Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals — *March 2018*

A Word From The Practice Chair

Welcome to our March 2018 newsletter. It seems that "old man winter" does not want to go quietly into that good night. Just ask your friends and family in the northeast! But, based upon all empirical data and my experience, I have good news to report: Spring will spring (eventually). Sometimes the exercise of patience is difficult. So, I hope you had a chance to escape your cold environs and maybe made your way down south for some rest, relaxation, and spring break celebrating. If not, have no fear, I can guarantee warmer weather will come.

I am drafting this note as the first pitches of the Major League Baseball season are underway. So, dust off that baseball cap (preferably one with a Cubs logo) and let's talk workers' compensation! Consider this month's edition a "Year in Review." Jessica Bell takes us through the cases that had the most impact (and still are reverberating around Illinois) on how we handle workers' compensation claims in Illinois. This would be the equivalent of David Letterman's "Top Ten List" (although here, Jessica discusses *twelve* cases!).

And, let's not forget the upcoming Heyl Royster Spring Claims Handling Seminars. Please join us in either Itasca (May 3) or Normal (May 10). Signing up is easy: just go to www.heylroyster.com and click on the homepage banner to sign up today. The theme for this year is "Lighting the Way" as we put a spotlight on timely workers' compensation topics to help guide your claims handling and problem solve for you and your clients.

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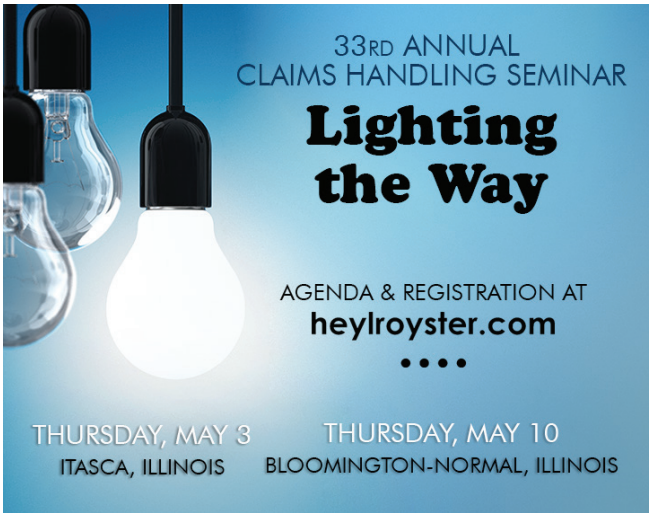

The Year in Review

By: Jessica Bell, Peoria & Springfield Offices

In this month's issue we explore some of the more significant appellate court cases handed down in 2017. Because of the unique structure of the appellate court when it comes to workers' compensation cases, it is important to remember that the vast majority of cases that construe the Illinois Workers' Compensation Act are decided by the Appellate Court, Workers' Compensation Commission Division. Created in 1984, that court hears all appellate court cases throughout the state that arise under the Act. The panel consists of one justice from each appellate court district, selected by the Illinois Supreme Court justice from that district.

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The current composition of this special panel of the appellate court is:

- Justice William Holdridge, Third District (Presiding Justice)
- Justice Thomas Hoffman, First District
- Justice Donald Hudson, Second District
- Justice Thomas Harris, Fourth District
- Justice John B. Barberis, Jr., Fifth District

To reach the Illinois Supreme Court, a party desiring such review must first file a petition with the appellate court requesting that at least two members of the panel "join in a statement that the case in question involves a substantial question which warrants consideration by the Supreme Court." Ill. S. Ct. R. 315(a). Without this statement, no further appeal beyond the appellate court is possible.

A. Traveling Employee

In *Kenaga V. Illinois Workers' Compensation Comm'n,* 2017 IL App (1st) 161859WC-U, the appellate court considered the traveling employee doctrine and reversed a Commission's denial of benefits, finding the undisputed facts supported a finding that the claimant's injuries were reasonable and foreseeable.

Undisputed evidence at trial indicated the claimant, a police officer, was required to appear in court to testify, sometimes on his day off. Though permitted to drive his personal vehicle to the court house, he was required to wear his uniform on such occasions. On the day of injury – claimant's day off – he drove to the courthouse in his personal vehicle and parked in a section reserved for law enforcement officers. After testifying and leaving the courthouse, he missed a step while descending a flight of stairs in the parking garage en route to his car. He suffered a tear of the distal biceps when he grabbed the handrail to catch himself from falling.

