Illinois Self-Insurers' Association

AUGUST 2022

FROM THE DIRECTOR'S DESK

By Keith Herman; Executive Director, Illinois Self-Insurers' Association

Welcome to the Illinois Self-Insurer's Association's August 2022 Newsletter. We hope you are having a great summer! By the time you receive our next publication, the smell of pumpkin spice and autumn leaves will fill the air, so take some time to enjoy the beautiful summer days while we still have them.

Looking forward to the fall, the ISIA's Annual Meeting and Educational Seminar will be on September 21, 2022 at the Hyatt Lodge in Oak Brook, Illinois. This year promises to be better than last year especially since we will be back to an in-person event. This is an election year for the Board of Directors. Details with the agenda will be sent via email and posted on the ISIA website.

The ISIA continues with its commitment to education through our "Lunch and Learn" webinar series. In June, we offered a presentation, Fact, Fiction, and the Future – The Truth about Medicare Compliance and Set-Asides. In July, we presented Illinois Employee Workers' Compensation Fraud. More webinars are planned, so check out our website. Webinars are free as part of your membership to the ISIA.

We are in the process of adding some additional resources for our valued ISIA members. We expect to roll out a member's bulletin board with opportunities for members to share ideas and request assistance from other members regarding workers' compensation.

In this edition of our newsletter, we again feature our updates from the Illinois Workers' Compensation Commission and from the legislature in Springfield. We are also pleased to provide a feature article on best practices in workers' compensation accident and claims investigation.

Medicare and Medicare Set Asides remain a significant part of the workers' compensation process. To supplement our recent webinar, we are providing additional information to better understand Medicare and its role in your workers' compensation cases.

Mr. Joe Belmonte of Vocamotive, a long-time ISIA associate member, provides some interesting data and insights into "gig" workers and the "gig economy."

The Appellate Court has been relatively quiet in publishing decisions involving workers' compensation cases. However, one recently published decision, *McDonald's v. Illinois Workers' Compensation Commission*, offers a reminder that the Commission and the courts will assess penalties and fees where compensation is denied without a good faith basis.

We also provide a summary of some Commission decisions. First, the interplay of the personal comfort doctrine and assessment of risk "post-McAlister" is addressed in the *Flint v. Dixon Direct, LLC* case. We also look at the Commission's assessment in *Connely v. North American Lighting, Inc.* as of whether an injured worker's attendance issues constitute a "refusal to work" for purposes of suspending TTD.

Thank you for your continued support of the ISIA. We value your membership!

UPCOMING events

MSK MANAGEMENT AND EARLY INTERVENTION

REGISTER NOW ›

Tuesday, August 23rd • 12:00 PM - 1:00 PM

Athletico's Workers' Compensation Manager, Matt Weirch, will review early intervention strategies to prevent OSHA recordables and how to decrease overall healthcare cost.

Strategies that will be discussed:

- Virtual Injury Screens
- OSHA first aid for MSK cases
- Ergonomics
- Case examples

REGISTRATION RATES:

