SELECTED RECENT APPELLATE DECISIONS ON

ILLINOIS WORKERS' COMPENSATION ISSUES

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I -
JURISDICTION

Mahoney v. Industrial Commission, 218 Ill.2d 358 (2006)

In Mahoney v. Industrial Commission, 218 Ill.2d 358 (2006), the Petitioner was hired in Illinois by United Airlines. He was hired in 1969 and worked for United continuously in Illinois until 1993. He then transferred to Florida and lived there for six years before he was injured. He received TTD consistent with Florida's Workers' Compensation Act and all of his medical care was provided in Orlando. The Petitioner filed an Application for Adjustment of Claim in Illinois. The Arbitrator found that the Petitioner had no employment relationship in Illinois, determined that the Commission did not have jurisdiction, and denied his claim. The Commission affirmed the Arbitrator's decision. The Circuit Court confirmed the Commission's decision claiming that it was not against the manifest weight of the evidence.

The Appellate Court reversed ,finding that the plain language of the Act "clearly states that site of the contract for hire is the exclusive test for determining the applicability of the Act to persons whose employment is outside of Illinois where the contract of hire is made within Illinois." (355 Ill.App.3d at 269). The employer urged the Court to expand prior decisions (Youngstown Seed & Tube Company v. Industrial Commission, 79 Ill.2d 425 (1980)) to require the Commission to review "the totality of arrangements" of the employment. The Supreme Court declined to reinterpret its prior decision:

> "The Appellate Court here correctly noted that this Court in Youngstown applied a bright line test based on the plain language for future Court. 'If the employment contract was made in Illinois, a claimant injured while working in another state was covered under the Act. Conversely, if the contract for hire was not entered into in Illinois, then there was no coverage'…The Youngstown Court indeed reviewed the 'totality of the arrangements', but only in the context of determining whether the claimant continued employment under the initial contract of hire which was executed in Illinois (218 Ill.2d at 371-2).

The Court concluded that 'the place of the contract of hire is the sole determining factor for the existence of jurisdiction over employment injuries occurring outside the state.' (218 Ill.2d at 374)"

P.I. & I. Motor Express, Inc. v. Industrial Commission, 368 Ill.App.3d 230 (5th D. 2006)

In P. I. & I. Motor Express, Inc. v. Industrial Commission, 368 Ill.App.3d 230 (5th D. 2006), claimant was employed as a truck driver for P & I Motor Express. The contract of hire had been entered into in the State of Illinois. The Petitioner was injured as a result of an accident which occurred in Pennsylvania. The claimant admitted that, prior to the events giving rise to the instant claim, he signed a form by which he agreed to be bound by the workers' compensation laws of the State of Ohio. The Circuit Court of Sinclair County confirmed a Commission decision granting the Petitioner benefits under the Illinois Workers' Compensation Act.

Relying on the form signed by the claimant electing Ohio's workers' compensation statute as his exclusive remedy, the employer argued that the claimant was not entitled to benefits under the Act, and that Ohio law and the Full Faith and Credit Clause of the United States Constitution required that Illinois deny the claimant benefits. The Appellate Court rejected that argument stating that the Commission was not obligated to enforce either the agreement or the Ohio statute. The Appellate Court noted that Section 23 of the Act provides that no employee has the power to waive any of the provisions of the Act and confirms that a workers' compensation claim is a matter of public interest and not a private matter between the employer and employee: "In this case, the very document upon which the employer relies states that the claimant's contract of hire was entered into in the State of Illinois. As the state where the employment contract was entered into, Illinois has a legitimate concern over the employer/employee relationship and may apply its own workers' compensation statute even though the claimant's injury occurred elsewhere." (368 Ill.App.3d at 237).

II -
SECTION 2 - STATUTE OF LIMITATIONS - REPETITIVE TRAUMA - MANIFESTATION DATES

Durand v. Industrial Commission, 224 Ill.2d 53, (2006)

In Durand v. Industrial Commission, 224 Ill.2d 53, (2006), the Supreme Court reversed an Appellate Court decision confirming the denial of benefits to a worker claiming repetitive trauma. The Commission held that the Petitioner's manifestation date is not necessarily the date on which the employee notices a repetitive trauma injury or its relationship to its work.

Instead, relying on Oscar Meyer & Company v. Industrial Commission, 176, Ill.App.3d 607 (1988), the Court noted that the date on which the employee becomes unable to work due to physical collapse or medical treatment helps determine the manifestation date.

The Court held that Courts should consider various factors, finding such a manifestation date on either the date on which the employee requires medical treatment, or the date on which the employee can no longer perform work activities: "A formal diagnosis, of course, is not required. The manifestation date is not the date on which the injury and its causal link to work become plainly apparent to a reasonable physician, but the date on which it became plainly apparent to a reasonable employee. However, because repetitive trauma injuries are progressive, the employee's medical treatment, as well as the severity of the injury and particularly how it affects the employee's performance, are relevant in determining objectively when a reasonable person would have plainly recognized the injury and its relation to work." (224 Ill.2d at 72). The Court concluded by stating "We decline to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment." 224 Ill.2d at 74.

The Durand case contains an excellent review of the case law on manifestation dates in repetitive trauma or repetitive use injury cases.

III -
NOTICE - CREDIBILITY OF WITNESSES
S & H Floor Covering, Inc. v. Workers' Compensation Commission, 373 Ill.App.3d 259 (4th D. 2007)

In S & H Floor Covering, Inc. v. Workers' Compensation Commission, 373 Ill.App.3d 259 (4th D. 2007), the Arbitrator found that the Petitioner had given Respondent notice of his accident 49 days rather than 45 days after the occurrence. The Workers' Compensation Commission reversed the findings of the Arbitrator and awarded the Petitioner compensation. The employer appealed, arguing that the employee did not provide notice within 45 days and that the Commission's decision was against the manifest weight of the evidence.

The Court held that the Commission's findings regarding notice will not be disturbed unless they are against the manifest weight of the evidence, and affirmed that the purpose of notice requirements is to enable employers to investigate alleged

accidents. The Appellate Court found that a claimant complies with the Act if within 45 days the employer possesses known facts relating to the accident.