The arbitrator determined claimant was a traveling employee and awarded benefits. The commission reversed, without commenting on the traveling employee doctrine. The circuit court affirmed.

The appellate court held the Commission erred in failing to consider the traveling employee doctrine, noting the undisputed evidence showed the claimant was a traveling employee. The appellate court further noted the claimant's acts were certainly reasonable and foreseeable, thus meeting the standard for traveling employees. The employer attempted to argue claimant's fall down the stairs was due to his own carelessness and thus, should be denied. The appellate court denied this argument, noting the employer was attempting to insert contributory negligence argument into workers' compensation law and rejected that argument.

B. Section 6(f) Presumption - Health Impairments for Fire Fighters, EMTs

a. Overcoming the presumption

In *Simpson v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160024WC, the claimant, a firefighter with the City of Peoria, filed an application seeking benefits under the Act for a heart attack and cardiovascular disease with a date of accident of January 12, 2008. The evidence presented at arbitration indicated the claimant began working for the City as a firefighter in 1976 and was promoted to an administrative position in 1997. Although he would be required to respond to fires in certain instances, his work was significantly more administrative following the promotion. On the alleged date of injury, claimant, 63 years old, had been at home cleaning his garage. He finished in the garage and showered to get ready for dinner. Following the shower, he lay down on the bed because he was not feeling well. He went to the emergency room at the insistence of his girlfriend where he was diagnosed with a heart attack and cardiovascular disease. He underwent placement of two stents and was prescribed medications, one

of which (a blood thinner) precluded his return to work as a firefighter in any capacity.

The arbitrator found causation and awarded medical benefits and 25% man as a whole. The Commission reversed the arbitrator's award of benefits, noting the City presented sufficient evidence to overcome the rebuttable presumption of section 6(f) and then, under further analysis once the presumption was rebutted, the claimant failed to prove an accident that arose out of and in the course of his employment. The circuit court affirmed.

The appellate court discussed the standard for rebutting the presumption in section 6(f), noting it is not necessary that an employer eliminate any occupational exposure as a possible contributing cause. Rather, once *some* evidence of another potential cause of the claimant's condition is introduced, the presumption ceases to exist and the Commission is free to determine the factual question based on the evidence before it, without consideration to the presumption. The appellate court ultimately determined the Commission properly applied the presumption set forth in section 6(f) and that its decision that the claimant's work as a firefighter did not cause his heart attack and heart disease was not against the manifest weight of the evidence based on their evaluation of the credibility of the medical testimony presented.

b. Evidence required to rebut presumption

The court again addressed the section 6(f) presumption in *Johnston v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160010WC. The claimant, a firefighter, filed an application seeking benefits for a heart attack he sustained while shoveling snow in the fire department parking lot. The arbitrator denied benefits, finding the employer successfully rebutted the section 6(f) presumption in favor of the claimant and found his injuries did not arise out of his employment. The arbitrator's decision was affirmed by the Commission and confirmed by the circuit court.

On appeal, the court considered the amount of evidence necessary to rebut the presumption of section 6(f), considering whether the evidence required should be "clear and convincing," or simply "some evidence." After considering the legislative history of section 6(f), the appellate court determined the intent behind rebutting the section 6(f) presumption was only to require *some* evidence, and not clear and convincing evidence that something else caused the claimant's condition.

C. Average Weekly Wage

a. Post-accident new employment AWW

Noting that the issue as one of first impression, the appellate court considered the proper method of establishing the average weekly wage an employee could earn in employment or business *after* a work related accident in *Crittenden v. Illinois Workers' Compensation Comm'n,* 2017 IL App (1st) 160002WC. It was undisputed the claimant was not able to return to his pre-injury employment and he was a candidate for a wage differential.