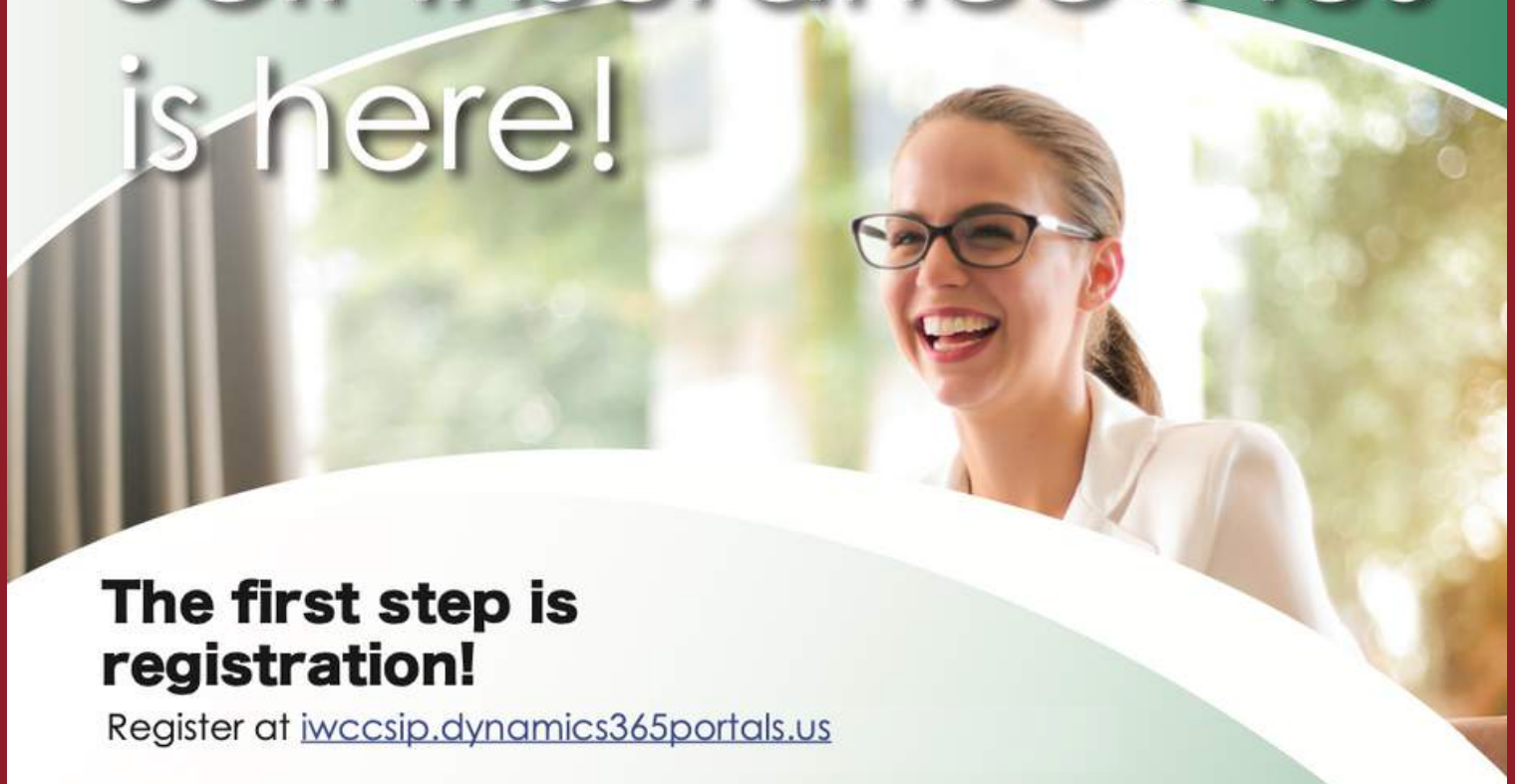
Free for ISIA Members! | $50 for Non Members

SPEAKER INFORMATION:

Matt Weirch, OTR/L, CEAS, MS
Work Comp Program Manager at Athletico in Kansas, Missouri & SW Illinois

Matt has ten years of experience in workers' compensation with emphasis in industrial rehabilitation, ergonomics, preventative wellness, mental health and program development. He earned his master's in Occupational Therapy from Washington University in St. Louis and undergraduate degree from St. Louis University. Matt works closely with employers to implement injury prevention services.

Self-Insurance Plus is here!



The first step is registration!

Register at iwccsip.dynamics365portals.us

Instructional materials available:

Visit the IWCC's Self-Insurance webpage: http://iwcc.il.gov/siplus to learn about registration and the IWCC's new electronic filing system: Self-Insurance Plus!

If your company is already registered in Self-Insurance Plus, but you are not registered yet yourself, contact your Self-Insurance Plus company administrator to add you to the company account and send you an invitation to complete registration. If you don't know who your company administrator is, contact the IWCC at the email below.

Self-Insurance Plus offers secure, continuous online access, immediate notifications, and the ease & efficiency of digital submission.

Contact: wcc.selfinsurance@illinois.gov

WHAT'S NEW AT THE ILLINOIS WORKER'S COMPENSATION COMMISSION?

The Workers' Compensation Commission continues to make changes and adjustments to ensure that the system is efficient and effective in resolving cases.The Commission has been working diligently to communicate changes to all stakeholders via email and postings on the Commission website, Chairman Brennan continues to meet with both sides of the Workers' Compensation Bar and encourages dialogue from the practitioners to improve the system.

The Illinois Workers' Compensation Commission 2021 Annual Report is now available. Please take some time to read through the data. Illinois continues to lead the surrounding states in duration of TTD weeks. Filed cases continue a downward trend.