The Commission found that the employer was not prejudiced by the delay, noting that the Respondent had a telephone conversation with the claimant's wife, that the employer had knowledge of the claimant's ongoing knee pain, and that his condition had worsened to the point that he could not return to work as a result of his condition. The Appellate Court found that the Commission's decision that the Respondent had proper notice was not against the manifest weight of the evidence. The Appellate Court concluded that the evidence supported the Commission's decision reversing the Arbitrator's findings. The Court, however, took the opportunity to address the issue of whether an extra degree of scrutiny is applied in evaluating the record when the Industrial Commission rejects the Arbitrator's factual findings:

> We will consider giving credence to [Cook v. Industrial Commission, 176 Ill.App.3d 545, 551-52], which provides for 'an extra degree of scrutiny' to be applied to the record in determining whether there is sufficient support for the Commission's decision, especially when the Commission makes credibility determinations regardless of the Arbitrator's findings.

IV - AVERAGE WEEKLY WAGE

Airborne Express, Inc. v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st D. 2007)
Boelkes v. Harlem Consolidated School District No. 122, 363 Ill.App.3d 551 (2nd D. 2006)

In Airborne Express, Inc. v. Illinois Workers' Compensation Commission, 372 Ill.App.3d 549 (1st D. 2007), the Appellate Court for the 1st District defined average weekly wage and discussed the circumstances under which "overtime" was included in the calculation of average weekly wage. It defined overtime as working time in excess of a minimum total set for a given period. The Court stated "Overtime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." 372 Ill.App.3d at 554.

To include "overtime" in a calculation of average weekly wage it must be established that the Petitioner is required to work overtime as a condition of employment, that he consistently worked a set number of hours every week, or that overtime hours are part of his regular hours of employment.

In Boelkes v. Harlem Consolidated School District #122, 363 Ill.App.3d 551 (2nd 2006), the Appellate Court held that average weekly wage calculations pursuant to the Workers' Compensation Act are not relevant to average weekly wage calculations in contract actions and wage disputes.

V -
ARISING OUT OF - FALLS ON PREMISES
First Cash Financial Services v. Industrial Commission, 367 Ill.App.3d 102, (1st D. 2006)

In Fast Cash Financial Services v. Industrial Commission, 367 Ill.App.3d 102, (1st D. 2006), the Petitioner fell in a bathroom reserved for employees. The Commission awarded the Petitioner benefits noting that the Respondent presented no evidence that the bathroom tiles were dry or clean. The claimant testified that she did not know what caused her to slip and did not observe anything on the floor.

In reversing the award, the Appellate Court analyzed the law underlying the "arising out of" component of compensability:

> "In order to determine whether a claimant's injury arose out of her employment we must first categorize the risk to which she was exposed. The risk to which an employee may be exposed are categorized into three groups: (1) Risks distinctly associated with employment; (2) Risks personal to the employee, such as idiopathic falls; and (3) Neutral risks that have no particular employment or personal characteristics." 367 Ill.App.3d at 105.

The Court noted that idiopathic falls arise out of employment only where employment conditions significantly contribute to the injury by increasing the risk or the effects of the fall. There was no evidence that the claimant suffered from a physical condition that caused her to fall. Because she testified that she fell for an unknown reason, the fall was not idiopathic. Injuries resulting from risks to which the general public is exposed do not arise out of employment: "By itself, the act of walking across a floor at the employer's place of business does

not establish a risk greater than that faced by the general public." 367 Ill.App.3d 102 at 105.

The Court held that for an injury caused by a fall to arise out of employment a claimant must present evidence that the fall stemmed from a risk associated with her employment: "Employment related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the worksite, or performing some work-related task which contributes to the risk of falling." 367 Ill.App.3d at 106.

The Court noted that the Plaintiff did not offer sufficient evidence as to the cause of her fall or that conditions of the bathroom contributed to the incident. The Court further found that the Arbitrator and Commission improperly shifted the burden to the Respondent to prove that the bathroom floor was clean: "Based on the evidence in the record, the claimant cannot show more than a mere possibility that the floor was dirty on August 8, 2003, and that this was the cause of her fall, and, thus, there is no reasonable certainty that the claimant's injury stemmed from a risk associated with her employment." 367 Ill.App.3d 102 at 107.

VI -
COURSE AND SCOPE OF EMPLOYMENT - ARISING OUT OF - VIOLATION OF WORK RULES

J.S. Masonry, Inc. v. Industrial Commission, 369 Ill.App.3d 591 (1st D. 2006)

In J.S. Masonry, Inc. v. Industrial Commission, 369 Ill.App.3d 591 (1st D. 2006), the employer appealed an award of compensation claiming that because the claimant was injured by his failure to fasten safety gates in violation of company rules, his subsequent accident was outside the scope of his employment. The claimant argued that his injuries arose out of his employment because he was performing tasks for the benefit of the employer. The Court held that because the injury occurred within the period of employment at a time and place where employee was fulfilling his employment duties, there was no dispute concerning whether the injury was sustained in the course of employment. Rather, the issue was whether the injury arose out of employment.

The Appellate Court agreed that an employee's injury does not arise out of employment when the injury is the result of an

activity prohibited by the company rules and conducted solely as a personal convenience. On the other hand, an injury suffered while an employee is performing duties for which he was hired while knowingly violating safety rules does arise out of and in the course of employment. According to the Court: "The decisive issue is whether the employee was, at the time of the accident, violating a rule while still in the scope of his employment, or whether the alleged rule violation took him outside its sphere…Here the claimant was performing the duties for which he was hired, namely to stand atop a scaffold and receive materials, and to relay bricks, blocks, and mortar to the bricklayers. He was not in an area in which he was forbidden to enter, and was not engaged in any activity which was unauthorized by the company. Although he may have been performing his duties in a negligent manner, the claimant was 'doing exactly the thing he was employed to do.'…The claimant was acting in the spirit of his employment and his injuries arose out of his employment, without regard to the factual dispute as to whether he had violated a company rule by failing to secure the safety gate." 369 Ill.App.3d at 597-8.

VII -
ARISING OUT OF - GOING TO AND FROM WORK
University of Illinois v. Industrial Commission, 365 Ill.App.3d 906 (1st D. 2006)

The claimant allegedly injured her knee when she tripped over a metal strip in the doorway of a walkway between the parking structure and a university hospital. The Commission awarded benefits. The university appealed claiming that at the time of her injury the claimant was not exposed to a risk greater than that to which the general public was exposed.