When evaluating the information necessary to determine wage differential benefits, the appellate court determined that if the claimant is not working at the time of arbitration such that actual earnings are not able to be reviewed to determine a post-accident average weekly wage, the Commission must rely on functional and vocational expert evidence. More specifically, the Commission must consider *suitable* employment which the claimant is both able and qualified to perform when determining the appropriate rate for benefits. The appellate court indicated the Commission must identify a specific job/occupation that the claimant is able and qualified to perform and apply the appropriate wage for that occupation in the calculation of post-accident AWW for wage differential considerations.

b. Concurrent employment

In *Bagwell v. Illinois Workers' Compensation Comm'n,* 2017 IL App (4th) 160407WC, the

claimant filed applications seeking benefits under the Workers' Compensation Act for two separate injuries sustained while employed at respondent's candy factory. In addition to his employment for respondent, claimant also served as a pastor at a local church. At arbitration, claimant argued the salary he earned as a clergyman should have been included in the calculation of average weekly wage. Testimony at arbitration was clear the employer had no knowledge the claimant was paid for his work as a pastor, and claimant presented no evidence that the employer had actual knowledge he was paid. The arbitrator awarded benefits, but refused to include claimant's concurrent salary in the calculation of AWW. The Commission affirmed as it related to the concurrent employment earnings and the circuit court confirmed.

The appellate court affirmed the Commission's opinion excluding the claimant's concurrent earnings in the calculation of AWW. In so doing, the court interpreted section 10 of the Act to require concurrent earnings to be included only if the employer knew that an employee received payment for his concurrent work. The court held the term "employment" included only that work for which payment was provided in exchange for the work, and even though there was evidence the employer knew the claimant served as a pastor, there was no evidence the employer knew he was *paid* for that role.

D. TTD Benefits

In *Holocker v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160363WC, the appellate court reevaluated an employee's entitlement to TTD benefits when the employee is terminated for cause unrelated to his workers' compensation claim. Recall the appellate court had previously addressed TTD benefits in *Interstate Scaffolding*. The appellate court considered the law in *Interstate Scaffolding*, and, in *Holocker*, held that *Interstate Scaffolding* does not stand for a *per se* rule that an employee is owed TTD benefits as a matter of law until they reach MMI. Rather, the court concluded the determining factor for eligibility for TTD benefits is whether the employee's condition has stabilized to the extent that they are able to re-enter the workforce.

In *Holocker*, the claimant had returned to work at full duty without restrictions, but was still treating for work-related injuries. After complaining of anxiety and panic attacks while operating cranes at work, his physicians restricted him from operating cranes for at least one year. His employer accommodated this restriction and he continued working in the same position as before the accident. While his restrictions were being accommodated, Holocker took a vacation and, upon his return, missed work for a number of days without notifying his employer. He was subsequently terminated for the absences pursuant to the terms of the collective bargaining agreement. He continued to seek treatment for the work related injuries, but the only restriction that remained was the restriction from operating a crane.

Holocker sought TTD benefits post-termination, relying on *Interstate Scaffolding* to argue that his condition had not yet stabilized, as evidenced by his restriction from operating cranes. The arbitrator agreed and awarded TTD benefits, noting Holocker had not reached MMI or been released to unrestricted full duty as of the date his employment was terminated. The Commission reversed finding that Holocker's work related injuries had stabilized and had no impact on his employment. The circuit court reversed the Commission and reinstated the arbitrator's award of benefits.

In denying Holocker TTD benefits post-termination, the appellate court found his work injuries (and restrictions) had no effect on his employment. The court rejected Holocker's argument that *Interstate Scaffolding* stands for the principle that an injured worker is entitled to TTD benefits as a matter of law until he has reached MMI. The court stated "when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally

disabled as a result of a work-related injury *and whether the employee is capable of returning to the work force*." *Holocker*, 2017 IL App (3d) 160363WC, ¶ 40. Because Holocker was capable of returning to the work force, he was no longer "temporarily totally disabled," and was not entitled to receive TTD benefits after his termination.

E. Arising Out of/Risk Analysis

In *Dukich v Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, the appellate court conducted a risk analysis to conclude an employee's act of walking on wet pavement on the employer's premises was a neutral risk to which the claimant was at no greater risk than the general public. The employee, an attendance clerk at a high school, slipped and fell when she was walking down a wet handicap ramp from the school building to her car, which was parked in a designated parking spot in a lot controlled by the employer. The employee presented no evidence that there were any defects where she fell and testified that the cause of her fall was "the rain." There was no evidence the employee was in a hurry or carrying anything required by her employer.

