

Review of Illinois Workers' Compensation

MARCH 2011

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Illinois Workers' Compensation has made the national news in the last few months. Of course, the legal news only becomes interesting when the players are involved in conspiracy, controversy and intrigue. Tens of millions spent for prison guards, an arbitrator trying to secretly hold a workers compensation hearing, a hidden settlement to an arbitrator – these stories and more have placed the Illinois Workers Compensation system in the national spotlight. Both the Governor and the House Speaker have demanded investigations and changes in our system. Now is the time for employers to step forward and make it clear to the legislature that these problems are symptoms of a broken system that demands fixing. Illinois really can't afford to have more employers seeking to flee the state because of bad business climate.

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REVIEW OF ILLINOIS WORKERS' COMPENSATION

March 2011
By Michael E. Rusin

AROUND SPRINGFIELD – THE STATE LEGISLATURE

Workers' compensation reform has become a hot issue in Springfield for good reasons and bad reasons. It is almost hard to believe that there is so much discussion concerning workers' compensation reform since Illinois Republicans did not fare well in the November 2010 elections.

The serious talk about workers' compensation reform began after an Oregon study in 2010 reported that Illinois had the third highest cost of workers' compensation for employers in the country. Of course Democrats and union leaders criticized the report as inaccurate, but few could honestly deny that Illinois workers' compensation costs are among the highest in the nation.

The November 2010 election pitted Republican State Senator Bill Brady against incumbent Democratic Governor Pat Quinn. Brady actively campaigned stating that he would reform Illinois workers' compensation to reduce employer costs. He argued that the law was overly generous and he was openly critical of the commissioners and arbitrators. Governor Quinn on the other hand actively sought the support of plaintiff attorneys and unions and stated he saw no need to reform workers' compensation. Despite being ahead in the polls, Brady lost and Quinn won, effectively ending any expectation that we would be discussing workers' compensation reform in the 2011 legislative session.

However, politics are incredibly unpredictable. Although Governor Quinn won the election, and although Republicans were unsuccessful in winning either the House or the Senate in the 2010 elections, Republicans did make small gains in the Senate and especially in the House. Governor Quinn had a primary immediate goal at the end of 2010 and that was to raise Illinois income taxes. Prior to the election, Illinois income taxes stood at 3%. Governor Quinn had promised pre-election that he would seek to raise taxes to 4%-4.5%. After the election, he began to argue for a 5% to 6% income tax rate.

He needed to get the income tax increase passed before the new legislature was seated in January 2011. He had a large Democratic majority in the 2010 legislature, but it was going to get smaller once the 2011 legislature was sworn in.

The Democrats, however, wanted bipartisan support for the income tax increase. Democrats proposed trading Republican votes for the tax increase in return for Democratic votes for workers' compensation reform. The Governor hastily held a number of open forums at which multiple individuals testified about the need or lack thereof for workers' compensation reform. Numerous employer organizations testified about how bad the workers' compensation system was. To the contrary, union officials and plaintiff attorneys urged no changes. It appeared that reform legislation was imminent. However, it doesn't appear that the Governor really felt the

urgency to get Republican support for his income tax increase. In the end he decided to simply pass the income tax increase and ignore the demand for workers' compensation reform. An income tax increase to 5% (a 60% increase in the state income tax) was passed with Democrats alone supporting the bill. Republicans uniformly voted against the income tax increase.

WORKERS' COMPENSATION REFORM

Workers' compensation reform seemed destined for a long hibernation. However, a series of stories published by the *Belleville News-Democrat* has put a spotlight on the Illinois workers' compensation system and its hearing officers. An initial investigation uncovered large payments made to employees of the Menard Correctional Center in Chester, Illinois. The newspaper reported that the state had paid nearly \$10-million in workers' compensation awards and settlements to 389 employees at the jail including at least 230 guards who claimed repetitive trauma as a result of locking and unlocking heavy cell doors. The story raised questions of possible fraud as the source of these excessive settlements and awards. Many of the cases were filed by one law firm, and all the cases were heard by Arbitrator Dibble.

After publishing this ongoing story, the newspaper began to focus on investigating other potential abuses and especially on several of the far downstate arbitrators. The paper reported that eight of the state's 32 arbitrators had filed for and received workers' compensation awards. The paper also reported that Arbitrator Dibble who had either awarded or approved settlements for all the Menard workers had also received a workers' compensation settlement. However, despite extensive digging, the reporter couldn't find the approved settlement contract in the Commission's records. Questions were raised as to whether the Commission was trying to hide Arbitrator Dibble's settlement. However, this is unlikely. Instead, the failure to locate the settlement contract was in part based on the Commission's process of allowing arbitrators to approve unfiled settlement contracts and then having unfiled settlement contracts mailed to the Commission for filing and numbering (an inexcusably poor process which has since been corrected, as explained below).

After scoring hits with the stories, the *Belleville News-Democrat* continued to investigate the Commission. They hit on a huge story by filing a request under the Freedom of Information Act for copies of e-mails involving the arbitrators. The biggest sensation came from reviewing e-mails from Arbitrator Jennifer Teague. The story identified numerous inappropriate e-mails, especially involving Arbitrator Teague's efforts to hold an arbitration hearing privately without the scrutiny of the press.

Illinois workers' compensation trials are open proceedings and anyone can watch them. Arbitrator Teague had a particularly sensitive case to arbitrate involving a police officer who filed a claim for injuries which occurred as a result of a motor vehicle accident wherein he was speeding while driving and killed two young girls. He resigned from the police force and was criminally charged. Nevertheless he suffered injuries and claimed he was entitled to workers' compensation benefits.

Other e-mails uncovered by the newspaper demonstrated Teague engaged in other inappropriate behavior using her state e-mail account. She engaged in *ex parte* communications with

attorneys, she gave advice to attorneys as to how to practice before other arbitrators and she was critical of other arbitrators.

E-mails involving Arbitrator Dibble showed inappropriate communication with Attorney Tom Rich involving the purchase of play tickets.