Since our last update, there have been some additional changes at the Commission. For self-insureds, the Commission has announced that Self-Insurance Plus, the IWCC's new public web portal, is now accessible. Self-Insurance Plus will allow for filing and processing of all self-insurance documents electronically. Electronic filing will increase efficiency of the Commission by facilitating faster processing, providing continual access, and reducing storage and mailing costs. You can access Self Insurance Plus here.

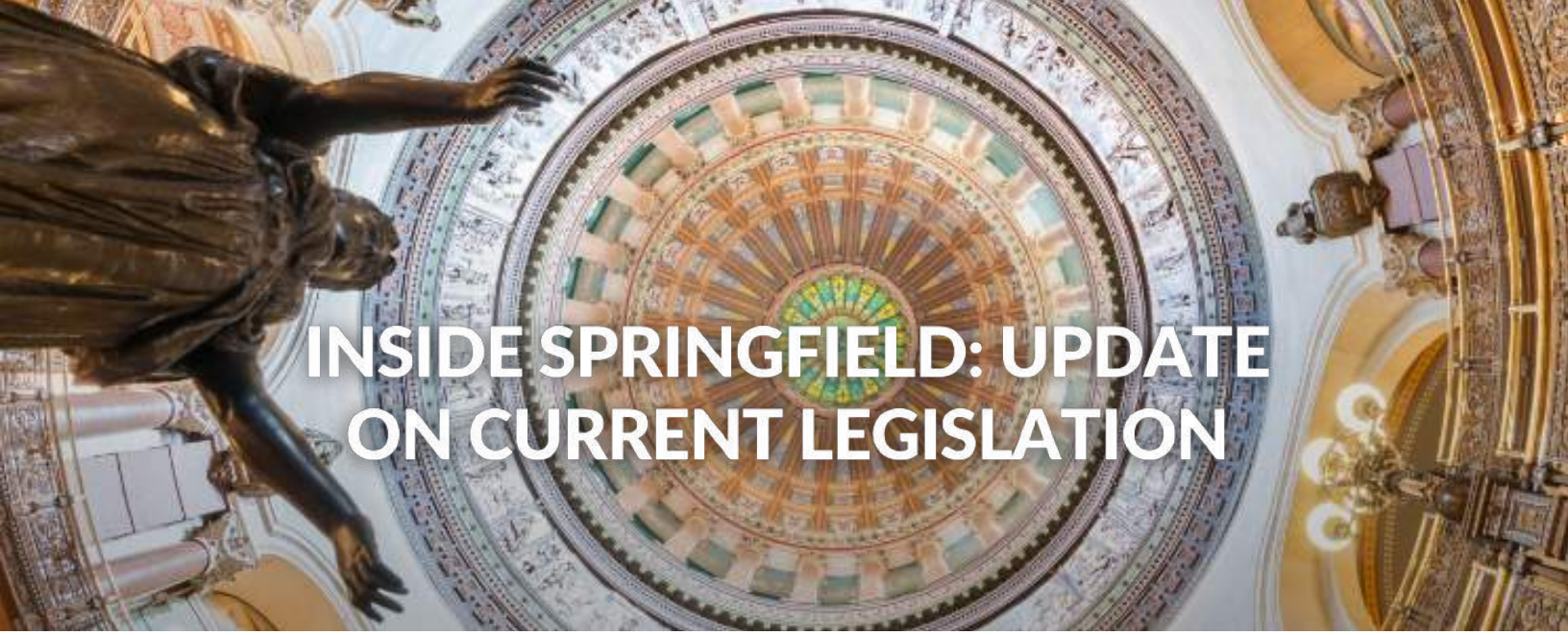
The CompFile system, which is the e-filing system for the Commission, has been up and running for some time. Through the efforts of the Commission staff, the CompFile system continues to improve and "glitches,"once identified, are promptly resolved. CompFile, like any other cyber program, could be susceptible to cyber-attacks. Proactively, the Commission, in partnership with the State of Illinois and its Department of Innovation and Technology, announced that effective July 20, 2022, all CompFile users are required to authenticate into the system using Okta Multi-Factor Authentication to enhance the security of the system and for the protection of its users.

In our last newsletter, we announced the Commission's Medical Fee Advisory Board passed an increase in evaluation and management ("E&M") codes. Effective September 1, 2022, there is a 15% increase for E&M codes to the workers' compensation medical fee schedule. This was a reduction from the initially proposed 30% increase.