In upholding the Commission's denial of benefits, the appellate court further noted that the dangers created by rainfall are dangers to which all members of the general public are exposed on a regular basis and are not risks associated with one's employment. Although the claimant did not testify to using the wet pavement more frequently as part of her job requirement, which could have created a risk associated with her employment, the appellate court denied that argument, pointing out that there was no evidence that the wet pavement the claimant slipped on was any different than wet pavement anywhere else, reiterating their previous finding that she was at no greater risk than the general public. The court further found that the condition of wet pavement alone is not a "hazardous condition" so as to create a risk associated with employment.

F. Wage Differential Considerations

a. Partial incapacitation as a result of work injury

The appellate court considered an employee's entitlement to a wage differential award when the employer does not return him to his pre-injury job in *Sysco Food Serv. v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 170435WC. The claimant, a delivery truck driver, injured his knee in a work-related injury. There was evidence he also had a pre-existing degenerative condition that may have been aggravated by the work accident (though at least one physician testified that it was not aggravated), but he ultimately was released to return to work without restrictions after successfully treating for his conditions. At arbitration, the employee testified his knee was "as good as it was before the operation," and that he was pain free. He testified that his knee injury had not caused him to do anything differently than he did before the work accident. There was no medical evidence that he was restricted from returning to work as a truck driver and he confirmed he had no restrictions from any physician.

Nonetheless, the employer did not return him to his position as a truck driver, instead offering him a job as a security guard earning less than he was in his pre-injury position. Evidence presented suggested the employer did not return him to work for safety concerns when the employee complained of pain in his knee after returning to work following his release.

When considering the employee's entitlement to a wage differential award, the appellate court concluded that a claimant must be partially incapacitated from pursuing his usual and customary line of employment "*as a result*" of the work injury, not based on the reasons the employer gave for not returning him to work. Because the claimant admitted he was ready, willing, and able to return to work as a truck driver and that he was authorized to return to work as a truck driver from his physician, there was no evidence that he was partially incapacitated from pursuing his usual and

customary line of employment "as a result" of a work related injury and was not entitled to a wage differential award, even though he did not return to his usual and customary line of employment.

b. Valid job search/Prior restrictions

Entitlement to wage differential benefits was also considered in *Knezevich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160208WC-U. The claimant, an ironworker, sustained an injury to his thumb as a result of work related accident. While working light duty and still treating for his thumb injury, he sustained an injury to his low back. Following a course of treatment with various physicians, he underwent a Functional Capacity Evaluation, which released him to return to work with permanent restrictions not consistent with the requirements of an ironworker. The employee presented evidence at arbitration alleging he made 1,181 employer contacts in an attempt to find work. In reliance on that self-directed job search, a vocational counselor retained by the employee determined there was no stable labor market for him.

At arbitration, the employer presented evidence of a long history of medical issues, workers' compensation claims, and permanent restrictions. The employer presented an FCE completed before the petitioner's current injuries releasing the claimant with permanent restrictions that purported to preclude him from returning to work as an ironworker *before* the injuries currently in question even occurred.

The arbitrator accepted the claimant's job search logs and his vocational report finding no stable labor market and awarded permanent total disability benefits. The Commission unanimously modified that decision, spending significant time to comment on the credibility of the claimant's job search logs. The Commission determined the claimant's job logs were not reliable, in fact characterizing them as "farcical," and finding the vocational opinion relying on them as not credible. The Commission determined the claimant was not entitled to permanent total disability benefits. Further, the Commission considered the claimant's entitlement to wage differential benefits, based on the employee's argument that his current injuries incapacitated him from returning to ironworking. The Commission found the evidence did not support such a finding, specifically noting the prior FCE finding the claimant was not capable of returning to work as an ironworker. There was essentially no evidence that the claimant's *current* injuries prevented him from returning to work as an ironworker as it was a culmination of all of his conditions that lead to that determination.

The appellate court affirmed the circuit court's confirmation of the Commission's decision, specifically questioning the credibility of the claimant's job search efforts. As there was no credible evidence presented that there was no stable labor market for the claimant, an award of permanent total disability benefits was improper. Further, as the evidence presented supported a finding that the claimant's current injuries did not incapacitate him from returning to work as an ironworker, an award for a wage differential was also not proper.

G. Penalties

In *Theis v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161237WC, the petitioner filed a claim in April 2013 alleging work related injuries as a result of her employment. An arbitration hearing took place in April 2014 and the arbitrator issued a written decision on May 23, 2014. The arbitrator's decision awarded petitioner benefits, including permanent partial disability benefits and payment of "all medical expenses contained in claimant's exhibits 1-9." Neither party appealed the arbitrator's decision.