Other e-mails also from Dibble and Teague were inappropriate but most notable was an e-mail exchange involving Arbitrator Teague and her workers' compensation settlement. E-mail exchanges from Arbitrator Teague indicated that she would not hear litigation involving State of Illinois cases unless the Attorney General's office accelerated her own workers' compensation settlement.

These stores have been a stain on the Commission but moreover they have inspired the legislature to start talking about workers' compensation reform. House Speaker Mike Madigan has introduced a bipartisan resolution calling for an audit of the Illinois workers' compensation program as it relates to state employees. The resolution, filed on February 24, 2011, seeks an audit of the number of claims made by state workers in the last four years, a review of the settlement contract process, an analysis of any fraud identification and control policies and procedures, an analysis of the arbitrator case loads over the four-year period, and a review of conflict of interest policies applicable to arbitrators and commissioners.

Employers have been complaining about excessive workers' compensation costs for years and the legislature has ignored employer claims. However, workers' compensation reform will certainly be a hot issue in this legislative session.

AROUND THE COMMISSION

At the Commission Level

There have been a number of changes at the Commission level. Certainly more changes can occur since most of the commissioners are now serving on expired terms. The terms of Commissioners Mario Basurto (employer), Nancy Lindsay (employer), and James DeMunno (public) have all expired. The terms of Commissioners Kevin Lamborn (employer) and Molly Mason (employee) expired in January 2011.

Commissioner Paul Rink retired and was replaced by Commissioner Daniel Donohoo (public). Commissioner Donohoo had served for 21 years as the Madison County Recorder of Deeds and recently earned a law degree in 2008 from Cooley Law School in Michigan.

Commissioner Barbara Sherman resigned. Her position was recently filled by Commissioner Thomas Tyrrell (employee), an attorney who worked in a solo private practice in the northwest suburbs of Chicago for 25 years.

As a result of the new assignments, Chairman Weisz reassigned the panels. Panel A of the Workers' Compensation Commission now consists of Commissioners Lamborn, Donohoo and Tyrrell. Panel B consists of Commissioners Lindsay, Dauphin and Mason. Panel C consists of Commissioners Basurto, DeMunno and Gore. Strangely, although the Commission is made up of six men and three women, the three panels are broken down into two panels of three men and one panel of three women.

At the Arbitration Level

New Downstate Arbitration Assignments

Prior to all the news stories from the *Belleville News-Democrat*, Chairman Weisz had decided to reassign some of the downstate arbitrators. After the story hit about Arbitrator Dibble's lost settlement contract, Mr. Weisz decided to shift some of the far downstate arbitrators to central Illinois and some of the central Illinois arbitrators down to southern Illinois. Then the news stories hit about Arbitrator Teague's and Arbitrator Dibble's e-mails. He didn't suspend either arbitrator, but the Department of Central Management Services did. Both Arbitrator Dibble and Arbitrator Teague were put on indefinite administrative leave. After that, Chairman Weisz decided to make major changes to the downstate arbitration calls. Several downstate calls have been eliminated (Belleville, Carlinville, Clinton and Winchester). Cases from those calls will be moved. Attached is a list of the remaining downstate calls effective April 1, 2011 and the arbitrators assigned to handle those calls.

Benefit Rates

The Commission has published new rates for 2011. As expected the minimum TTD and PPD rates have increased. These rates should have been increased July 1, 2010 when the state's minimum wage increased to \$8.25 an hour. However, the Commission didn't pick up the increase until this year. The new state minimum TTD and PPD rate is \$220.00 for a single individual with no dependents.

The State Average Weekly Wage increased for the first time since July, 2009 but it is still not as high as it was then. Therefore, the maximum TTD and minimum PTD and death benefit rates have not increased. A current rate chart showing updated rates covering the period January 15, 2010 to July 14, 2011 is attached.

IN THE APPELLATE COURT OF ILLINOIS, WORKERS' COMPENSATION DIVISION

Court Reverses Commission Award of Medical Expenses and Limits Claimant's Recovery to Actual Group Insurance Payments

Tower Automotive v. Illinois Workers' Compensation Commission and Robert Nawrot, No. 1-09-3161WC, filed January 31, 2011.

This case involved a disputed accident. Petitioner claimed that he suffered a work injury June 30, 2005. Respondent disputed the case in its entirety. Nevertheless, the Commission ruled in petitioner's favor awarding 74 weeks of TTD and 175 weeks of PPD. In addition, the Commission awarded petitioner \$165,000.00 in medical bills. Respondent appealed on all issues.

Respondent especially appealed on the issue of medical bills. Even though petitioner actually incurred \$165,000.00 in medical bills, he didn't pay that amount in medical bills. Instead, petitioner's medical bills were submitted and paid by his wife's group health insurance carrier to the extent of \$53,000.00. Petitioner only paid out of pocket approximately \$1,000.00. The remaining balance of \$111,000.00 was written off by the health care providers.

Respondent appealed to the circuit court, but the decision of the Commission was affirmed. Respondent appealed to the appellate court. The court affirmed the award of TTD and PPD, but the court reversed the award of medical expenses. Instead of granting petitioner \$165,000.00 for medical bills, the court ruled that respondent should only be responsible to pay petitioner the amount actually paid by petitioner and the amount actually paid by petitioner's wife's group health insurance carrier. This reduced the medical bill award from \$165,000.00 to \$53,000.00.

The court rejected petitioner's argument that the collateral source rule applies to workers' compensation claims. Under the collateral source rule, "benefits received by an injured party from a source wholly independent of, and collateral to, the tortfeasor will not diminish the damages otherwise recoverable from the tortfeasor....The justification for this rule is that a tortfeasor should not benefit from the expenditures made by the injured party, or for his benefit, or take advantage of the contracts that may exist for the benefit of an injured party, where the tortfeasor did not contribute to the cost of the contract."

The court correctly held that a workers' compensation claim is not like an action in tort because there is no wrongdoer or tortfeasor. The court found that the Act was satisfied by making sure petitioner's medical expenses were covered without imposing excessive costs on the employer for medical bills not actually paid by petitioner. The court ruled, "It is for this reason that we now hold that the collateral source rule is not applicable to the right to recover under the Act." The award for medical is limited to what petitioner actually paid out of pocket and to what the actual group lien was.

