of TTD, 40% loss of use of the man as a whole, and \$11.00 in medical bills. The total award was \$101,000.00. After taking a credit for compensation paid, the net award had petitioner owing us \$3,000.00. Petitioner filed a review and we settled for \$30,000.00.

**Greg Rode** received a favorable decision from the arbitrator on behalf of State Farm Insurance in the case of *Dean Dierschow v. Leo Deutsch & Sons, Inc.*, 09 WC 12163. Petitioner claimed an injury to his back and left shoulder on October 17, 2008. Petitioner was employed as a union laborer and also had secondary employment as an apartment building manager. It is undisputed that he injured his left shoulder while pushing a wheelbarrow containing mortar. He began treatment October 20, 2008 for his left shoulder. His left arm was placed in a sling.

On December 28, 2008, he was working at the apartment building with his arm in a sling to repair some frozen pipes. He had increased back pain after that incident. He first complained of back pain to his treating doctor January 5, 2009. He eventually began treatment with Dr. Lorenz and had back surgery June 26, 2009. We accepted liability for petitioner's left shoulder injury, but we disputed the low back claim. We proved that petitioner didn't report a back injury initially. We proved that he didn't complain of any back problems until January 5, 2009. The arbitrator found the left shoulder condition related to the accident but denied liability for petitioner's low back treatment.

**Brent Halbleib** successfully defended a case on behalf of Brentwood Services, *Phyllis Porter v. St. Bernard Hospital*, 07 WC 47068. Petitioner claimed an accident October 5, 2007 while working as a custodian at the hospital. She claimed she was exposed to MRSA. We presented the testimony of petitioner's supervisor as well as an infectious disease nurse from the hospital to establish that it was unlikely petitioner would have been exposed to MRSA. We proved that petitioner was required to wear gloves, pants, and closed toed shoes. Our nurse proved that there were only two cases of employees having been diagnosed with MRSA in the past 30 years. We had petitioner examined by Dr. Scott Kale who concluded that petitioner's MRSA condition was based on community exposure rather than work exposure. The arbitrator ruled in our favor and denied compensation in its entirety.

**Steve Friedman** obtained an excellent decision from the Commission confirming a denial of compensation in favor of State Farm Insurance. In the case of *Deanna Sowa v. G C Salons, Ltd.*, petitioner claimed an injury on August 31, 2007. Petitioner was employed as a cosmetologist at a beauty salon in a large shopping center. Petitioner was a smoker and was allowed to take smoke breaks. Both the store petitioner worked in and the shopping center were non-smoking areas. Therefore, petitioner was required to exit the shopping center in order to take a smoke break. Petitioner exited the mall. As she left the loading dock, she squeezed between a pillar and the edge of a garbage dumpster. She returned the same way and in squeezing past the dumpster, her foot slipped off a three-inch concrete ledge. She fell and fractured her foot.

We proved that there was no defect in the region petitioner used for her smoke break. The arbitrator further found that petitioner's choice to maneuver outside the normal walking area and squeeze between a dumpster and a concrete pillar was a personal choice which created an increased risk. The arbitrator found, "The area traversed by petitioner was not an area intended for people to walk through." The arbitrator therefore found that petitioner's injury was the result of an unreasonable and unforeseeable action. Therefore, the case was not compensable and the claim was denied. Petitioner appealed to the Commission and the Commission affirmed in a 2-1 decision.

**Randy Stark** obtained an excellent decision for PMA Management and Commonwealth Edison in the case of *Tim Foss v. Exelon*, 03 WC 10564. Petitioner claimed repetitive trauma culminating in an accident on January 1, 2001. Petitioner was employed as a senior operations training instructor at the Byron Nuclear Power Plant. He claimed that 20 years of work caused repetitive trauma resulting in multi-level degenerative disc disease and spondylolisthesis. Petitioner demanded an award of 30% loss of use of the man as a whole. The arbitrator denied compensation in its entirety. We supported our defense with an IME and record review. We also proved via surveillance that petitioner was extremely active in his everyday life, operating a tractor on some personal property and setting up a pontoon boat for use on the Rock River.

**Heather Boyer** received a favorable decision from the arbitrator on behalf of Chartis Insurance in the case of *Ronald Byrd v. General Logistics, Inc.*, 08 WC 35707. Petitioner claimed an injury January 25, 2008. Petitioner claimed that he injured his back while moving boxes in his trailer because the rear axle was overweight. Medical records showed that on January 25, 2008, petitioner was taken by ambulance to St. Elizabeth's Health Center in Youngstown, Ohio for

chest pain. He was diagnosed with bronchitis, rhinitis, chest pain, hypertension and diabetes. He returned to work February 4, 2008.

He worked for approximately 11 weeks afterwards and then began treating for cervical radiculopathy. He claimed that his cervical radiculopathy was caused by his work injury. We presented a peer review report concluding there was no causal connection between petitioner's claimed accident date and his subsequent cervical treatment. We also proved that petitioner told his supervisor that he hurt himself at home. We presented testimony from a supervisor who claimed that petitioner did not move the boxes he testified that he moved. The arbitrator found petitioner's testimony not be credible and denied compensation in its entirety.