The Court noted that the walkway where claimant was injured was a usual access route from the parking facility designated for employees. It stated that an injury to an employee which takes place in an area of the employer's premises which constitutes a usual access route for employees, and which is caused by some special risk or hazard located thereon, is an injury which arises out of employment in accordance with the Act. In this case there was a thick metal strip which constituted a hazardous condition in the walkway designated for employees. The Appellate Court found that the Commission's decision that her injury arose out of her employment was not against the manifest weight of the evidence.

The university next argues that the Commission's findings that the Petitioner's condition was causally related to her injury was against the manifest weight of the evidence. The claimant had a pre-existing knee condition and failed to support her claim with expert medical causation testimony. The Appellate Court disagreed. It held:

> A claimant's testimony standing alone may be sufficient to support an award of benefits under the Act. Seiber v. Industrial Commission, 82 Ill.2d 87, 97 (1980). Medical testimony is not essential to support the conclusion that an accident caused a claimant's condition of ill-being. International Harvester v. Industrial Commission, 93 Ill.2d 59 (1982). Circumstantial evidence can be sufficient to prove a causal nexus between an accident and the claimant's injury…The claimant testified that she had no 'problems' with her knee from the time that she last saw (her doctor) on September 13, 1999, and the date of her accident on December 18, 2000. She stated that, at the time that she began working for the university, she was not experiencing any stiffness or pain in her right knee. (365 Ill.App.3d at 912-3).

The Appellate Court concluded that the Petitioner's testimony and records of her medical treatment provide sufficient circumstantial evidence to support the Commission's conclusion that her condition of ill-being was causally related to her accident.

VIII -
ARISING OUT OF AND IN THE COURSE OF - EMPLOYEE/EMPLOYER RELATIONSHIP

Roberson v. Industrial Commission, 225 Ill.2d 159 (2007)

In Roberson v. Industrial Commission, 225 Ill.2d 159 (2007), the claimant, a truck driver, filed a claim for benefits under the Workers' Compensation Act claiming he injured his back while unloading a truck. An Arbitrator denied the claim but the Industrial Commission reversed and awarded benefits. The Circuit Court reversed the Commission and denied benefits. The Appellate Court reversed the Trial Court and awarded benefits. The Supreme Court affirmed that award.

The Supreme Court reviewed the evidence of causal connection and found that the Commission's determination that the claimant's back injury arose out of and in the course of his employment was

not against the manifest weight of the evidence. The Court held that the Industrial Commission's conclusion that the Petitioner's injury arose out of his employment was supported by the claimant's testimony, a detailed account of the accident, a consistent history offered to his treating physicians and in the emergency room, and the notice that he gave to the trucking company. Interestingly, the Supreme Court found that a medical notation indicating that that Petitioner "slept" in his truck was probably a transcriptional error for "slipped" in his truck.

The main issue in the case was whether the Petitioner was an employee or independent contractor. The Supreme Court's opinion contains an excellent review and summary of employee/employer law and a lengthy review of specific facts in the case. It reaffirms that employment is a decision within the province of the Industrial Commission to be determined by the preponderance of the evidence and fact determinations should not be set aside unless "no rational trier of fact could have agreed with the agency" (225 Ill.2d at 173).

The Court found that the Commission's decision finding that the driver was an employee was not against the manifest weight of the evidence even through there was an "independent contractor contract".

The Supreme Court reviewed at some length the history of employee and independent contractor arrangements in the trucking industry and reviewed Federal legislation and regulation enacted over the past 50 years to address the efforts by motor carriers to shield themselves from liability. The Court noted that the primary intent of those Federal regulations was to "[prevent] motor carriers from escaping liability to injured persons by claiming that their drivers were independent contractors rather than employees". 225 Ill.2d 177.

The Court noted that Federal regulations required a motor carrier to exercise exclusive possession, control, and use of leased equipment, like an operator owned and leased truck. The Court noted that while those Federal regulations do not "mandate that the driver is an employee for all purposes" (225 Ill.2d at 178), those contracts and the "exclusive possession, control, and use" requirements of Federal law "may be considered in a common law analysis of whether a driver is an employee of a trucking company" 225 Ill.2d at 178-9.

After a close evaluation of the evidence, and an admonition that the question was whether or not the Commission properly filed

one line of precedent or another, the Court restated its standard of review: "The question is whether the Commission's decision was against the manifest weight of the evidence." (225 Ill.2d at 184). The Court found that the evidence was balanced and therefore the decision was not against the manifest weight of the evidence. The Court cited A. Larson & L. Larson, Workers' Compensation Law § 61.07(5) at 61-21 (2006): 'There is a growing tendency to classify owner drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business.'

IX -
VOLUNTARY/RECREATIONAL ACTIVITY

Pickneyville Community Hospital v. Industrial Commission, 365 Ill.App.3d 1062 (5th D. 2006)

In Pickneyville Community Hospital v. Industrial Commission, 365 Ill.App.3d 1062 (5th D. 2006), the Commission had awarded claimant benefits when he suffered an intercerebral hemorrhage and stroke while giving a speech at a retirement dinner. The Appellate Court confirmed, noting that the record supports a finding that the claimant was ordered or assigned not only to attend the event but to speak. The Court reviewed the evidence establishing that the undertaking was an assignment rather than voluntary.

The Court also reviewed the medical evidence of causation and found that the Commission's decision was not against the manifest weight of the evidence.

> One can easily believe that the claimant did not want to present a toast. Fear of public speaking is a common phenomenon. Given this, it is not difficult to accept that claimant was assigned the speech. The determination of this issue rests on an assessment of workplace culture and the credibility of witnesses. These are questions of fact best decided by the Commission. (365 Ill.App.3d at 1072).