Comment: This is an excellent decision for employers. It is a case of first impression and I am pleased to report that this case was handled by our office. Attorneys **Daniel Egan** and **Jeffrey Powell** worked together to achieve this significant decision. Prior to this decision, employers have been forced to pay claimants the full amount of medical bills charged rather than the actual amount of medical bills incurred by the claimant. This claim has far reaching effects on reducing the costs employers will now incur for medical expenses. This was a job well done by our attorneys.

Court Sustains Award of Wage Differential Benefits – Court Rejects Employer’s Argument that Section 8(d)(1) Benefits Would End with Normal Retirement

United Airlines v. Workers’ Compensation Commission and Charlotte Graham, No. 1-09-2966WC, filed January 18, 2011.

Petitioner was employed by United Airlines as a flight attendant. She sustained back injuries on May 9, 2001 and October 23, 2001. She underwent extensive medical treatment including two low back surgeries. She eventually was placed at MMI and given permanent work restrictions. She never returned to work as a flight attendant and sought an award for Sec. 8(d)(1) wage differential benefits.

The employer hired an economist and attempted to offer his report into evidence to show at what age petitioner was likely to leave the work force. The employer wanted to prove that the wage differential would end long before petitioner’s death. The employer contended that the word “disability” in Sec. 8(d)(1) referred to “economic disability” and therefore petitioner’s retirement age was relevant in determining the amount of the award. The Commission rejected that evidence and the employer appealed.

The circuit court denied the appeal and the appellate court affirmed the denial. The appellate court completely rejected the employer’s argument relying on its prior case of *Petrie v. Industrial Commission*, 160 Ill.App.3d 165 (1987) and the Supreme Court’s decision in *Cassens Transport Co. v. Illinois Industrial Commission*, 211 Ill.2d 519 (2006). The court held:

“Employer confuses the court’s analysis of section 8(d)(1) as a whole with analysis of the phrase, ‘duration of disability’ or simply the word ‘disability.’ A discussion of section 8(d)(1) necessarily encompasses economic factors because its purpose is to compensate an injured employee for his reduced working capacity. It does not follow that the specific phrase ‘duration of disability’ within section 8(d)(1) must refer to economic disability rather than the duration of a claimant’s physical or mental injury.”

The court held that a §8(d)(1) award does not end at the age of retirement. Therefore, respondent’s evidence that petitioner would have retired at a specific age was not relevant to entry of an award. The employer’s claim was rejected.

Comment: I applaud United Airlines for pursuing this appeal and attempting to limit its exposure for §8(d)(1) benefits. However, prior court decisions on this issue have been totally contrary to the employer’s claim. Both prior appellate court and Supreme Court decisions have consistently and definitively ruled that §8(d)(1) awards don’t end with retirement. Section 8(d)(1) awards can only be attacked pursuant to §19(h). Moreover, a petitioner under §19(h) may only be successful if the employer can show not only a change in a claimant’s economic disability but also his physical disability.

It is clear from past court decisions that the courts will not help the employer in §8(d)(1) cases. If employers want help to limit §8(d)(1) awards, it will have to be done legislatively. The

current statute is extremely unfavorable to employers when it comes to §8(d)(1) awards. Moreover, the 2006 legislative change which raised the cap on §8(d)(1) awards has made the situation even worse. The maximum wage differential rate is for accidents after 2/1/06 is the state average weekly wage or \$930.39. This is an area which merits immediate legislative adjustment. The maximum wage differential rate should be capped at a much lower rate. Wage differential benefits should not be lifetime benefits. They should end with an individual's retirement or at most through age 67 when full Social Security retirement benefits commence.

Court Dismisses Petitioner's Appeal for Failure to Timely File All Appeal Documents

Rosa Rojas v. Illinois Workers' Compensation Commission and Foel Packing Co., No. 1-09-2958WC, filed December 27, 2010.

Petitioner filed an application with the Commission August 17, 1999 but never pursued it properly. On February 6, 2003, the case was set for trial. Petitioner failed to appear and the case was dismissed for want of prosecution. Petitioner's attorney filed a timely petition to reinstate on March 12, 2003, but never pursued it. Petitioner eventually got a new attorney who filed a new notice of motion on the old petition to reinstate, but he didn't pursue a hearing on it for almost a year and a half. Arguments were finally held on the old petition to reinstate on September 30, 2004 and the arbitrator denied the petition to reinstate. Petitioner appealed to the Commission and the Commission affirmed the denial. The Commission issued its decision September 25, 2007 and petitioner received it September 27, 2007.

Petitioner then mailed appeal documents to the circuit court on October 16, 2007, the day before the appeal was due on October 17, 2007. The circuit court clerk didn't assign a case number until December 2, 2007. The employer contended that petitioner's appeal wasn't timely. Petitioner claimed the appeal was timely, but the evidence showed that petitioner didn't obtain a receipt for payment of the record on appeal until October 19, 2007. Since the appeal was due by October 17, 2007, there was no way petitioner could have had all of the necessary appeal documents on file. The appellate court on its own motion ruled that the petitioner failed to prove subject matter jurisdiction and dismissed the appeal.

Comment: I am certainly sympathetic to the employer here. The amount of litigation generated by this claimant was outrageous. Not only did the case require significant litigation before the Commission, this dismissed case involved significant litigation in the circuit and appellate courts. Frankly, it is surprising that the litigation made it past the circuit court level. It is even more surprising that the case made it all the way to the appellate court with a published decision. The decision shows again the willingness of the appellate court to dismiss circuit court appeals for errors with respect to the filing requirements. Both parties must be wary and diligent when filing appeals to the circuit court. The court does apply strict scrutiny to all appeals and an unwary litigant can face a dismissal.

Court Rules in Favor of Employee Injured While Walking on Public Sidewalk to Make a Bank Deposit

Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Commission and Ruth Lindquist, No. 1-09-2546WC, filed February 22, 2011.