On October 3, 2014, the petitioner filed a petition for penalties and fees under sections 19(l), 19(k), and 16 of the Act. On October 8, 2014,

the employer issued payment for the PPD award pursuant to the arbitrator's decision. On October 16, 2014, the employer's attorney sent claimant's counsel an email requesting medical bills to be paid, claiming he never received the bills previously and did not receive the petitioner's exhibits at trial. On December 4, 2014, the employer issued payment to the petitioner for her medical expenses.

The Commission awarded penalties pursuant to 19(l), but denied penalties under section 19(k) and fees pursuant to section 16. The circuit court reversed the award of penalties under section 19(l) and affirmed the denial of penalties and fees under sections 19(k) and 16.

On appeal, the appellate court affirmed the denial of penalties, first noting that penalties pursuant to section 19(l) are not applicable to PPD awards. The court further explained that section 19(l) allows an employer 14 days to respond to a written demand for payment of benefits under section 8(a) or 8(b). If the demand is for payment of medical bills, the employer has 30 days after receipt of the bills to issue payment.

The employee argued the request for hearing submitted at arbitration which referenced unpaid bills constituted "written demand" for payment of bills, which started the clock for the employer to issue payment. The employee further argued she had no duty to provide her bills to the employer since they were submitted into evidence as exhibits at arbitration.

The appellate court denied both arguments. First, the court specifically noted the act of noting medical expenses on a request for hearing *in advance* of arbitration does not serve as a demand for payment of those bills *after* arbitration. Further, the court found that the simple act of submitting bills as an exhibit at trial is not the same as tendering them to the respondent for payment. The court specifically denied the proposition that the employer has a duty to seek out the petitioner's medical bills in order to comply with the requirements of the Act for payment.

H. Medical Opinions/Surveillance

The appellate court considered the credibility of conflicting medical opinions in the case of *Scimeca v. Illinois Workers' Compensation Comm'n,* 2017 IL App (2d) 161054WC. There, the claimant, a police officer, was injured when he was hit by a vehicle while tending to a stranded motorist in a snowstorm. The petitioner notified his supervisor and subsequently sought treatment two days after the accident, reporting symptoms in his low back and ribs. He was eventually referred to a neurosurgeon, who recommended surgery on claimant's lumbar spine. Respondent sent claimant to an independent medical examination with Dr. Salehi, who ultimately found causation for the lumbar condition and agreed with the surgical request. He did not initially comment on the rib condition.

The petitioner underwent a microdiscectomy, but had persistent complaints. His treating physician referred him to an orthopedic surgeon and ordered an updated MRI. Neither recommendation was immediately authorized by the employer. Respondent secured an updated IME report from Dr. Salehi and also sent the petitioner to an IME with Dr. Player. Dr. Salehi acknowledged the claimant's ongoing complaints, but stated he had "no good explanation" for the ongoing complaints. He also reviewed a surveillance video obtained by the employer showing the petitioner transporting two jet skis via a trailer with another person. Dr. Salehi thought the claimant's subjective complaints were inconsistent with what the surveillance showed.

Dr. Player, a general practitioner, found that the claimant's rib complaints were not supported by objective findings and denied further medical, specifically relying on the surveillance video obtained by the employer.

When the MRI was authorized approximately seven months later, the treating physician recommended additional care due to the findings of the MRI. The employer denied the request and the claim proceeded to arbitration.

The arbitrator awarded the prospective medical treatment, as well as TTD that had been suspended and medical bills that had been denied in reliance on the IME reports. The arbitrator noted the IME opinions were not persuasive. The Commission modified the arbitrator's decision to deny the requested treatment, finding the IME opinions credible when they noted a lack of objective findings as the bases for denying additional treatment, and the surveillance video reliable. The circuit court found the Commission's decision against the manifest weight.

On appeal, the court considered the credibility of the physicians involved in the case, as well as the reliability of the surveillance obtained by the employer. The appellate court found the Commission erred in finding the IME opinions credible, since the reason they denied treatment was the lack of objective findings, which is the very thing the May MRI showed, but neither physician was provided with. The appellate court cited to *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000) noting "an expert's opinion is only as valid as the bases and reasons for the opinion." *Scimeca*, 2017 IL App (2d) 161054WC, ¶ 31.