X -

AGGRAVATION OF PRE-EXISTING CONDITIONS - SECTION 12 OBJECTIONS - PROSPECTIVE TREATMENT

Certified Testing v. Industrial Commission, 367 Ill.App.3d 938 (4th D. 2006)

In Certified Testing v. Industrial Commission, 367 Ill.App.3d 938 (4th D. 2006), the Appellate Court reviewed the law of pre-existing injuries:

> Employer's arguments misses the mark. Claimant admitted having prior knee problems; however, he testified that his knee problems worsened significantly after he experienced a burning sensation in his knee while descending a ladder. Employer does not address the well-settled principle that aggravations of pre-existing injuries are generally compensable. 367 Ill.App.3d 945.

The Appellate Court reaffirmed the deference to Commission decisions regarding credit due the Petitioner's testimony as well as credit due the testimony of treating physicians. The Appellate Court dispensed with Respondent's argument that a physician's opinion based on arguably false information must be rejected.

Finally, the Appellate Court addressed Respondent's claim that opinions from Petitioner's examining physician were not fully disclosed in accordance with the requirements of Section 12. The Appellate Court rejected Respondent's assertion that under Ghere v. Industrial Commission, 278 Ill.App.3d 840, undisclosed opinions from an examining physician are not admissible into evidence:

> "It was reasonable for the Commission to find that Dr. Watson's deposition testimony was a natural continuation of the opinion in his narrative report and that his opinion, that claimant's condition would restrict his ability to perform his job as a sheet metal worker, did not come as a surprise to employer. Thus, we conclude that the Commission did not abuse its discretion in overruling employer's Section 12 objection." (367 Ill.App.3d at 948)

Finally, the Appellate Court held that where a matter involves a Section 19(b) Petition, an employer may challenge the cost and

necessity of a prospective surgery in subsequent proceedings (367 Ill.App.3d at 948).

XI -
CAUSAL CONNECTION AND PRE-EXISTING CONDITIONS
St. Elizabeth Hospital v. Workers' Compensation Commission, 371 Ill.App.3d 882, (5th Dist. 2007)

In St. Elizabeth Hospital v. Workers' Compensation Commission, 371 Ill.App.3d 882, (5th Dist. 2007), the claimant had episodes of pre-existing back pain and evidence of pre-occurrence degeneration in his back. The Petitioner slipped while working for the Respondent and felt an onset of pain in his back. He continued to have symptoms which progressed over the coming months. He ultimately underwent spine surgery approximately seven months later.

The employer introduced testimony and reports from two IME doctors and claimed that the Petitioner's need for surgery stemmed entirely from the pre-existing condition.

The Appellate Court rejected the employer's argument noting that the Arbitrator and the Commission expressly found that the IME doctors lacked credibility, and "This finding makes [employer's] reliance on these two opinions dubious." 371 Ill.App.3d at 889. The Court noted that the employer's argument rested largely on challenging the Commission's findings that a treating physician was credible and IME doctors were not. The Court confirmed that making those determinations was for the Commission and not for a Court of review.

XII -
EXCLUSIVITY AND BORROWED LOANED EMPLOYEES
Behrens v. California Credit Company, 2007 WL 1598586 (1st D. 2007)

In Behrens v. California Credit Company, 2007 WL 1598586 (1st D. 2007), the Appellate Court for the First District held that one employee assigned to a borrowing employer from one temporary agency could not bring a tort action against another loaned employee or that separate loaning temp agency. The Court held that for purposes of exclusivity provision of the Workers' Compensation Act, finding that doctrine of respondeat superior shifted liability for alleged negligence of a temporary employee from the Defendant temporary employment agency to the borrowing employer. If an employee is a borrowed servant at the time of an allegedly tortious act, the loaning employer can escape

liability for the conduct because the employer who has borrowed the employee has assumed liability in respondeat superior for the actions of that employee.

XIII -
BORROWED LOANED EMPLOYEES
Surestaff Inc. v. Azteca Foods, Inc., 2007 WL 1828551 (1st D. 2007)

A loaning employer sued a borrowing employer to recover workers' compensation benefits paid by the loaning employer. At issue were jury instructions. The Appellate Court held that an oral agreement whereby a temporary employment agency, as loaning employer, agreed to pay workers' compensation benefits for its loaned employees was an "agreement to the contrary" under Workers' Compensation Act which waived the agency's right to reimbursement from the borrowing employer for benefits paid. (820 ILCS 305/1(a)(4)).

XIV -
EXCLUSIVE REMEDY, EMPLOYER/EMPLOYEE, AND JUDICIAL ESTOPPEL
Townsend v. Fassbinder, 72 Ill.App.3d 890 (2nd D. 2007)

In Towsend v. Fassbinder, 72 Ill.App.3d 890, a painter fell and sustained injuries while painting a home. He filed a common law negligence and premises action against the owner of the home and against the general contractor which was the homeowner's company. A verdict was returned for the Plaintiff. Defendant appealed.

The general contractor claimed that the Plaintiff should have been judicially estopped from pursuing a common law action against them because he had collected workers' compensation benefits. Noting that the Plaintiff claimed he was employed by a different employer, and further noted that an employee may file a common law action against an employer though he has already filed a workers' compensation claim in order to toll the statute of limitations on an uncertain civil action the Court rejected the claim of judicial estoppel. The Court noted that the general contractor took the position before the Industrial Commission that the Plaintiff was not its employee and in the civil action claimed that it could not be sued under common law because of exclusivity. The Court noted that it was the general contractor's burden to prove the affirmative defense that Steve was its employee on the day of the accident and that the jury's verdict showed that the Defendant did not meet that burden: "If Defendants had submitted to the jury a special interrogatory

asking if Steve was employed by United on the date of the accident, as the Trial Court recommended, and the jury had affirmatively answered it, then Defendants might have a legitimate argument that the judgment was an error. However, Defendants did not submit a special interrogatory on this point. We fail to see how Defendant can claim that United was Steve's employer, given the verdict against them." 372 Ill.App.3d at 900.

The Appellate Court also rejected the general contractor's argument that the Trial Court erred in refusing a tendered instruction on the affirmative defense of employment. The non-pattern instruction stated that the Defendant had the duty of proving two elements: (1) that Plaintiff was the general contractor's employee and (2) that Plaintiff collected workers' compensation benefits. The Court rejected that proposed instruction as an improper statement of the law:

> The proffered instruction would not have fully and comprehensively informed the jury of the relevant principles of the law. The proffered instruction completely misstates the law and is far more objectionable than the instruction offered in Derosa (v. Albert S. Amling Co., 84 Ill.App.3d 64).