Petitioner was employed by the Metropolitan Water Reclamation District as an accounting clerk. The district's office is located in downtown Chicago. Petitioner's job duties included making deposits at the bank. The bank is located about three blocks away on Michigan Avenue. Petitioner made bank deposits two to three times per week. On November 9, 2005, petitioner walked from the District's office to the bank. As she was walking down a public sidewalk, she stumbled while walking up an inclined driveway that had a dip of about six inches. She fell and broke both of her wrists. She denied any debris or defect in the pavement. She did not trip on any high curb. She basically just stumbled on a public sidewalk.

After a hearing before the arbitrator, the case was denied on the basis that petitioner was not exposed to any increased risk greater than that of the general public. Petitioner appealed and the Commission in a 2-1 decision reversed. They awarded 16 weeks of TTD and 35% loss of use of each hand for two broken wrists.

Respondent appealed to the circuit court and the circuit court denied the case. Petitioner appealed to the appellate court. The appellate court reversed and ruled in petitioner's favor. The appellate court ruled that petitioner's accident was compensable. The appellate court found that petitioner's fall traversing a public sidewalk was a risk that was neutral in nature. However, the court ruled that the claim was compensable under the "street risk doctrine." Under this doctrine, "where the evidence established that the claimant's job requires that she be on the street to perform the duties of her employment, the risks of the street become one of the risks of the employment, and an injury sustained while performing that duty has a causal relationship to her employment."

The court ruled, "The undisputed evidence establishes that the claimant was required to traverse the public streets and sidewalks to make bank deposits on behalf of the District. As such, the hazards and risks inherent in the use of the street became the risks of her employment. A six inch 'dip' in a commercial driveway is a street hazard, and though the risk of tripping and falling on such a hazard is a risk faced by the public at large, it was a risk to which the claimant, by virtue of her employment, was exposed to a greater degree than the general public."

Comment: It is always difficult to balance out cases involving risks common to the general public. Illinois is not a positional risk state. Therefore, in order for a claimant to prove a case compensable, the claimant must prove that the injury occurred as a result of a risk of the employment rather than a risk common to the general public. In this case, petitioner simply tripped while walking on a non-defective public sidewalk. Her risk of injury is the same as the risk faced by the general public. Under the *Caterpillar* case and its progeny, the case should not be compensable.

However, the court viewed this case more in the nature of a traveling employee situation. Once the court finds an employee to be a traveling employee, some of the defenses that an employer normally has are diminished. Traveling employees are entitled to compensation so long as they are engaged in reasonable and foreseeable activities. In this case, the claimant was considered to be a traveling employee and therefore the “street risk doctrine” applied and a trip and fall on a normal public sidewalk was ruled compensable.

Traveling Employee – Deviation – Court Reverses Commission Award and Denies Compensation

Gene May, Inc. v. Illinois Workers’ Compensation Commission and Jason Conley, No. 2-09-1256WC, filed February 9, 2011.

Petitioner was employed by respondent as an installation and service technician. Respondent’s business involved installing and repairing heating and air conditioning units. On June 19, 2001, petitioner was working at a job site in Aurora. He was sent to pick up a part at a location approximately five miles south of the job site. Petitioner did go to the supplier and pick up a part. He was subsequently involved in a motor vehicle accident approximately an hour later at a location that was northeast of the job site. At the time of the accident, petitioner was driving at a high rate of speed away from the job site. Petitioner testified that he had no recollection of the accident itself and had no idea why he was at the location where the motor vehicle accident took place.

The case was tried before an arbitrator who found petitioner’s accident compensable. Respondent appealed to the Commission and the Commission affirmed in a 2-1 decision. The Commission awarded almost \$83,000.00 in TTD and PPD plus another \$30,000.00 in medical bills.

The employer appealed to the circuit court, but the circuit court affirmed. The employer appealed to the appellate court and the appellate court reversed. The appellate court ruled that petitioner failed to prove that his accident arose out of and in the course of his employment. The appellate court ruled that petitioner clearly deviated from his employment without any explanation. The court found the Commission’s decision awarding compensation was based on speculation. The court held, “If a deviation from employment is at issue, the burden is on the claimant to prove it was reasonable. The lack of evidence on that issue leaves that burden unfulfilled as the Commission’s decision is contrary to the manifest weight of the evidence, we are compelled to reverse it.”

Comment: This is an excellent decision from the court. Our firm handled this case. **Ken Marshall and I** combined to achieve this reversal. It is difficult to win a case in the appellate court. It’s especially difficult when we lost the case before the arbitrator, the Commission, and the circuit court. We were convinced that we were correct in our position. We litigated this case on behalf of Farmers Insurance and we are thankful they gave us the opportunity to litigate the matter to the appellate court where we could eventually find success.

GREAT DECISIONS AROUND THE OFFICE

I obtained an excellent arbitration decision on behalf of Illinois Public Risk Fund in the case of *Keith Kaschub v. Darien-Woodridge Fire Protection District*, No. 08 WC 49489. Petitioner fell at work on February 8, 2008 and suffered a serious fracture to his ankle. He required multiple surgeries including open reduction and internal fixation. He sought an award of approximately \$117,000.00 including 39 weeks of TTD, over \$40,000.00 in medical bills, and permanent disability for 55% loss of use of the left foot.

We disputed the case in its entirety, claiming that petitioner engaged in horseplay. It was true that petitioner fell at work and suffered a very serious ankle fracture. However, we proved that immediately prior to the accident, petitioner was in an excited mood because a supervisor had advised him that he didn't need to work overtime. We proved that immediately prior to the accident, petitioner bear hugged a co-employee from a neighboring fire district. The co-employee was startled and pushed petitioner, causing both men to fall over, which resulted in petitioner's ankle injury. The arbitrator rejected petitioner's testimony and accepted the testimony of our witnesses. The claim was denied in its entirety.

Joe Basile obtained an favorable decision on behalf of EMC Insurance in the case of *Gary Hanover v. Arlington*, 05 WC 44088. This was a heavily contested case. An initial 19(b) hearing resulted in an award requiring the employer to provide knee surgery prescribed by Dr. Montella. Following the surgery, we had to provide extensive physical therapy and petitioner underwent functional capacity evaluations. Further, we had to provide maintenance benefits and vocational rehabilitation. We started vocational rehabilitation services in January 2009. However, it became clear after several months that petitioner was simply going through the motions of vocational rehabilitation without really trying to find a job. In July and August 2009, we had two excellent job leads for petitioner and he failed to follow up on them. We terminated vocational services in September 2009. Petitioner still didn't find a job and he filed a second 19(b) petition claiming entitlement to continued maintenance and vocational rehabilitation services. The arbitrator denied further maintenance and vocational rehabilitation. The arbitrator ruled in our favor denying maintenance benefits after September 2009 and denying further vocational rehabilitation services due to a substantial lack of cooperation and job search effort.