The appellate court also questioned the reliability of the surveillance video, noting its foundation was questionable, since very little information was provided regarding the circumstances under which the video was made. For example, it was unknown whether or not the claimant was taking any pain medication at the time the video was shot. The appellate court found the Commission erred in relying on the video, also noting there was nothing in the video to indicate the claimant was capable of full-time, unrestricted work as the IME physicians claimed.

I. Section 19(h)/8(a) Petitions

The appellate court issued a ruling interpreting section 19(h) of the Act in the case of *Murff v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 160005WC. The claimant, a sanitation worker for the City of Chicago, filed a claim alleging injuries to his left shoulder and cervical spine. Following the exhaustion of conservative care, he underwent cervical spine surgery. When the complaints persisted following surgery, he was ultimately released with permanent light duty restrictions and limitations of lifting less than 20 pounds. An evaluation by an orthopedic surgeon further opined that the claimant would never be able to return to his work as a sanitation worker.

Following his release with light duty restrictions, the City of Chicago assigned him to work in rodent control, a job that matched his restrictions. The parties proceeded to arbitration and the arbitrator issued a decision January 22, 2014 awarding permanent partial disability benefits of 50% MAW, as well as some unpaid TTD. Neither party appealed the arbitrator's decision.

In June 2014, claimant was informed he was to be released to work as a garbage man and, if he couldn't do that job, he should go home and/or contact the union. The claimant promptly filed a petition pursuant to section 19(h) and section 8(a) of the Act, seeking an award of additional benefits based upon a reduction in his earning power. The Commission denied his petition and the circuit court confirmed the Commission's decision.

The appellate court held that the material change in disability required for an increase in benefits under section 19(h) does not apply to an increase in *economic* disability alone. Rather, the court noted the term "disability" as used in section 19(h) refers only to physical and mental disability. Because the claimant admitted at the hearing on his 19(h) petition that he had not sought any additional treatment since his release prior to the arbitration hearing, that his restrictions were unchanged, and that his condition was unchanged, there was no evidence of a change to his physical or mental disability to support an increase in an award.

The court further denied the petitioner's request for vocational rehabilitation and maintenance benefits under section 8(a), noting that there is nothing about section 8(a) that permits a party to reopen a claim for those benefits after a final award is entered by the arbitrator. Because the parties did not appeal the arbitrator's decision, there is no opportunity to request additional benefits under section 8(a).

J. Death Benefits

In *Salisbury v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160138WC, the appellate court considered a surviving spouse's entitlement to a lump sum payout of death benefits, as well as an employer's opportunity to take a credit for an overpayment of benefits made prior to the final award at arbitration.

The employee died June 2009 when his crop dusting plane crashed in the course of his employment. Following the accident, the employer began paying benefits to the surviving spouse in the amount of $1,231.41 per week. At arbitration, the surviving spouse was awarded death benefits of $461.78 per week. Based on the weekly overpayment, the employer was given a credit of $192,594.22.

The surviving spouse filed a petition for a lump sum payout of the death benefits. She admitted she had saved most of the $192,594.22 that had been paid prior to arbitration, that she was employed on her own, and that her income was sufficient to meet her needs. She admitted she had no financial hardship to justify a lump sum payout. Rather, her request was based on her own preference to manage the benefits rather than chance a loss of benefits at some point in the future. The Commission denied her request and the circuit court confirmed.

On appeal, the claimant argued the Commission had no authority to award a credit to respondent against a subsequent award of death benefits for the overpayment of benefits. The appellate court disagreed, concluding the opportunity for a credit in situations like this claim are consistent with the overall beneficent purposes of the Act. If an employer is not able to take a credit for amounts paid prior to a final award, it would encourage administrative delays as employers would try to resolve every ambiguity before issuing payment to avoid any overpayments. Further, the court noted the Commission did not *award* the employer anything and the claimant was not required to reimburse the employer for the overpayment. Rather, the Commission simply considered the payments made in contemplation of a final award and factored them into the determination of a final award in favor of the claimant.

The claimant also argued the Commission erred in denying her request for a lump sum payout of benefits. The appellate court stated the Supreme Court rule that "lump sum awards are the exception and not the rule" and that lump sum payouts are appropriate only if it is in the best interest of both parties. The court determined claimant failed to present any evidence that a lump sum payout would be beneficial to the employer, and also noted that claimant did not present any credible evidence that a lump sum payout to her would be appropriate in this case.