XV -
EXCLUSIVITY
Martinez v. Gutmann Leather, LLC, 372 Ill.App.3d 99 (1st D. 2007)

In Martinez v. Gutmann Leather LLC, 372 Ill.App.3d 99 (1st D. 2007), the Appellate Court held that a dispute between an employee and co-worker was personal in nature and therefore a wrongful death tort claim against the employer was not barred by the exclusivity provision of the Workers' Compensation Act. The Court held that although a fight occurs on the employer's premises, resultant injuries are not compensable under the Workers' Compensation Act if the dispute is not connected with work.

XVI -
WAGE DIFFERENTIAL, BONDS, COMMISSIONERS
Morton's of Chicago v. Industrial Commission, 366 Ill.App.3d 1056 (1st D. 2006)

In Mortons of Chicago v. Industrial Commission, 366 Ill.App.3d 1056 (1st D. 2006), the Petitioner was awarded a wage

differential. Both parties filed a Petition for Review and the Commission modified the decision of the Arbitrator by increasing the wage differential benefits.

The Court held that the form of the bond was adequate even though it did not contain specific terms mandated by Section 19(f): "Absence of an undertaking to pay the award and costs does not render Mortons' bond ineffective. When a bond is required by statute, the statutorily terms are read into the bond, regardless of whether the bond actually contains those terms." 306 Ill.App.3d 1060-61.

The Appellate Court went on to find that the Commission's decision granting a wage differential award was not against the manifest weight of the evidence. A wage differential award requires a claimant to prove (1) partial incapacity preventing her from pursuing her usual and customary line of employment and (2) an impairment of earnings. The Respondent argued that the employee had not sustained her burden of proving an impairment of earnings. The claimant introduced evidence of pre-accident earnings from herself and her co-employees showing that there was a small variance in their incomes. She then offered evidence of her co-employee's current income and her relatively lower income at the job she took subsequent to her injury. The Appellate Court stated "Based on (her co-worker's) wage increase and the average wage increase for services at Mortons, we conclude that the Commission could reasonably infer that the claimant's salary would have increased 13% from 1998 to 2000. Accordingly, the Commission's decision to award the claimant wage differential benefits was not based upon conjecture or speculation and is not against the manifest weight of evidence." (366 Ill.App.3d at 1062).

XVII - WAGE DIFFERENTIAL

Taylor v. Industrial Commission, 372 Ill.App.3d 327 (4th D. 2007)

In Taylor v. Industrial Commission, 372 Ill.App.3d 327 (4th D. 2007), an Arbitrator made a wage differential award. The claimant sought review and the Commission reduced the amount of the award to 2/3 of the difference between the claimant's average weekly wage for the year preceding the injury and his current earnings. There was no factual dispute on appeal but only a dispute as to the inferences to be drawn from undisputed facts. First the Appellate Court held that the decision of the

Commission would not be disturbed unless it was against the manifest weight of the evidence.

The claimant in the case asserted that it was error for the Commission not to use the earnings of the laborer who replaced the claimant after the injury. The Commission found that it would be too speculative to assume that the claimant would have continued to work more lucrative delivery routes for the Respondent: "Here the question is not only the rate of pay the claimant would have made, but whether he would have continued to be chosen to work the more lucrative routes." (372 Ill.App.3d at 330). The Appellate Court found that the Commission's decision was not against the manifest weight of the evidence.

XVIII -
PERMANENT TOTAL DISABILITY BENEFITS
City of Chicago v. Illinois Workers' Compensation Commission, 2007 WL 1544178 (1st D. 2007)

In City of Chicago v. Illinois Workers' Compensation Commission, 2007 WL 1544178 (1st D. 2007), the Appellate Court for the First District addressed proof and burden shifting in permanent total disability and odd lot cases. First, the Appellate Court rejected the Respondent's argument that an odd lot award is subject to de novo review by the Appellate Court. The Appellate Court explained why odd lot determinations are not set aside unless they are against the manifest weight of the evidence.

In an odd lot permanent total case a Petitioner must do more than make a *prima facie* case of odd lot disability. Rather, the employee must initially establish by a preponderance of the evidence that he falls within odd lot disability. When the employee establishes odd lot disability "by a preponderance of the evidence", the burden then shifts to the Respondent to show the employee is employable.

The question of whether or not the preponderance of evidence establishes odd lot disability **AND** whether there is evidence to establish the employee is employable are both fact questions. They will not be disturbed unless they are against the manifest weight of the evidence. The Court noted that odd lot can be proven in one of two ways. The claimant can present evidence of a diligent or unsuccessful attempt to find work. The only other way to demonstrate odd lot status is to show that because of age, skill, training, experience and education, he will not be regularly employed in a well-known branch of the labor market. The Petitioner offered no evidence of a job search but the

Industrial Commission - and the Appellate Court - found the testimony of vocational counselors sufficient to support the Commission's decision.

XIX -
ODD LOT DISABILITY - JOB SEARCH, SECTION 12 REPORTS AND HEARSAY
Westin Hotel v. Industrial Commission of Illinois, 372 Ill.App.3d 527 (1st D. 2007)

In Westin Hotel v. Industrial Commission of Illinois, 372 Ill.App.3d 527 (1st D. 2007), the Appellate Court addressed the admissibility of IME reports. The Court affirmed prior Appellate decisions finding that a party's independent medical expert is not per se an agent of the party who hired him and, therefore, the expert's opinions are not admissible as admissions against that party's interest. The Court went on to state, however, that the error in admitting the IME report did not require reversal. An examination of the record as a whole indicated that the IME report was cumulative, contained no unique information, and did not prejudice the objecting party: "The Commission's finding as to causation was sufficiently supported by other competent evidence so as to render the admission of (the IME report) harmless." 372 Ill.App.3d at 537.