Dan Egan received an excellent decision from the Illinois Workers' Compensation Commission on behalf of the Illinois Public Risk Fund in the case of *John Lardino v. City of Crystal Lake*, 06 WC 17971, 11 IWCC 168. Petitioner claimed an accident of June 6, 2004. He claimed that he injured his low back as a result of excessive sitting working on a computer project. Petitioner treated with his family doctor and a chiropractor. We disputed liability on the basis that petitioner was suffering from a personal condition. We obtained a medical opinion from Dr. Soriano concluding that petitioner's low back condition was not due to excessive sitting. The arbitrator had ruled in our favor and the Commission affirmed the denial of all liability.

John Maciorowski scored an excellent decision from the Commission on behalf of Alternative Risk Services in the case of *Ivy Thornton v. City of Bloomington Police Department*, 08 WC 4702, 10 IWCC 962. Petitioner claimed a work injury January 31, 2007. Petitioner was employed as a police officer for the City of Bloomington for six years and claimed that she had

low back problems associated with wearing a heavy belt. We proved that petitioner had pre-existing back problems. We proved inconsistent medical records. We arranged for an IME with Dr. Marshall Matz who concluded that petitioner's condition was not work-related. We cross-examined petitioner's treating physician and he admitted inconsistencies in the medical records and lack of any medical literature to support petitioner's claim. The arbitrator denied the case in its entirety and the Commission affirmed unanimously.

Mark Cosimini received two very good decisions from Arbitrator White on behalf of Farmers Insurance in the cases of *Chris Betley v. Collision Revision*, cases 08 WC 49143 and 09 WC 19776. Petitioner alleged he was dragging the hood of a vehicle across the employer's large facility on 8/21/08, and he suffered injuries to his lower back. He first sought treatment a month later, but he did not provide a history of the alleged work accident. He first reported an alleged work accident after an MRI revealed a herniated disc. Petitioner had surgery on his back, and he was allowed to return to work with no restrictions.

About two months after petitioner returned to work, he alleged a second accident as a result of lifting a frame clamp. He reported the accident immediately, and we accepted the case as compensable. We denied the first case in its entirety.

During the depositions of the examining doctors, we took the position that petitioner only suffered a temporary aggravation of a pre-existing condition as a result of the second accident. Any permanency benefits would be attributed to the surgery which was performed as a result of the denied claim. Dr. Fletcher who served as both a treating and examining physician for petitioner supported our position. Similarly, Dr. Zelby testified petitioner only suffered from a temporary aggravation of a pre-existing condition as a result of the second accident.

The Arbitrator denied petitioner's first claim noting he failed to prove accident, causal connection, and notice. With respect to the second claim, she awarded TTD benefits and medical bills, but she denied permanency benefits.

John Maciorowski achieved an impressive reversal on behalf of Chartis Insurance in the case of *Jose Guzman v. Carpentry Collaborative*, 08 WC 7638, 11 IWCC 2. This was a totally disputed case wherein petitioner claimed he aggravated a low back condition January 15, 2008. The case was tried before an arbitrator who awarded 93 weeks of TTD and medical bills. We appealed and the Commission reversed the award totally.

We showed definitely that petitioner lied during cross examination. We proved petitioner had a significant pre-existing condition even though petitioner denied it. We arranged for an IME with Dr. Matz who supported our position that petitioner had no significant objective findings and no significant disease. Petitioner began treatment with Dr. Michel Malek who we contended was unreliable and an overly aggressive surgeon. Follow-up examinations with Dr. Matz were used to show that petitioner didn't need significant treatment.

Nevertheless, Dr. Malek (an extremely aggressive surgeon) performed a three-level fusion. We presented four witnesses to contradict petitioner's contentions. After considering all of the evidence, the Commission found petitioner not to be credible. It also appeared to the

Commission that petitioner embellished his account as time went on, although petitioner denied doing so. The Commission held, "The Commission finds that petitioner was not credible and that petitioner failed to prove he sustained a compensable injury January 15, 2008." The claim was denied in its entirety. This decision shows that persistence and hard work can lead to success. It is extremely frustrating when we deal with physicians like Dr. Malek who are so overly aggressive in their surgical recommendations.

Greg Rode obtained an excellent arbitration decision for Westfield Insurance in the case of *Robert Enders v. Hogan Plumbing Co.*, 10 WC 41749. This case involved a difficult situation wherein the petitioner filed two claims for a low back injury working for the same employer. The first claim was for an accident of September 11, 2006 involving a different carrier. Our claim was for an accident of June 30, 2008. Following the second accident, petitioner had low back surgery. We proved that the surgery was related to petitioner's first accident and not his second alleged accident. All of the liability for this claim was placed on the first carrier and not our client.

Greg Rode also scored an excellent decision on behalf of IRMA in the case of *Michael Roth v. Village of Cary*, 10 WC 20061. In this claim, petitioner alleged an accident of October 12, 2009. The accident was admitted. Petitioner was involved in what we claimed was a minor motor vehicle collision. However, petitioner subsequently claimed a spinal injury for which he needed surgery. We couldn't dispute that petitioner was involved in an incident, but we decided that his condition of ill-being was causally related to the accident. We proved petitioner had a long history of back problems. We arranged for an IME and record review with Dr. Jay Levin. Dr. Levin concluded that petitioner did not sustain any significant injury at the time of his motor vehicle accident. He concluded that petitioner's condition of ill-being was not causally related to his accident. The arbitrator ruled in our favor. The arbitrator ruled that petitioner's condition of ill-being was not causally related to his work injury and all TTD and medical expenses were denied.