K. Intervening Accident/Theory of Accident

In *Fisher v. Illinois Workers' Compensation Comm'n,* 2017 IL App (4th) 160929WC, the appellate court considered an employee's ability to change his theory of accident after an award by an arbitrator and during the appeal process. On his application for adjustment of claim, the employee alleged a work related accident from a specific incident of bending a piece of wire by hand and shaping it to put in a transformer. At trial, the employee testified he felt a tingling sensation in his right arm on a specific date and at a specific time when he was bending a two inch wire by hand. He asked a co-

worker to finish the task for him, but did not report an injury to his employer or seek treatment. That evening, he attended a party and had a few drinks. He admitted some pain in his shoulder, but did not seek treatment, only taking an ibuprofen at home. He testified his shoulder "felt fine" upon waking the following morning and admitted he participated in a basketball game. He testified he used both hands/arms during the basketball game, though he had some limited use of the right arm. He testified his arm was "hurting even more" after returning home from the basketball game. He sought medical treatment two days later.

The arbitrator found the claimant did not sustain a work related injury when bending a two inch wire on the alleged accident date. The arbitrator noted the claimant did not report the accident to the employer and did not seek treatment on the alleged day of injury. The arbitrator specifically noted the claimant testified to "markedly increased symptoms" following the basketball game, and reported the same in the medical records submitted at trial. The arbitrator found the employer's IME physician credible when he noted the claimant's complaints and activities were not consistent with having sustained a rotator cuff tear on the alleged accident date. The IME physician noted the claimant would have experienced pain, not just a tingling sensation and would not have been capable of participating in a basketball game.

The appellate court confirmed the circuit court's decision confirming the Commission's denial of benefits, noting the evidence supported the arbitrator's determination that the alleged injury did not occur at the time of the alleged accident. The appellate court specifically noted the "[c]laimant's delay in seeking medical attention or reporting the injury allow an inference adverse to him, as does his participation in a basketball game the day after the alleged injury." *Fisher*, 2017 IL App (4th) 160929WC, ¶ 17.

The appellate court further dismissed the claimant's argument that the arbitrator should have considered a repetitive trauma theory of accident when determining causation for the claimant's right shoulder injury. In considering this argument, the appellate court first pointed out that the claimant did not plead the case as a repetitive trauma injury – providing an accident history of an acute trauma on the application for adjustment of claim. Further, the claimant testified to an acute trauma as the alleged cause of his injury, and the opinion from his physician relating the injury was based on "a very specific time when it occurred." The appellate court found the Commission's consideration of the case as an acute trauma consistent with the evidence, but also noted the claimant would have likely lost on a repetitive trauma theory anyway.

L. Causation/Pre-existing Condition

In *Schroeder v. Illinois Workers' Compensation Comm'n,* 2017 IL App (4th) 160192WC, the appellate court considered the chain of events surrounding an employee's medical condition to determine if her current condition of ill-being was related to the alleged work accident.

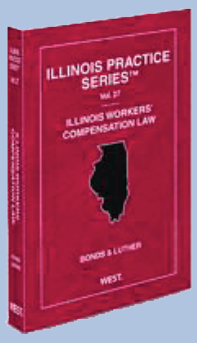
The claimant, a truck driver, alleged she sustained injuries to her back as a result of a slip and fall on ice. Prior to the slip and fall, she had actively sought treatment for low back injuries, including several surgeries. She was recommended for a third surgical procedure approximately ten months before the work accident, but declined to move forward as she wanted to return to work. Following the work accident, evidence presented indicated the employee was no longer capable of working in her pre-injury employment. She did not respond to conservative treatment and underwent a third surgery. She also reported an increase in her pain complaints, though objective testing after the accident was substantially similar to testing prior to the accident.

In reinstating the Commission's decision finding causation and awarding benefits to the petitioner, the court noted a claimant need not be in perfect

health and free of any pre-existing conditions in order for causation for current condition of ill-being to be related to a work accident. Rather, the appellate court noted the evidence was clear that the claimant's condition had clearly deteriorated after the accident, giving rise to an inference that the work related accident caused the deterioration.