The Chairman is working with the Arbitrators to improve efficiency and to ensure that arbitration decisions are issued promptly. The Commission recently updated the Arbitrator's calendars to balance out the time allocated for pretrials with time for writing decisions. Calendars are posted on the Commission website.

Oral arguments, at least in Chicago, are again proceeding "in person" before the Commission panels. Oral arguments in Springfield along with the Review Calls remain in a virtual setting.

The ISIA acknowledges the ongoing improvements and progress by the Illinois Workers' Compensation Commission under the excellent leadership of Chairman Brennan and the diligent efforts of the Arbitrators, Commissioners, and their staff.



INSIDE SPRINGFIELD: UPDATE ON CURRENT LEGISLATION

By: Daniel J. Ugaste; St. Rep. 65th Dist.

As I am writing this in the middle of summer, I am sure that to no one is surprised that there is not much to report. We ended Session early this year, in the first part of April. While the Speaker of the House could have called us back through the end of May without any drastic changes in the rules, now that we have hit the middle of summer, voting requirements change. The only way for a bill to take immediate effect is for a super majority to vote for the legislation. Otherwise, the earliest date legislation could take effect is the middle of next year.

Still, there have been rumblings about Governor Pritzker, along with Speaker Chris Welch and Senate President Don Harmon calling us back to Springfield for a Special Session. If we are called back to Springfield for a Special Session, we can only address those issues that they state will be covered in the Special Session.To date, we have only heard that they will most likely want to address social issues prior to the election. No firm date has been set but there is rumor of sometime in September.

One piece of news that I am happy to tell you about is that the Commission on Government Forecasting and Accountability reports that in addition to the excess revenue anticipated when the Legislature was in Springfield in April, the State of Illinois realized $1.8 billion in revenue above the anticipated amount by the close of the end of fiscal year '22. Fiscal year '22 ended on June 30. As such, Illinois has an extra $1.8 billion in its coffers. This news is, of course, always welcome news. Especially this year when state government failed to use the extra money in its possession prior to the end of the Legislature adjourning to completely pay off the debt incurred in the Unemployment Trust Fund as a result of the response to the pandemic.

As of March of this year, the Illinois Unemployment Insurance Trust Fund was $4.5 billion in debt to the Federal government. Instead of paying off the entire amount with the money it had, the State only allocated $2.7 billion and left the Trust Fund $1.8 billion in debt. Interest continues to accrue on the debt, which interest must be paid out of the General Revenue Fund, and still something must be done to pay the debt off. Currently in Illinois law, a "speed bump" exists that will increase taxes and decrease benefits to assist in paying off this debt. This would take place as of January 1, 2023, if the debt remains and the date for the speed bump stays in place. The last estimate I received was it would result in extra $400 million plus in taxes on job creators and approximately $300 million in benefit cuts to unemployed workers, until the debt is paid. Further-more, if the debt remains unpaid, employers will eventually face a FUTA tax penalty. This occurs when a debt is owed the US Government for unemployment insurance benefits, and it remains unpaid for an extended period. The latest estimate of this penalty would be $21 per year for every $7,000 of payroll an employer has. Also, the penalty will increase periodically the longer the debt remains unpaid. It is for this reason that I asked, along with another state representative, for the Governor, the Speaker of the House, and the Senate President to call us back for a Special Session specifically to address this issue and allocate the extra $1.8 billion in unexpected revenue received by the State to pay off this debt and prevent unnecessary benefit reductions, tax increases and interest payments. To date, I have not received a response from Governor Pritzker, Speaker Welch or Senate President Harmon.

BEST PRACTICES IN ACCIDENT INVESTIGATION & CLAIM DEFENSE - A SERIES: INITIAL INVESTIGATION

The best defense is a good offense. For those that may be unfamiliar, those words are not merely a catchy saying; instead, they are a quote from former World heavy-weight boxing champion Jack Dempsey who success-fully defended the title for over seven years. With an 80% win percentage over 85 fights and a 78% knockout rate in his wins, we, as Illinois workers' compensation defense attorneys, adjusters, risk managers, and business owners, would surely love to have a similar record of successfully managing a claim every time a new one came across our desks. Alas, unlike obtaining and defending a world heavyweight boxing title, workers' compensation claim management is rarely that easy. However, that does not mean there are no lessons to learn from the former champion of the sport known as "The Sweet Science."