I also received an very favorable decision for Sedgwick CMS on behalf of Target Corporation, in the case of *Deanna Figueroa v. Target*, 07 WC 25748. In this case, petitioner suffered an undisputed accident on April 4, 2007. She was putting up shelves in a fixture room when a shelf fell and struck her in the head. We accepted liability and we paid for petitioner's initial medical treatment. Initially she complained of a head contusion. However, shortly thereafter she started complaining of neck pain. She treated conservatively. The initial treating physicians diagnosed a neck strain. She had a fairly normal MRI and a negative EMG/NCV. She had been released for and we provided light duty work.

However, several months after the accident, petitioner moved from Illinois to Florida. She started treating with different doctors in Florida. Her diagnosis changed. She was diagnosed with a torn rotator cuff. She was diagnosed with multiple cervical disc herniations. She underwent two surgeries including a shoulder surgery and a cervical fusion. She sought an award for almost \$164,000.00 including \$108,000.00 in medical bills, almost \$8,00.00 in TTD, and almost \$48,000.00 in PPD.

We argued that she wasn't entitled to any of this because her injury was simply a fairly minor head contusion. The arbitrator ruled in our favor. The arbitrator found that petitioner failed to prove a causal relationship between her accident and all of her medical treatment after she moved to Florida. The claim for TTD, PPD, and medical bills was denied in its entirety.

John Maciorowski obtained an excellent decision from the Commission reversing an arbitration award on behalf of Chartis Insurance in the case of *Luis Jiminez v. BFI/Allied Waste*, 05 WC 1612, 11 IWCC 214. This case involved a young man, 31 years old, who suffered a back injury December 21, 2004. He had two back surgeries resulting in a clinically successful fusion. However, he claimed that he had continuing pain and was unable to return to work. We tried the case before Arbitrator Kinnaman who awarded 166 weeks of TTD, 95 weeks of maintenance, and then permanent and total disability for life. We appealed the case to the Commission. We proved that objectively, petitioner wasn't that disabled. We proved his subjective complaints were not supported by objective measurement. We argued he could return to work and that he had made an insufficient job search. The Commission accepted our arguments. The commissioners rejected the conclusion that petitioner was permanently and totally disabled. They awarded 166 weeks of TTD but only 8 weeks of maintenance. Instead of a permanent and total disability award, they awarded petitioner only 45% loss of use of the man as a whole. The value of the arbitration award was almost \$1.1-million over the course of petitioner's lifetime. After reducing the PPD award by credit for the compensation we had already paid, the Commission's decision was approximately \$53,000.00 for TTD.

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John Maciorowski scored a substantial victory from the Commission on behalf of State Farm Insurance in the cases of *Robert Lewis v. Sherman's Place*, 08 WC 53330 and 08 WC 53331, 10 IWCC 1061. These cases involved repetitive trauma claims where petitioner worked at a warehouse loading and unloading trucks. He claims a specific injury, but also repetitive trauma. He treated conservatively and was eventually referred by his attorney to Dr. Hoffman. He eventually came under the care of Dr. Blair Rhode who agreed to treat him through financing by

Med Finance. Under Dr. Rhode's care, petitioner underwent a right carpal tunnel release and a right open cubital tunnel release along with a medial epicondyle microtenotomy. Shortly thereafter, he also performed a left-sided cubital tunnel release at the elbow. The arbitrator found everything compensable. He awarded TTD, medical bills, and permanent disability for 17.5% loss of use of the left arm, 25% loss of use of the right arm, and 17.5% loss of use of the right hand.

On appeal, we convinced the Commission that the case wasn't compensable for the vast majority of the treatment. The Commission found that the causal connection was not proven and reversed the arbitrator. They reversed the award in its entirety except for 7.5% loss of use of the right hand.

Mark Cosimini secured an excellent arbitration award from Arbitrator Holland on behalf of Chartis Insurance in the case of John Allison v. Gregory Services, 09 WC 52399. Petitioner worked as a Teamsters mechanic for a pipeline company. Petitioner was welding in extreme heat in Arkansas 7/05/08, and he suffered a heart attack. He underwent a catheterization, and a total occlusion was identified. A stent was placed in the right coronary artery.

Petitioner returned to work in 5 weeks with no restrictions. Diagnostic studies revealed Petitioner's heart function was at a pre-infarction level. However, he testified he was constantly fatigued. In May 2009, Petitioner testified his symptoms were unbearable. He was diagnosed with an occluded left anterior descending artery and had a bypass surgery on 6/03/09. Petitioner never returned to work and is receiving SSDI.

Dr. Yacoub testified the heart attack in Arkansas was at least partially responsible for Petitioner's current condition. Dr. Dan Fintel performed a record review for us, and he gave excellent testimony indicating Petitioner made an excellent recovery from the heart attack in Arkansas. Dr. Fintel attributed Petitioner's current condition to his pre-existing condition and not to the work-related heart attack.

The Arbitrator held Petitioner's work-related heart attack caused some permanent damage, and he awarded permanency benefits. However, Petitioner's current inability to return to work was unrelated to the heart attack. Petitioner demanded permanent total disability benefits. Based upon Petitioner's earnings, the present cash value of the demand was more than \$1,000,000.00. The total amount of the Arbitrator's award was less than \$90,000.00.

CONCLUSION

Workers' compensation legislation in Illinois has certainly moved off the back burner. Legislative reform is necessary to re-balance the costs of the system. Years ago, this was a labor-management issue. It's not that way any longer. Workers' compensation reform can't be resolved by labor-management discussions alone. One of the primary players in any workers' compensation negotiation is the medical provider community. The Illinois system is expensive in part because of high indemnity benefits but even more so because of high medical costs.

The problem starts with free choice of medical. A claimant in Illinois has two free choices of doctors. The medical lobby is a strong one and doctors and hospitals want to keep workers compensation reimbursement rates for medical services high. The enactment of the medical fee schedule in 2006 did nothing to control employers' costs. The addition of a utilization review component to the Illinois workers' compensation system has been fairly ineffective. Significant workers' compensation reform cannot take place until medical costs are reduced. Reimbursement rates for workers' compensation patients exceed Medicare reimbursements and even group medical reimbursements by a large margin. Medical providers have to realize that employers can't be unfairly overcharged for treating workers' compensation patients.