The Court also addressed, and reversed, the finding that the Petitioner had proved that he was odd lot permanently disabled. The Court reviewed the requirements for establishing odd lot permanent total disability, stating:

> If the claimant's disability is limited in nature so that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove by a preponderance of the evidence that he fits into the 'odd lot' category - one who, though not altogether incapacitated to work - is so handicapped that he will not be employed regularly in any well-known branch of the labor market…The claimant ordinarily satisfies his burden of proving that he falls into the odd lot category in one of two ways: (1) By showing diligent but unsuccessful attempts to find work or (2) By showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market.
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> Claimant did not present any evidence that he conducted any job search. Moreover, the only witness to testify regarding claimant's unemployability was Dr. Coe, a specialist in occupational medicine. Dr. Coe testified that, to a reasonable degree of medical certainty, claimant is permanently and totally disabled from gainful employment. Dr. Coe's opinion was based on the history he took from claimant, claimant's symptoms, claimant's medical records, and Dr. Coe's physical examination of claimant. However, merely proffering medical evidence of permanency is insufficient to shift the burden to the employer...Indeed the most recent cases making an odd lot determination on the basis that there is no stable job market for a person of the claimant's age, skills, training, and work history have required evidence from a rehabilitation service provider or a vocational counselor...As far as we can tell, Dr. Coe had not ordered or reviewed any vocational rehabilitative tests, conducted a labor market survey on claimant's behalf, attempted to find claimant a position within his restrictions, or prescribed a functional capacities evaluation...In sum, since claimant presented neither evidence of a diligent but unsuccessful job search nor expert vocational testimony regarding the job market for someone of his age, skills, training, and work history, we hold that the Commission's finding that claimant proved odd lot permanent disability status was against the manifest weight of the evidence. (372 Ill.App.3d at 545).

It is important to note that the Arbitrator and Commission awarded permanent total disability benefits based on "odd lot" status. The order did not state that the Petitioner was physically permanently and totally disabled. The First District held that to prove odd lot one cannot just rely on medical evidence but also must introduce evidence relating to his work skills and capacity and the available labor market.

XX -
19(b) PROCEEDINGS - 19(g) ENFORCEMENT
Aurora East School District v. Dover, 363 Ill.App.3d 1048 (2nd D. 2006)

In Aurora E. School District v. Dover, 363 Ill.App.3d 1048 (2nd D. 2006), the Commission held that a decision on a 19(b) Petition can be reduced to judgment under Section 19(g) of the

Act even if PPD or 8(j) issues remain pending. Only full tender of a Commission award is a defense to a 19(b) judgment.

XXI -
MODIFICATION AND ENFORCEMENT SECTION 19(G)
Gurnitz v. Lasits-Rohline Service Inc., 368 Ill.App.3d 1129 (3d D. 2006)

In Gurnitz v. Lasits-Rohline Service, Inc., 368 Ill.App.3d 1129, the Petitioner filed a Complaint in the Circuit Court seeking modification of the Commission's decision pursuant to Supreme Court Rule 369. The Respondent filed a Motion to Dismiss challenging the applicability of Rule 369 and claiming lack of subject matter jurisdiction. The Plaintiff asked for leave to file an Amended Complaint citing Section 19(g) of the Workers' Compensation Act (820 ILCS 305/19(g)) rather than Rule 369. The Court denied the claimant's Motion to Amend and dismissed the Plaintiff's Complaint for lack of subject matter jurisdiction. The Court noted that while Section 19(f) is the statutory provision providing for review of the Industrial Commission's decision, Circuit Court still could clarify the Commission's Order in a 19(g) Petition. The Court held that in a 19(g) Petition the Court could make a determination as to the Arbitrator's intent when it entered an award even if the award was equivocal.

The Court went on to find that because the Court had jurisdiction under Section 19(g) to interpret the Arbitrator's award, the Court abused its discretion in failing to allow the Plaintiff to amend its Complaint and pursue 19(g) relief.

XXII -
19(h) PETITION
Behe v. Industrial Commission, 365 Ill.App.3d 463 (2d D. 2006)

The Petitioner filed a first 19(h) Petition alleging a recurrence or increase in compensable injuries. The first Petition was denied. After the 30 month (now 60 month) time period expired, Petitioner filed a Section 19(h) Petition arguing that the decision on the first 19(h) Petition effectively tolled the limitation period.

The Appellate Court noted that in the case of Hardin Sign Company v. Industrial Commission, 154 Ill.App.3d 386 (1987), the Court had held that a successive 19(h) Petition filed outside the 30 month limitation period is permitted if an award is

granted for a change in circumstances on a previous 19(h) Petition. The Hardin Court found that an award on a 19(h) Petition was an "award" triggering a new 30 month requirement. The Behe Court held, however, that the denial of a Section 19(h) Petition does not toll the 30 month limitation requirement. As such, a second 19(h) Petition after the denial of a first 19(h) Petition was untimely.

XXIII -
BONDS

Unilever Best Foods North America v. Illinois Workers' Compensation Commission, 2007 WL 1757151 (1st D. 2007)

The employer sought judicial review of a Commission award and filed a bond executed by a law firm associate. The employer also filed a statement of authority in support of bond pursuant to which a corporate manager stated that its Attorney Slevin was authorized to sign its bond. The Court held that the statement of authority did not allow the associate to execute the bond. It noted that in previous cases: "We sanctioned a procedure by which a corporation was able, after the expiration of the 20 day statutory review period, to identify the individual that signed an appeal bond on its behalf as an officer of the corporation. We have never authorized a Plaintiff in a judicial review proceeding under the Act to submit evidence after the expiration of the review period establishing that its attorney was authorized to execute a bond on its behalf." 207 WL 1757151, P.3.

Evidence of an attorney's authority to execute a bond on behalf of a Plaintiff must be filed before the expiration of the 20 day statutory review period. A bond must be executed by the specific attorney so authorized.

XXIV -
SETTLEMENT CONTRACT

Kinn v. Prairie Farms, 368 Ill.App.3d 728 (2nd D. 2006)

The employer and employee agree to settle a workers' compensation claim after which the employee discovered a medical bill remained unpaid. He brought an action in the Circuit Court to rescind the settlement agreement. The Court noted that neither party sought review within 20 days and, therefore, the Circuit Court lacked the power to review the settlement unless there was fraud. The Appellate Court rejected any suggestion of equitable or legal authority for the Appellate Court to rescind

a settlement when no review was sought within 20 days after approval.

The Plaintiff also alleged fraud asserting that Defendant had Plaintiff's medical bills and never advised the Plaintiff that they were unpaid or disputed.