**Tom Margolis** obtained an excellent decision from the Commission on behalf of Chartis Insurance in the case of *Darrell Bulliner v. SWIT, Inc.*, 08 WC 33585, 09 IWCC 865. Petitioner claimed an injury July 7, 2008 as a result of being the victim of an assault by a co-worker. We disputed liability, but the arbitrator ruled in petitioner's favor, granting compensation and medical.

We appealed to the Commission and the Commission reversed the arbitrator, finding that petitioner failed to prove accidental injuries arising out of and in the course of employment and compensation was denied in its entirety. The 17-page Commission decision describes in detail the extensive testimony presented from multiple witnesses and police officers. It was undisputed that petitioner was attacked by a co-worker. However, we proved that the attack was a personal one. There were disputes between the two employees over a woman. The Commission ruled that the fight was the result of a personal dispute and therefore not compensable.

**Randy Stark** obtained an excellent and unique decision from Arbitrator DeVriendt on behalf of West Bend Mutual Insurance in the case of *Rudy Kyncey v. P & M Mercury Mechanical*, 08 WC 56325 and 56326. The decision is unique because the case was tried before the arbitrator under §19(p) of the Act. The only issue in dispute before the arbitrator was whether petitioner's future medical benefits including a disc replacement surgery was causally connected to the accident. Contrary to petitioner's testimony about continuing back problems, we produced an IME report from Dr. Goldberg who concluded that petitioner's current ill-being was not causally related to the accident. We also showed video surveillance documenting significant physical activities including heavy snow removal on multiple occasions in January and February 2009. The arbitrator found petitioner was at MMI with respect to his alleged work accidents as of March 4, 2009. Any medical expenses incurred by petitioner after that date were found to be not causally related.

This decision allowed us to negotiate a settlement and avoid a potentially huge MSA account. Further, it also protected the employer and carrier for any claims for reimbursement from any pension funds.

**Steve Friedman** obtained an excellent decision on behalf of Chartis Insurance in the case of *Charles Wiltberger v. Otis Elevator*, 04 WC 56575. Petitioner sustained an undisputed accident September 8, 2004 when he made electrical contact while repairing an elevator. Petitioner never returned to work following this incident. We accepted liability for the accident, but we denied

liability for petitioner's five years of lost time as well as his claimed neuropsychological injuries and his alleged herniated disc.

Our defense included extensive surveillance video demonstrating petitioner to be very physically active, including working on various construction projects completed during the time when he claimed he was unable to work and when he was allegedly dizzy, had double vision, and was unsteady. We also subpoenaed and produced bank records which documented several construction transactions. We even had investigators interview customers who had work done by petitioner. Further, we presented medical evidence showing prior motor vehicle accidents and prior claims of neck and back injuries. Our medical experts included Dr. Shenker, Dr. Matz, and Dr. Grote who performed a neuropsychological evaluation. After two full days of trial including presentation of nine witnesses, the arbitrator found in our favor and denied compensation in its entirety.

**Dan Egan** received a favorable award from the arbitrator on behalf of Gallagher Bassett and Tower Automotive in the case of *Hector Rodriguez v. Tower Automotive*, 07 WC 3632. This case involved an accepted accident of January 2, 2007 wherein petitioner injured his low back moving some chains. He was treated for a lumbar strain but was discharged from care January 17, 2007.

He continued to work for Tower Automotive until April 2008. He didn't have any further treatment with the company clinic. He treated with a family doctor and saw the family doctor intermittently without any complaints of back pain for a year and a half.

He started treating with the family doctor for back pain on August 9, 2008 and claimed the treatment was causally related to his accident of January 2007. We disputed and denied all liability. Arbitrator Cronin ruled in our favor. Although the arbitrator found that petitioner sustained an accident, he found that the August 2008 medical treatment was not causally related to the accident and no permanent partial disability was granted.

**Steve Friedman** obtained a hard fought decision from the Commission denying compensation on behalf of Chartis Insurance in the case of *Jerry Hunter v. D'Agostino Auto Service*, 05 WC 3101, 09 IWCC 794. This was a bizarre and unique case. Petitioner claimed that he sustained an injury while working for the employer November 19, 2004. On that date, petitioner was in the rear storage area. An unknown individual entered the employer's premises and shot petitioner.

We disputed the case in its entirety. We disputed whether petitioner was ever employed by respondent. We disputed whether the shooting had anything to do with his employment. Multiple witnesses were presented. Petitioner was severely injured. The gunshot severed the femoral artery in petitioner's leg. He incurred over \$240,000.00 in medical bills and was likely permanently and totally disabled. We presented nine witnesses. We defended the case on the basis that petitioner knew his assailant and that petitioner was likely engaged in a personal transaction involving the sale of drugs. The arbitrator adopted our explanation of the events and denied compensation. Petitioner appealed to the Commission and the Commission affirmed in a unanimous decision.