In order to effect meaningful reform, the legislature has to modify the standard of causation. In Illinois a claimant is entitled to full benefits if he can prove that his work accident or work duties were "a cause" of his injury. This is simply too easy a standard and employers are paying for way too many personal illnesses.

Carpal tunnel claims such as the ones filed by the Menard Prison guards are a perfect example of a system in failure. The legislature can audit the state claims. It is not likely that they will find any fraud. It is more likely that they will be amazed at how much the state has to spend paying out workers' compensation benefits to state employees because the system is overly generous.

Meaningful legislature must start with redefining what constitutes an accident in the Illinois workers' compensation system. Employees must be required to prove that their accident or their work duties were the "primary" cause of their injury or at a minimum the "major contributing cause."

Secondly, the legislature must act to control medical costs. Employees have enjoyed free choice of medical for 35 years. Medical providers have been able to charge almost whatever they wanted during this time. The current fee schedule allows reimbursement rates at levels far in excess of any other reimbursement system. We are now faced with doctors who charge exorbitant amounts and perform unnecessary surgeries. Employers have not been able to rein in chiropractic clinics that run up tens of thousands of dollars in unnecessary and outrageous charges.

Third, the legislature has to put a limit on wage differential benefits. There has never been a cap on the length of time an individual can receive wage differential benefits. The purpose of wage differential benefits is to replace lost wages during an individual's work life. However, the failure to put a cap on the benefits means that employers are paying for an employee's lifetime

rather than their work life. A reasonable cap would allow benefits to continue through age 65 or even age 67. Wage differential benefits for life are not a reasonable award for what an individual who has suffered a wage loss has actually lost. Similarly, an age-related cap should be placed on permanent total disability benefits. At least, employers should be able to reduce PTD benefits. However, permanent total disability benefits are again payable for life in Illinois.

Meaningful and thoughtful workers' compensation reform should occur. It is likely to take a while, but I am hopeful that within a year the legislature will take meaningful action.

The fallout from the news stories and controversies involving the arbitrators has sparked a rather severe reaction by the Chairman. The elimination and consolidation of so many calls is difficult to justify. The new consolidated Belleville-Collinsville call is going to be extremely busy and difficult to manage. Arbitrator Neal will have a challenging assignment starting next month.

Employers are overjoyed that Arbitrator Teague has been suspended. The complaints against her have been numerous over the past several years but ignored by the legislature and the Commission. The "discovered" e-mails from her state e-mail account should be sufficient to prohibit her from returning to her prior position. I fully expect that the Attorney Registration and Disciplinary Commission will file ethical charges against her.

The next few months should prove interesting.

PERSONAL

The winter of 2011 has been a challenging one. We have had our share of bad weather. Unfortunately, my race plans did not include a winter competition and I have been stuck here all winter. Fortunately, my race plans for the spring are in place. I will travel to Mallorca, Spain in May, 2011 for my first ½ Ironman race of the year. It should be exciting to swim in the Mediterranean Sea for the first time. After the race, we will tour Spain for a week and hopefully see a bullfight. No, I will not be running with the Bulls. I do place some limits on the challenges I am willing to take on. The summer race schedule will take me to Lawrence, Kansas in June for Ironman Kansas 70.3 and Sonoma County, California in July for Vineman 70.3. The primary goal for 2011 is to earn a qualifying spot in the 2011 ½ Ironman World Championships in Las Vegas, Nevada in September, 2011. That race should be awesome – although Vegas in September could be a scorcher.

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DOWNSTATE ARBITRATION STATUS CALL SUMMARY

Effective April, 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 (discontinued)												
Bloomington (Mathis)	10	14	14	11	9	13	11	8	12*	11	14	12
Carlinville (discontinued)												
Clinton (discontinued)												
Collinsville (Neal)	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 (Tobin)	24	22	28*	25	23	27	25	22	26	24	28	27
De Kalb (Lee)	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 (Andros)	18	8	15	19	17	14	19	16	21	18*	8	13
Lawrenceville (discontinued)												
Mattoon (Mathis)	26	23	23	27	25	22	27	24	28*	26	30	28
Mt. Vernon (Tobin)	4	1	1	4	3	7	5	2	6	3	7	6
Ottawa (Fratianni)	24	14	21	25	23	20	25*	22	26	24	14	19
Peoria (Giordano)	18	22	21	18	16	20	18	15	19	17*	21	19
Quincy (White)	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)	11	8*	8	12	10	14	12	9	13	11	8	13
Rock Island (Holland)	4	1	1	5	3	7	5*	2	6	4	1	6
Springfield (White)	3	7	7	4*	2	6	5	1	6	3	7	5
Urbana (Tobin)	19	16	16*	20	18	15	20	17	21	19	9	21
Waukegan (Erbacci)	7	4	4	8*	13	10	8	12	9	14	4	9
Wheaton (Andros/O'Malley)	3	7	7	4	2	6*O	6*A	1	7	3	7	5
Herrin (Nalefski)	10	14	7	11	9*	13	11	8	19	11	15*	12
Winchester (discontinued)												
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.

STATE OF ILLINOIS

**TABLE OF RATES
WORKERS' COMPENSATION**

Temporary Total Disability (TTD) and Death Benefit Rates

TTD and Death Rate = AWW x 66 2/3 %

<u>Minimum TTD</u>	<u>Before</u>	<u>2/1/06 –</u>	<u>7/1/07 –</u>	<u>7/1/08 –</u>	<u>7/1/09 –</u>	<u>7/15/10 –</u>
<u>Rates*</u>	<u>2/1/06</u>	<u>6 30/07</u>	<u>6/30/08</u>	<u>6/30/09</u>	<u>7/15/10</u>	<u>7/14/11</u>

Single	100.90	173.32	200.00	206.67	213.33	220.00
Married, 0 children or Single with 1 child	105.50	199.32	230.00	237.67	245.33	253.00
M w/ 1 or S w/ 2	108.30	225.32	260.00	268.67	277.33	286.00
M w/ 2 or S w/ 3	113.40	251.32	290.00	299.67	309.33	319.00
M w/ 3 or S w/ 4	117.40	260.00 (max)	300.00 (max)	310.00 (max)	320.00 (max)	330.00
M w/ 4 or S w/ 5	124.30	260.00	300.00	310.00	320.00	330.00

* The TTD rate shall not exceed an employee's average weekly wage. The compensation rate is to be 100% of employee's AWW or minimum, whichever is less.

