Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *January 2014*

A Word From The Practice Group Chair

On behalf of all our Heyl Royster workers' compensation attorneys and staff I wish you a fantastic 2014! We hope 2014 will be a good and prosperous year for everyone as we continue to navigate the difficult workers' compensation system in Illinois.

In this month's issue we highlight the recent Arbitrator and Commissioner appointments and provide a look at the new Commission panel composition for 2014. Also we have included the updated 2014 Fee Schedule Adjustment table published by the Commission, which reflects fee increases of 1.52 percent compared to January 1, 2013. According to the Commission's website, had the fee schedule tracked medical inflation, current rates would be 30 percent higher than in 2006. Instead, rates are reportedly 7 percent lower than 2006.

We also provide an update on some recently introduced legislative proposals. Given the political environment, and the fact 2014 is an election year, it is difficult to predict whether any of these proposals will gain traction. We will monitor this closely and keep you updated.

Finally, we provide a summary of the final appellate court decision of 2013, *Village of Villa Park*, which continues the appellate court's trend of finding work place falls compensable. This case is an appropriate conclusion to the appellate court's year, as it represents yet another pro-petitioner expansion of the "arising out of" doctrine. Our workers' compensation appellate attorney Brad Elward offers good practical advice on potential strategies to counter this trend.

Please mark your calendars for our annual workers' compensation seminar, which will be held on May 15 in Bloomington, Illinois. More information will follow as we approach the event.

May each of you have a safe and prosperous new year!

Craig S. Young
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New Legislation on the Horizon?

On November 7, 2013, several legislative proposals were submitted to amend the Workers' Compensation Act, many of which are in response to recent case law. In response to *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010), SB2625 proposes that no employer be required to pay temporary partial disability benefits to an employee who has been discharged for cause. The modification provides a safety valve for employees by allowing the Commission to reinstate TPD benefits and retroactively restore any benefits that should have been paid if it finds the employer's discharge of the employee was not for cause.

In response to *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110077WC, SB2623 proposes a credit for prior injuries subject to the person-as-a-whole provisions of section 8(d)(2), and limits the cumulative award for PPD to 500 weeks, which shall then constitute the complete loss of use of the body as a whole. The proposed amendment further expressly provides that injuries to the shoulder are deemed to be injuries to the arm and injuries to the hip are deemed injuries to the leg.

Addressing the traveling employee decisions of the past year or so, SB2622 states that an employee who is required to travel in connection with his or her employment and who suffers an injury while in travel status shall be eligible for benefits only if the injury arises out of and in the course of the employment that he or she is actively engaged in the duties

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of the employment. This proposed amendment specifically applies to travel necessarily incident to the performance of the employee's job responsibility if:

> (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
>
> (ii) the travel is required by the employer as part of the employee's job duties. Arising out of and in the course of the employment does not include travel to and from work. Arising out of and in the course of employment does not include when an employee is on a paid or unpaid break and is not performing any specific tasks for the employer during the break.

SB2622 defines "accident" as including the aggravation of a pre-existing condition by an accident arising out of and in the course of the employment, but only for so long as the aggravation of the pre-existing condition continues to be the major contributing cause of the disability. Moreover, the proposed amendment provides that an injury resulting from idiopathic causes is not compensable.

Finally, SB2626 proposes a means to compute average weekly wage where there are multiple employers and when there is less than full-time work.

We will keep you updated on these developments. All would be welcome amendments to the current Act and would improve the workers' compensation environment in this State.

GOVERNOR APPOINTS NEW ARBITRATOR AND COMMISSIONER

Governor Quinn has appointed Arbitrator Stephen Mathis as a Commissioner representing the public. Commissioner Mathis has served as an Arbitrator since 1996.

Governor Quinn also appointed Jessica Hegarty as an Arbitrator. Arbitrator Hegarty holds degrees from Loyola University and Chicago-Kent College of Law, and was a partner in the firm Hegarty and Hegarty.

Effective February 1, 2014, Arbitrator Barbara Flores will take over the call in Zone 4 (Geneva, New Lenox, Ottawa) formerly assigned to now-Commissioner Stephen Mathis.

FINAL APPELLATE COURT TALLY

During 2013 the Appellate Court Workers' Compensation Commission Division issued 17 published decisions and 68 unpublished Rule 23 Orders. The current court consists of Justices Thomas Hoffman (1D), Donald Hudson (2D), William Holdridge (3D), Thomas Harris (4D), and Bruce Stewart (5D). The court will continue to hold oral arguments in Chicago and Springfield.