Like boxing, to be world-class in Workers' Compensation claim management and defense requires building a solid foundation from day one. And while many areas of work comp claim management are without quest-ion more art than science, the basics of strong claim management and defense can be very systematic and almost scientific in structure.

The first step to building the foundation of effective claim management and, if needed, claim defense, is to develop an accident investigation process that is both assertive and action-oriented. It does not matter whether an employee has a questionable claim and less than stellar track record or if they have been with the company for multiple decades and are an integral part of your work family. An action-oriented investigation will help to either move the case along and help them get the treatment and benefits they deserve so they can get healthy and back to work as soon as possible. It will help you defend claims efficiently, accurately, and fairly across the board, ensuring that neither the business nor the injured employee's fellow coworkers bear the burdens of an unjust claim outcome.

With that in mind, there are several vital steps to consider when building the foundation of your accident investigation:

- **Freeze the Facts:** The sooner the facts are recorded, the more accurate and credible the recollections tend to be.
- **Take pictures of the area at issue:** Take photos of the accident site as soon as possible, documenting any areas inconsistent with the Claimant's report.
- **Secure and save any video evidence:** Make sure to check if there was a video from the time of the accident and if so, preserve the footage and save it so it is readily producible.
- **Identify witnesses and supervisors/ managers:** Quickly determine if any witnesses saw the alleged accident.
- **Gather statements as soon as possible:** Once you have identified witnesses, make sure to get a signed and dated written statement as soon as possible. A timely statement may rebut a later change in the accident history or help the witness later recollect what happened better.
- **Establish trust and communication with the injured employee:** An open line of communication tends to help the claim move faster and more efficiently, and lets the employee know he or she is valued.
- **Initiate Medical Care:** The sooner an injured employee seeks medical treatment, the better the overall expected outcome for recovery.
- **Identify any relevant preexisting condition/ injury, previous work injuries, or previously filed WC claims:** Investigate for prior workers' compensation claims, as well as previous injuries or preexisting conditions to the same body part.
- **Obtain Medical Records:** Pertinent medical records are crucial to successful claim management. And contain histories about the alleged accident and prior medical conditions. This applies to relevant medical records from prior injuries or conditions.

Remember that like a 12-round boxing match, an accident investigation does not end after Round 1. Accident investigation is an ongoing process that requires diligence, persistence, and execution from start to finish. It may require adjustments in strategy and action. Therefore, it is imperative to continually obtain updated claim information and medical records while being aware of changes in the case's underlying facts.

Be on the lookout for round 2 of this series to fortify world-class claim management and defense practices.

THE GIG ECONOMY AND NONSTANDARD WORK ARRANGEMENTS

By: Joseph Belmonte C.R.C., Vocamotive, Inc.

Self-insured employers can reduce workers' compensation spend up to 80% by strategically implementing injury prevention programs for their workforce. Selecting the appropriate strategy for your organization depends on several variables. The right approach provides a cost-effective solution Nonstandard workers are referred to by different names such as temporary help, contingent, part-time, on-call, direct hire, agency, contract, app-based, on-demand, freelancer, and gig workers.

According to the Illinois Department of Employment Security ("IDES"), "Gigs" are short-term assignments in which pay is generally determined by task or output rather than the number of hours worked. Employers who replace full-time workers with contract workers, or have simpler tasks being done by temporary workers are using the Gig Economy. Gig employees tend not to have predictable work, regular wages, or the same supervisor.

Many people associate the Gig Economy with jobs found on the Internet. Most frequently, we think of jobs with Uber and Lyft. However, it is estimated that these platforms account for only 0.5% of total employment in the United States and are a very small part of the Gig Economy though this segment is growing at a significant rate.

Benefits of the Gig Economy include flexible time schedules, ability to decide what type of projects or work to do, who to work with, and a low barrier to entry.

Drawbacks include the uncertainty of not having consistent work and stable income, lack of typical employee benefits such as health insurance, leave time, or a retirement plan, and not having a set work schedule. Other drawbacks include the need to work week-ends and holidays, and not being covered by typical labor laws such as unemployment insurance and the minimum wage.

Employers benefit from such relationships as a business that has up-and-down cycles can hire temporary and contract workers and then remove them from the payroll when business is slow, minimizing costs. According to IDES, data indicates employers may be expected to continue to move non-core jobs out of their businesses to focus on primary tasks in which they excel.

When the Bureau of Labor Statistics last studied this issue in 2005 it was reported alternative employment arrangements accounted for 10.1% of US employment. According to IDES, this had grown to 15.8% by 2015.