Maximums for TTD and Death and Minimums for Death, PTD and Member Amputations

The TTD maximum and death benefit maximum is set at 133 1/3 % of the state's average weekly wage. The death benefit, permanent total disability (PTD) and member amputation rate minimum is set at 50% of the state average weekly wage. The maximums and the death benefit minimum change two times a year on January 15 and July 15. The Max Wage Differential Rate for accident dates after 2/1/06 is the State AWW in effect on the date of accident. The member amputation minimum applies to accident dates after 2/1/06.

<u>Time Period</u>	<u>TTD Maximum Rate</u>	<u>Minimum Death, PTD & Amputation Rate</u>	<u>State AWW</u>
1/15/01 to 7/14/01	956.32	358.62	717.24
7/15/01 to 1/14/02	972.12	364.55	729.09
1/15/02 to 7/14/02	989.65	371.12	742.24
7/15/02 to 1/14/03	998.12	374.30	748.59
1/15/03 to 7/14/03	1004.41	376.66	753.31
7/15/03 to 1/14/04	1012.01	379.51	759.01
1/15/04 to 7/14/04	1019.73	382.40	764.80
7/15/04 to 1/14/05	1034.56	387.96	775.92
1/15/05 to 7/14/05	1051.99	394.50	788.99
7/15/05 to 1/14/06	1078.31	404.37	808.73
1/15/06 to 7/14/06	1096.27	411.10	822.20
7/15/06 to 1/14/07	1120.87	420.33	840.65
1/15/07 to 7/14/07	1148.51	430.69	861.38
7/15/07 to 1/14/08	1164.37	436.64	873.28
1/15/08 to 7/14/08	1178.49	441.93	883.86
7/15/08 to 1/14/09	1216.75	456.28	912.56
1/15/09 to 7/14/09	1231.41	461.78	923.56
7/15/09 to 1/14/10	1243.00	466.13	932.25
1/15/10 to 7/14/10	1243.00	466.13	922.45
7/15/10 to 1/14/11	1243.00	466.13	925.08
1/10/11 to 7/14/11	1243.00	466.13	930.39

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Permanent Partial Disability

PPD rate = AWW x 60%

<u>Minimum PPD Rates*</u>	<u>Before 2/1/06</u>	<u>2/1/06 – 6/30/07</u>	<u>7/1/07 – 6/30/08</u>	<u>7/1/08 – 6/30/09</u>	<u>7/1/09 – 7/15/10</u>	<u>7/15/10 – 7/14/11</u>
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Single	80.90	173.32	200.00	206.67	213.33	220.00
Married, 0 children or Single with 1 child	83.20	199.32	230.00	237.67	245.33	253.00
M w/ 1 or S w/ 2	86.10	225.32	260.00	268.67	277.33	286.00
M w/ 2 or S w/ 3	88.90	251.32	290.00	299.67	309.33	319.00
M w/ 3 or S w/ 4	91.80	260.00 (max)	300.00 (max)	310.00 (max)	320.00 (max)	330.00
M w/ 4 or S w/ 5	96.90	260.00	300.00	310.00	320.00	330.00

* The PPD rate shall not exceed an employee's average weekly wage. The compensation rate is to be 100% of employee's average weekly wage or minimum, whichever is less.

Maximum PPD rates**

The PPD maximum increases annually effective July 1 in the same proportionate increase as the state average weekly wage. Although by statute, the PPD maximum increases on 7/1, the new rate does not go into effect until published by the Commission in the following December.

<u>Time Period</u>	<u>Rate</u>	<u>Time Period</u>	<u>Rate</u>
7/1/91 - 6/30/92	353.88	7/1/01 - 6/30/02	534.16
7/1/92 - 6/30/93	371.36	7/1/02 - 6/30/03	542.17
7/1/93 - 6/30/94	384.73	7/1/03 - 6/30/04	550.47
7/1/94 - 6/30/95	396.89	7/1/04 - 6/30/05	567.87
7/1/95 - 6/30/96	410.43	7/1/05 - 6/30/06	591.77
7/1/96 - 6/30/97	421.59	7/1/06 - 6/30/07	619.97
7/1/97 - 6/30/98	439.89	7/1/07 - 6/30/08	636.15
7/1/98 - 6/30/99	465.67	7/1/08 - 6/30/11	664.72
7/1/99 - 6/30/00	485.65	7/1/11 - 6/30/12	_____
7/1/00 - 6/30/01	516.15		

- The PPD maximum for cases involving amputation of a member or enucleation of an eye is increased to the TTD maximum, however; the PPD rate in such cases is still calculated as 60% of the employee's AWW.

<u>Schedule of Losses</u>	<u>Before 7/20/05 or 11/16/05-1/31/06</u>	<u>7/20/05-11/15/05 or 2/1/06 and after</u>	<u>Before 7/20/05 or 11/16/05-1/31/06</u>	<u>7/20/05-11/15/05 or 2/1/06 and after</u>
§8(d)(2) - Man as a whole	500	weeks 500	Leg.....	200 weeks 215
§8(e) Arm	235	..... 253	Foot	155 167
Hand	190	..... 205	Great toe	35 38
Thumb	70	..... 76	Other toes	12 13
Index finger	40	..... 43	Eye.....	150 162
Middle finger.....	35	..... 38	Hearing.....	50 54
Ring finger	25	..... 27	Total deafness.....	200 215
Little finger.....	20	..... 22	§8(c) Disfigurement.....	150 162

Fingers and Toes - Loss of all or part of distal phalanx (bony loss) equals 50% loss. Loss beyond distal phalanx equals 100% loss. Amputation of or loss of use of 4 fingers equals 100% loss of hand.

Drafted by Michael E. Rusin – merusin@rusinlaw.com – 312-454-5119

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