Jessica Bell - Peoria & Springfield

Jessica focuses her practice on the defense of insurance clients and employers in workers' compensation matters. She joined the firm with extensive workers' compensation defense experience, having appeared before the Illinois Workers' Compensation Commission representing employers and insurance companies across the state. Jessica has also spoken with businesses directly to help assist in their understanding of the Workers' Compensation system, as well as the handling of claims within their business. Jessica is a member of the Workers' Compensation Lawyers' Association, Peoria County Bar Association, and Illinois State Bar Association. She is a past treasurer and vice-president of the Tazewell County Bar Association and former Tazewell County Assistant State's Attorney. As an ASA, Jessica appeared before Judges in the 10th Circuit, handling matters ranging from petty offenses to felonies.



Current Edition Available

Bruce Bonds and **Kevin Luther** co-authored the recently released "Illinois Workers' Compensation Law, 2017 Edition," Volume 27 of the Illinois Practice Series published by Thomson Reuters. This publication provides an up-to-date assessment of Illinois workers' compensation law in a practical format that is useful to practitioners, adjusters, arbitrators, commissioners, judges, lawmakers, students, and the general public. It also contains a summary of historical developments of the Illinois Workers' Compensation Act. Mr. Bonds concentrates his practice in the areas of workers' compensation, third-party defense of employers, and employment law. He is a member of the Illinois Workers' Compensation Commission's Rules Review and Revisions Committee and an adjunct professor of law at the University of Illinois College of Law, where he has taught workers' compensation law to upper-level students since 1998. Mr. Luther supervises the employment law, employer liability, and Workers' Compensation practices in the firm's Rockford and Chicago offices. He has represented numerous employers before the Illinois Human Rights Commission, arbitrated hundreds of workers' compensation claims, and tried numerous liability cases to jury verdict.

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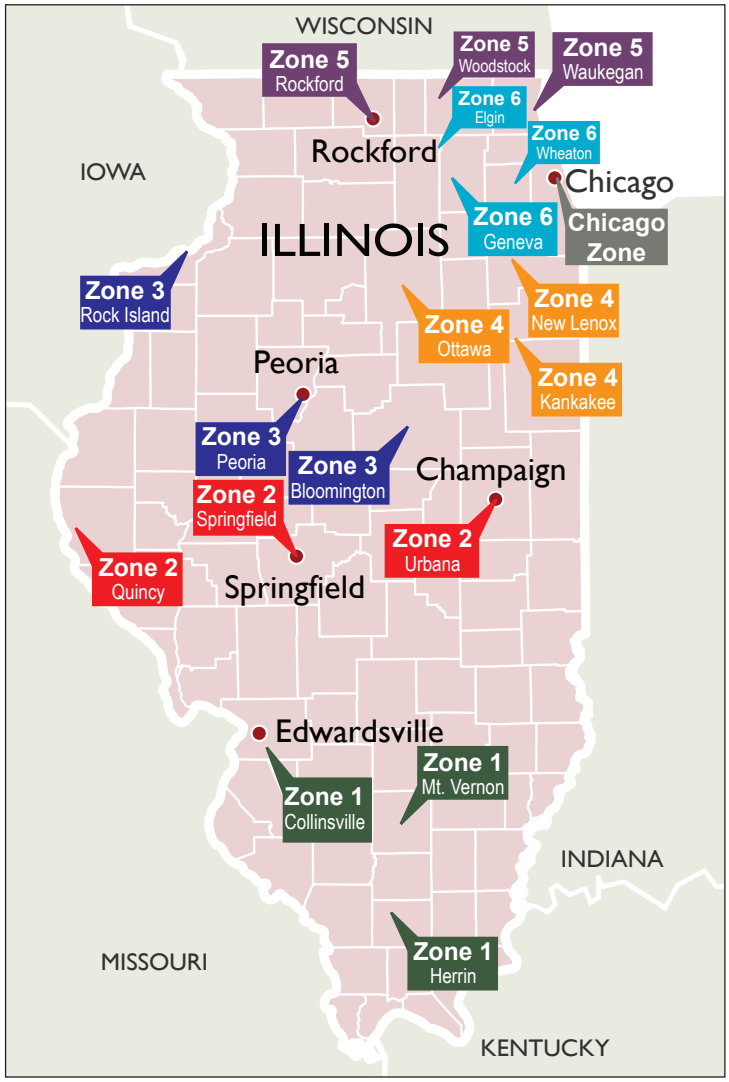

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