According to Bureau of Labor Statistics (BLS) news release for May 2017, 3.8% of workers (5.9 million people) held contingent jobs. These workers did not expect their jobs to last or reported that their jobs were temporary. Using three different measures, contingent workers accounted for 1.3% to 3.8% of total employment in May 2017. When the issue was last studied in 2005, all measures were higher, ranging from 1.8% to 4.1% of employment. A 2013 NIOSH study estimated 18.7% of adults were working in nonstandard arrangements.

> Workers in alternative arrangements remain less likely than workers in traditional arrangements to have employer-provided health insurance...

The Gig Economy and Nonstandard Work Arrangements

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According to a 2017 article by the Centers for Disease Control and Prevention (CDC) by Dr. John Howard, estimates vary. Current estimates of the nonstandard workforce range from 8% to 18% of the total workforce. An accurate count of the size of the nonstandard workforce is difficult to obtain because of the nature of nonstandard work arrangements and the absence of a standard definition of nonstandard work.

DEMOGRAPHICS

Those between the ages of 55 and 74 are the primary drivers of growth. People working under alternative work arrangements are more likely to be older and more highly educated.

The number of workers in the 25-54 age group has also grown.

The share of females working under alternative arrangements rose from 8.3% in 2005 to 17.0% in 2015. Data indicate that temporary work is expanding to more types of jobs and for the total number of jobs.

Workers in alternative arrangements remain less likely than workers in traditional arrangements to have employer-provided health insurance. In May 2017, 41% of contract company workers had employer-provided health insurance, compared with 28% of on-call workers and 13% of temporary help agency workers. In contrast, 53% of workers in traditional arrangements received health insurance benefits through their employers.

HEALTHCARE AND INJURIES

For decades, most workers had one full-time job working for one employer. Current labor laws are based on this concept. However, many independent workers lack access to basic protections such as unemployment insurance, workers compensation, and disability insurance.

According to Dr. Howard, "A significant challenge facing nonstandard arrangement workers and their job providers is determining which entity, if any, is responsible for providing various job protections to workers. Two questions often arise. First, is a nonstandard worker an employee or an independent con-tractor? Employers often label workers as independent but increasingly those labels are being challenged. Second, when a worker is hired by one employer--often a staffing agency--when is the host employer jointly responsible with the staffing agency for ensuring compliance with labor and employment laws? Each law establishing labor standards relies upon a different test for who is an employer of an employee. As a result, an employer may be responsible for safety and health compliance and paying wages for a group of nonstandard workers, even if that employer is not responsible for providing health insurance or pension benefits to those workers."

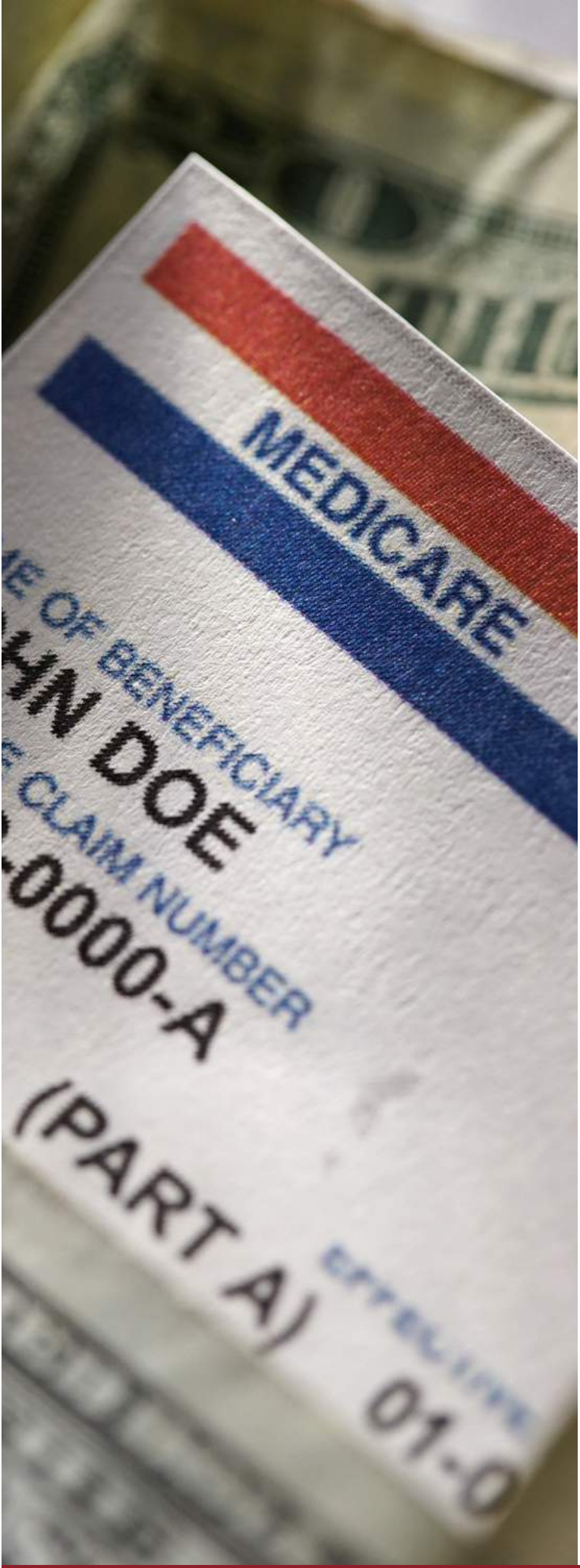
Dr. Howard reported data from literature reviews indicated increased risk of work-related injuries among contingent workers. workers. One study of agency and contract workers reported nonstandard workers had two times the rate of fatal and nonfatal work-related injuries than standard workers.