The Appellate Court rejected the Plaintiff's argument that he was a victim of fraud because "Plaintiff simply has failed to allege that the Defendant knowingly made a false statement of material fact." 368 Ill.App.3d at 733.

In essence, the Court held that the burden is on the claimant to establish the status of his medical bills at the time of settlement.

XXV -
SECTION 1 - SETTLEMENT CONTRACTS AND SECTION 5 LIENS -
Gallagher v. Lenart, 2007, WL 2264641 (Ill.2007)

The Supreme Court affirmed the Appellate Court's decision that in order to wave Section 5 lien rights, the parties must expressly include that waiver. The Appellate Court stated that "based upon the protections of the Act and general contract principles, such a waiver of a workers' compensation lien must be more explicitly and affirmatively stated in a settlement agreement and cannot simply be implied by a lack of any reference to that lien." 367 Ill.App.3d at 302-03. In reaching that decision the Appellate Court refused to follow Borrowman v. Prastein, 356 Ill.App.3d 546, 2005.

The Supreme Court noted that, after leave to appeal had been granted, the Second District handed down a similar decision in Harder v. Kelly, 369 Ill.App.3d 937 (2007) stating "We find the reasoning in Gallagher persuasive and we chose to follow that decision rather than Borrowman. Like the Court in Gallagher, we see no reason under the Act or general contract principles why an employer should be required to include an affirmative reservation of rights in a settlement agreement when there is nothing in the agreement otherwise suggestive of an intent to waive the right (369 Ill.App.3d at 943)".

The Supreme Court agreed with both Appellate Courts and held that in order for an employer to waive its lien under Section 5, the Court must consider whether the language of the contract is sufficient to show a specific intent to waive a lien: "Even if the language of the settlement contract did constitute a general

release, it would not be sufficiently explicit to waive Rail Terminal's workers' compensation lien. Considering the integral role the workers' compensation lien plays in the workers' compensation scheme, we do not believe general language is sufficient to effect such a waiver. On the contrary, the waiver of a workers' compensation lien must be explicitly stated."

This decision is consistent with another decision of the Appellate Court for the Fifth District, Burgess v. Brooks, 2007 WL 1488082. In Burgess, the Appellate Court for the Fifth District also followed the Gallagher rationale but held "The settlement agreement in the case at bar does contain an explicit and affirmative waiver of the State's lien rights." The settlement language at issue stated as follows: "Each party waives any right to ever reopen this claim under any Section of the Act."

XXVI -
LIENS IN CIVIL CASES

Crispell v. Industrial Commission, 369 Ill.App.3d 1022 (5th D. 2006)

In Crispell v. Industrial Commission, 369 Ill.App.3d 1022, the Appellate Court held that payments for prosthetic related expenses and for statutory medical expenses under Section 8(a) of the Act qualified as payment of "compensation" within the provisions of Section 5 of the Act and should be included in an employer's lien against a third-party judgment.

XXVII-
THIRD-PARTY LIABILITY

Forsythe v. Clark USA, Inc., 224 Ill.2d 274 (07)

The Estate of deceased employees brought a wrongful death suit against their employer's parent corporation. The Supreme Court addressed two issues and held that a parent company can be held liable under a theory of direct participant liability, and further held that a corporation could not pierce its own corporate veil and extend employer civil immunity to a parent corporation. The Court stated "If there is sufficient evidence to show that a parent corporation directed or authorized the manner in which an activity is undertaken…a duty arises. Specifically, the duty to utilize reasonable care in directing or authorizing the manner in which that activity is undertaken. Accordingly, a parent corporation can be held liable if, for its own benefit, it directs or authorizes the manner in which its subsidiary's budget is implemented, disregarding the discretion

and interests of the subsidiary, and thereby creating dangerous conditions. In such situations parent Defendants will not be protected by the exclusive remedy provisions of the Workers' Compensation Act. 224 Ill.2d at 299.

XXVIII -
EXHAUSTION OF ADMINISTRATIVE REMEDIES
Nestle USA, Inc. v. Dunlap, 365 Ill.App.3d 727 (4th D. 2006)

In Nestle USA, Inc. v. Dunlap, 365 Ill.App.3d 727 (4th D. 2006), an employer brought an action seeking declaratory relief from a ruling by the Industrial Commission Arbitrator reinstating a workers' compensation claim and seeking to enjoin the Commission from further hearing Dunlap's claim. The Trial Court dismissed the Petition. The Appellate Court affirmed the dismissal. The Appellate Court held that the employer was required to exhaust all administrative remedies before the Industrial Commission. In this case, the Appellate Court agreed that the Circuit Court did not have original jurisdiction and that the employer was required to exhaust all administrative remedies by appealing to the Commission before seeking judicial review. That would give the Commission a chance to consider the arguments of the parties and make its own factual determinations and conclusions.

XXIX -
COLLATERAL ESTOPPEL
Mabie v. Village of Schaumburg, 364 Ill.App.3d 756 (1st D. 2006)

In Mabie v. Village of Schaumburg, 364 Ill.App.3d 756 (1st D. 2006), the Appellate Court held that a prior decision in a firefighter's workers' compensation case finding that his injury arose out of and in the course of his employment collaterally estopped his employer from re-litigating the issue of causal connection in the firefighter's action under the Public Employee Disability Act.

XXX -
INSURANCE COVERAGE AND COLLATERAL DECLARATORY JUDGMENT
Virginia Surety Company, Inc. v. Bill's Builders, Inc., 372 Ill.App.3d 595 (3rd D. 2007)

In Virginia Surety Company, Inc. v. Bill's Builders, 372 Ill.App.3d 595 (3rd D. 2007), an insurance company brought a declaratory judgment action in the Circuit Court seeking a determination that the Petitioner and the workers' compensation carrier was not covered under a workers' compensation policy.

The claimant was a one man carpenter contractor with no employees. The insurance company claimed that the Petitioner was excluded from coverage as a partner or officer of the insured entity.