THE NEW COMMISSION PANEL COMPOSITION

Commissioners by panel:	**Panel A**	**Panel B**	**Panel C**
Employee representatives:	Thomas Tyrrell	Charles DeVriendt	David Gore
Public representatives:	Michael Brennan	Daniel Donohoo	Stephen Mathis
Employer representatives:	Kevin Lamborn	Ruth White	Mario Basurto

2014 MEDICAL FEE SCHEDULE ADJUSTMENTS

Annual Adjustments			
Effective date	**CPI-Medical**	**CPI-U / IL fee sch.**	**Annual Difference**
February 1, 2006	4.37%	4.90%	0.53%
January 1, 2007	4.26%	3.80%	-0.46%
January 1, 2008	4.52%	1.97%	-2.55%
January 1, 2009	3.26%	5.37%	2.11%
January 1, 2010	3.31%	-1.48%	-4.79%
January 1, 2011	1.03%	1.01%	-0.02%
September 1, 2011		-30.00%	-30.00%
January 1, 2012	3.19%	3.77%	0.58%
January 1, 2013	4.05%	1.69%	-2.36%
January 1, 2014	2.34%	1.52%	-0.82%
Cumulative	30.33%	-7.45%	-37.78%

(http://www.iwcc.il.gov/news.htm#fs14)

RECENT STAIRS CASE – *VILLAGE OF VILLA PARK*

by Brad Elward

On December 31, 2013, the Appellate Court, Workers' Compensation Commission Division, handed down its decision in *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, which upheld the Commission majority's finding that a fall on stairs at work was compensable based on the increased risk doctrine.

In *Village of Villa Park,* the claimant worked for the Village as a Community Service Officer. His job duties included handling ordinance complaints, theft reports, various noncriminal in-progress calls, accident reports, parking enforcement, and police officer backup, among other things. On April 5, 2007, the claimant was at work and on duty in the police station to which he was assigned. In the early evening, he was upstairs in the watch commander's office for a briefing, after which he and another officer began walking towards the back side of the building. The claimant said he turned and started walking down the rear stairwell to the locker room on the lower level. When he reached the third step, his right knee "gave out," causing him to fall down about seven stairs to the landing below, sustaining injuries to his right knee and lower back.

According to the claimant, the back stairwell consisted of about 10 steps, a landing, and then another 10 steps to the lower level. Locker rooms were on the lower level, as well as the briefing room, the lunch area, and the shooting range. The locker rooms were for the use of the police officers and were not open to the general public. The claimant described the lower level as "a secured area" and stated that the building entrance was accessible only with a pass key. On a typical work day, the claimant said he would enter the building through the back door and descend the stairs to the locker room in order to change from his civilian clothes to his uniform. He would walk back up the stairs to the mailbox area to check for any pertinent information, and then return downstairs to the lower level for his briefing meeting. The claimant testified that, before his shift even began, he would have traversed the back stairs at least two to four times. Moreover, at the end of the day, he would again descend the stairs to the locker room to change into his civilian clothes. The claimant said during most days, he would also use the stairs to go to the lunch room for his breaks or lunch, to get a soda, or to get rain gear or other equipment he needed for his duties.

The claimant had suffered a prior injury to his knee in January of 2007, which was wholly unrelated to his employment. The claimant had slipped on a patch of ice at his vacation home and had been treated by various medical providers. The medical care included an MRI of the knee, which revealed small joint effusion with complex tears to the anterior horn, posterior horn, and body of the lateral meniscus.

The arbitrator denied the claim, finding the fall was idiopathic and that the act of walking down stairs by itself

did not establish a risk greater than those faced outside the workplace. The Commission reversed, two-to-one, finding that the accident was compensable, but awarding benefits only for the back claim. The majority concluded, based on a post-accident MRI, that the knee condition had not changed since prior to the accident. Concerning the fall itself, the Commission reasoned that the claimant's use of the stairs fell within the "personal comfort doctrine" and, therefore, "arose out of" and "in the course of" his employment. The Commission focused on the claimant's testimony that he used the stairs numerous times per day in order to access the police locker room and for personal breaks. Further, the Commission concluded that the claimant's necessary and repeated use of the stairs for his employment exposed him to a greater risk than the general public.

The circuit court confirmed and the employer appealed, arguing that the fall did not constitute a compensable accident.

The appellate court affirmed the Commission majority, concluding the claimant had faced an increased risk while traversing the stairs. According to the appellate court, "[t]he evidence of record supports the Commission's finding that the claimant was 'continually forced to use the stairway' both for his personal comfort and 'to complete his work related activities.'" *Village of Villa Park*, 2013 IL App (2d) 130038WC, ¶21. Specifically, court noted the evidence established that the claimant was required to traverse the stairs in the police station a minimum of six times per day. This fact, if reasoned, "coupled with evidence that the claimant informed his superiors, prior to his fall on April 5, 2007, that he had injured his knee and the testimony of [the] Deputy Chief … that he had seen the claimant walk with a limp on numerous occasions prior to April 5, 2007, certainly supports the inference that the Village required the claimant to continuously traverse the stairs in the police station, knowing that he had an injured knee." *Id*. The appellate court found these facts were "more than sufficient to support both the conclusion that the claimant's employment placed him in a position of greater risk of falling, satisfying the exception to the general rule of noncompensability for injuries resulting from a personal risk, and that the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed." *Id*.