## **New Partners**

We are pleased to announce that Joseph P. Basile in our workers' compensation department and William J. Harrington in our civil department became partners of the firm as of January 1, 2010. Their excellent work and dedication is sincerely appreciated.

## **New Faces at the Office**

Four new associates joined the workers' compensation department in the last few months.

**Debra S. Chesnin** has a B.A. in Psychology from University of Michigan and a J.D. from University of Illinois. She is admitted to the U. S. District Court for the Northern District of Illinois and is the author of several Illinois Bar Journal articles, "Illinois Supreme Court Finds No Good-Faith Exception to the Illinois Human Rights Act," and "Court Catches Ball Legislature Dropped when Repealing Structural Work Act."

**Jigar S. Desai** holds a B.A. in Political Science from the University of Iowa and the J.D. degree from Chicago-Kent College of Law.

**Marcie L. Hefler** has a B.A. in Political Science from University of Wisconsin and J. D. from John Marshall Law School. Marcie is admitted to the U. S. District Court for Northern District of Illinois, U. S. Court of Appeals, Seventh Circuit, U. S. District Court for the Northern District of Indiana. She serves as a board member and treasurer of Youth Service Project in the Humboldt Park neighborhood of Chicago.

**Michael A. Moore** has a B.A. in Social Science from the University of Chicago and J. D. from Loyola University of Chicago.

2009 was also a banner year for new babies in the office. We have a number of prospective attorneys who recently joined the RMF family. In order of appearance, five babies were born in 2009: Domenico Alesi, Jr. on April 23, Mia Kamps on May 3, Matthew Boyer on May 19, Ellie Tripp on July 23 and Emily Miller on November 5. Welcome to the world!

## **CONCLUSION**

The 2006 amendments to the Act are really starting to be felt by employers. Rates are higher than ever, both at the high end and low end with the increase in the state's minimum wage. The minimum TTD and PPD rates frequently are equal to or close to the average weekly wage especially if an employee has one or more dependents.

The number large wage differential claims we are handling has increased dramatically. This is a function not only of the change in the law but also the poor economy. High wage jobs are harder to find. Some of the inequities in our statute and its application really encourage employees and their attorneys to push for quick trials in high wage differential claims knowing that after an award the employer has little leverage to change an unfavorable decision.

Employers cannot reasonably expect assistance from the courts as to the unfortunate 2006 changes. The courts will strictly construe the statute in favor of the employee. The court can't state that the legislature didn't intend the result created by the statute. The legislature clearly intended the results created by this unfavorable statute.

The 2006 changes were championed by our former Governor Rod Blagojevich. There is a good chance he will be convicted before our next Governor is elected. No matter who the incoming Governor is, he will be greeted by a financial disaster. The state's bond rating has been cut from A1 to A2. We now have the second lowest state rating in the country, second only to California. Our 11% jobless rate puts us among only a half dozen states in the country with double digit unemployment. Maybe this election year voters will decide to elect candidates who are pro business. Maybe it isn't such a good idea to have such a negative set of laws designed to encourage employers to flee rather than stay in Illinois.

Humpty Dumpty has already fallen off the wall here. Frankly, I am surprised by the number of gubernatorial candidates who are vying to take over the reins to try to piece the large egg back together. I think some of the smarter Democratic candidates decided to opt out of this year's election, recognizing that it will be virtually impossible for the next Governor not to increase taxes. Governors who raise taxes tend not to get re-elected. We will make it through this mess, but it won't be pretty.

2009 was a banner year for our firm as we celebrated our 25<sup>th</sup> anniversary. We opened our doors on May 1, 1984. It certainly doesn't seem that long ago and we are proud of our firm's longevity and accomplishments. Many of our senior partners have been recognized as either "Super Lawyers" or "Leading Lawyers" in the workers' compensation defense field. We do the best we can to pass the knowledge and experience on to our younger lawyers. We continue to strive for excellence. It's reflected in the recognition by our peers and the trial and appellate results we've received.

2009 turned into a busy competition year for me as I competed in two Ironman races on two continents. After successfully competing in Ironman New Zealand in March 2009, I immediately commenced training for Ironman Wisconsin in September 2009. Ironman Wisconsin is a tough Ironman race (not that any Ironman race is easy). After 2.4 mile swim in Lake Monona, the 112 mile bike ride through southwest Wisconsin is extremely hilly. The 26.2 marathon run through and around Madison, WI is fun as many University of Wisconsin students cheer the athletes. After a rather cool summer of training in Chicago, race day was of course hot and sunny. Nevertheless, I was pleased with completing my third Ironman race in two years.

My next adventure, however, will take me back down under as I will compete in a half-Ironman competition near Melbourne, Australia on February 7, 2010. Sign up seemed like a good idea until I watched videos of Australian swimmers competing with sharks nearby. I have been told not to worry, though. Even in Australia they recognize professional courtesy.