The Court held that given the nature of the claimant's business, the Act automatically applied and that under the Act an employer can insure his work force but must cover all of the employees and his entire workers' compensation liability. Officers must be included in that coverage unless they elect to withdraw from the Act (see 820 ILCS 305/3(17)(b)). The Court interpreted that section of the Act as "merely requir[ing] that the corporate officer take affirmative action by making an election to be excluded from operation of the Act and that the insurance carrier be notified of the election in writing". 372 Ill.App.3d at 602.

The insurance company sought rescission of the insurance contract based on misrepresentation. The Court cited the Insurance Code for the proposition that no misrepresentation in a written insurance policy voids the policy unless it is made with actual intent to deceive or materially affects the acceptance of the risk or hazard assumed by the company (215 ILCS 5/154). The Court noted that there was no indication the claimant made a false statement for the purpose of obtaining insurance for an otherwise insurable risk.

XXXI -
SECTION 4 - INSURANCE, SELF-INSURANCE, AND INSOLVENCY FUND
Elsbury V. Stann & Associates, 371 Ill.App.3d 181 (1st D. 2006)

The Plaintiff was injured while working for a self-insured member of a pooled risk fund. The fund was liquidated and the Plaintiff filed an Amended Application naming the State Treasurer as a party pursuant to Section 4a(5) seeking payment of an award under the Group Self-Insured Insolvency Fund. In accordance with the Workers' Compensation Pool Law (215 ILCS 5/107a.01), the Petitioner began receiving medical and disability payments. Payments were terminated without notice five months after the expiration of the time to file a proof of claim against the liquidated trust.

Subsequently, an Industrial Commission Arbitrator ruled the Plaintiff was permanently and totally disabled and found that the Petitioner was entitled to disability payments under either the Pool law or its predecessor provisions in the Workers'

Compensation Act. The State represented that it could not pay the benefits because the self-insurer's fund and the insolvency fund were themselves insolvent. The Plaintiff filed a mandamus action to compel the State Treasurer to protect the State's insolvency fund by tendering to it her general bond. The Treasurer argued that the Plaintiff was not entitled to payment from the insolvency fund because he failed to timely file a claim against the trust during the liquidation proceedings. The Court held that the language of the Workers' Compensation Act and the Pool law specifically provided for the remedy that the Plaintiff sought, and that the insolvency fund and self-insured fund was always appropriated for the purpose of compensating employees who were eligible to receive benefits under the Act when a group self-insurer is unable to pay those benefits due to insolvency either before or after the date of the award. The Court held that "there is no condition precedent, expressed or implied, by the legislature in this text of the Statute that a worker participate in the liquidation proceedings in article XIII of the Insurance Code." 371 Ill.App.3 at 188.

On the issue of the Treasurer's Bond, the Treasurer argued that her duty was to protect the funds that were deposited in the Insolvency Fund and not to supply funds through her bond to the Insolvency Fund. The Court held that "based on the plain language of the Statute (Section 4(a) of the Act),…the legislature did not intend for the Treasurer's bond to simply protect the funds received from third parties, but to protect the fund in a manner that effectuates its intended purpose." (371 Ill.App.3d at 189)

XXXII -
FEDERAL PRE-EMPTIONS AND SECOND INJURY FUND
Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Commission, 37 Ill.App.3d 1117 (1st D. 2007)

In Federal Marine Terminals, Inc. v. Illinois Workers' Compensation Commission, 37 Ill.App.3d 1117 (1st D. 2007), the Petitioner was injured while working as a longshoreman and warehouse and cargo manager at a shipping terminal. The Petitioner filed a workers' compensation claim under the Illinois Workers' Compensation Act and was awarded permanent total disability benefits.

The Respondent argued that the Petitioner's claim was pre-empted by the Federal Longshore and Harbor Workers' Compensation Act, (33 USC Section 901, et seq.). The Appellate Court rejected the Respondent's claim, holding that as a result of certain

amendments to the LHWCA, Federal and State Courts had concurrent jurisdiction over land-based injuries on piers, wharfs, dry docks, terminal buildings, and similar structures which fall within the coverage of the Federal Act.

The Respondent next argued that the Petitioner's permanent and total disability resulted from "pre-existing conditions and his work-related accident." The Respondent argued that based on those pre-existing conditions the accident "by itself should not have caused significant injury." 371 Ill.App.3d 1126. Respondent therefore sought payment from the Second Injury Fund, claiming that the pre-existing conditions were a first injury. The Appellate Court rejected the Respondent's claim citing the Supreme Court's holding in State Treasurer of Illinois v. Industrial Commission, 75 Ill.2d 240:

> "Our Supreme Court interpreted (the Second Injury Fund) statute to mean that recovery under the Illinois Second Injury Fund requires that, prior to the most recent work-related injury, the claimant must have suffered the permanent and complete loss of the use of one member. In this case there was no such finding. Further, although the record reflects that the claimant's right hand was paralyzed as a result of a childhood injury, there is no evidence that the paralysis resulted in the complete loss of the use of the hand. The claimant testified that he could use his right hand to hold and lift objects…In the absence of evidence that the claimant had a pre-existing complete loss of use of his right hand, there is no basis upon which the Commission could have ordered a portion of the benefits paid from the Illinois Second Injury Fund." 371 Ill.App.3d at 1126-7.

The Appellate Court also upheld the Industrial Commission's reliance on medical testimony to make a finding of permanent total disability (371 Ill.App.3d at 1129-30) as well as the Commission's factual determination that the Petitioner's pre-existing condition was aggravated or accelerated by the work injury in question (371 Ill.App.3d at 1130).

XXXIII -
MAKEUP OF COMMISSION

Piasa Motor Fuels v. Industrial Commission, 368 Ill.App.3d 1197 (5th D. 2006)

In Piasa Motor Fuels v. Industrial Commission, 368 Ill.App.3d 1197 (5th D. 2006), the Appellate Court for the Fifth District rejected an employer's argument that a decision in favor of a claimant was void because Workers' Compensation Commission Chairman Ruth participated in the Commission's decision. The employer argued that Section 13 of the Act prohibits the Chairman from acting "in the determination of cases under this Act" (820 ILCS 305/13). The Appellate Court rejected the employer's argument, reading the statute as granting the Chairman authority to determine cases but withholding from him or her "final authority" thereunder. The Court noted that the Chairman sat with two other Commissioners who participated in the decision and, therefore, did not exercise "final authority" in the determination of the case.

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