Lessons Learned

Village of Villa Park highlights the recent trend of expanding what constitutes an increased risk in the context of the employment. Now an employee with a pre-existing physical condition who encounters an otherwise non-defective condition on the premises, but who encounters that condition on a more frequent basis, may be deemed to have encountered risk to a greater extent than the general public.

The lesson to be drawn from this decision is clear: simply defending an alleged "increased risk" fall claim with evidence that there is no defect in the premises will likely not carry the day in today's legal environment. What is needed is a defense emphasizing not only the lack of any defect on the employer's premises, but one countering the increased risk argument by affirmatively showing that the risk is the same as that faced by the general public. For cases involving stairs, a strong defense will now require examination of the witness as to how many times stairs are encountered in his or her non-work day, possible surveillance video of the claimant using stairs, and investigation as to where the claimant travels and in what type of home the claimant lives – split level, two story, etc. It may also require ergonomic opinions.

Moreover, for pre-existing condition cases, medical evidence is mandatory. As emphasized by the appellate court in its mid-2013 decision in *Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, in several of the so-called landmark "increased risk" cases of the past, the courts, in denying compensability, "relied on medical testimony that each claimant's condition had degenerated to the point that any normal activity could have resulted in the injury at issue." *Id*. at ¶23. *See Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill. 2d 207, 215 (1969) (something snapped in back while turning in chair); *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38, 43 (1980) (bending over to pick up dropped route log book); *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App. 3d 284, 293-94 (3d Dist. 1991) (twisted knee while standing). In *Accolade*, in contrast, while there was a notation in respondent's accident report that claimant was told that her injury "could have happened anywhere anytime and nothing in particular caused it to happen," *Accolade*, 2013 IL App (3d) 120588WC ¶11, this conclusion was not supported by the medical records submitted at the arbitration hearing. Given this observation by the appellate court, any case involving a pre-existing condition must have the appropriate medical support indicating the current injury could have been caused by any event, not just the employment event.

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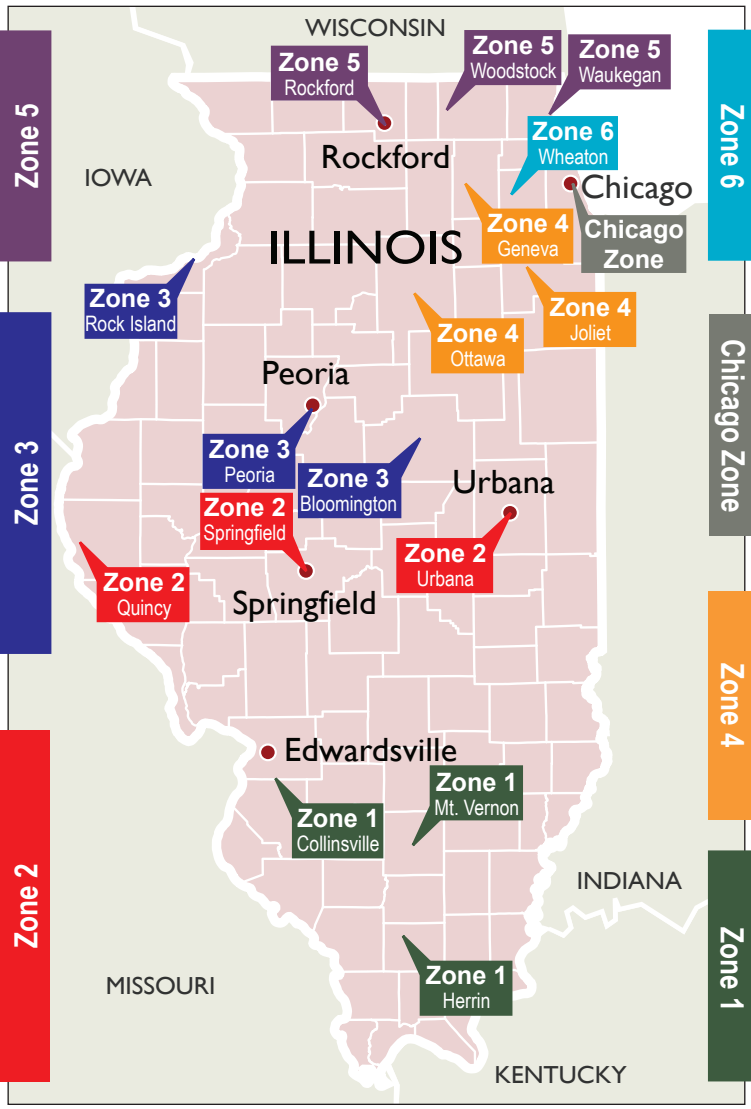

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