Illness outcomes were found to be greater for workers in nonstandard arrangements as well as increased illness morbidity which may be related to a lack of paid sick leave for nonstandard workers. Working while sick can increase risk of injury. In one study, workers with paid sick leave benefits were 28% less likely than workers without access to paid sick leave to sustain a work-related injury.

According to an August 2019 Bureau of Labor Statistics report, 12% of the 10,337 fatal occupational injuries nationwide for 2016-2017 were incurred by independent workers.

Studies indicate it may be helpful to increase safety focus when temporary workers are placed in high-risk industries such as construction, manufacturing, and agriculture.

In summary, the American workforce is subject to constant change as a result of technological development, changing demographics, and global economic conditions. This will present challenges in identifying health and safety risks to workers associated with nonstandard work arrangements and improving safety and health.



DON'T BE BESIDE YOURSELF OVER SET-ASIDES: THE TIMING AND STRATEGY OF WORKERS' COMPENSATION MSA'S

*By: Julie A. Garrison, JD, MSCC, CMSP (**Bio**)*

Americans are working longer and retiring later, but the Medicare entitlement age of 65 years has remained constant. As a result, the workforce includes many current Medicare beneficiaries and those who have a reasonable expectation of becoming Medicare beneficiaries within thirty months. When such individuals sustain work injuries, "workers' compensation" is the primary payer of related medical expenses and Medicare is secondary. In any settlement closing medical rights, Medicare's interests must be considered. A Medicare Set-Aside ("MSA") projects the cost of future medical care and is the CMS-accepted vehicle to protect Medicare's interests. However, too often an MSA is an afterthought and/or the cost of an MSA can be a roadblock to settling a claim. Proper planning will help reduce MSA costs and advance settlements.

IDENTIFY MEDICARE BENEFICIARIES AND OTHERS WITH REASONABLE EXPECTATION

Generally, MSA's are required for current Medicare beneficiaries and others who have a reasonable expectation of Medicare enrollment in the near future. The initial step is to identify injured workers who meet those criteria. Employers or their representatives are Responsible Reporting Entities ("RRE") for purposes of reporting to CMS workers' compensation claims brought by Medicare beneficiaries. Pursuant to Section 111 mandatory reporting, CMS has a query application whereby an RRE can verify a claimant is a currently enrolled Medicare beneficiary.

In addition, anyone over the age of 62-1/2 years has a reasonable expectation of Medicare enrollment/eligibility within 30 months. Claimants receiving Social Security disability benefits or in the process of applying for or appealing the denial of such benefits are in the reasonable expectation category. Having End Stage Renal Disease also establishes a reasonable expectation and accelerates Medicare entitlement.

MONITOR MEDICAL STATUS TO DETERMINE STRATEGY AND TIMING OF AN MSA

Once Medicare beneficiary or reasonable expectation status is confirmed, it is crucial to monitor a claimant's medical treatment throughout the life of a claim. Many claims will progress to physician discharge from active treatment with a claimant deemed at maximum medical improvement ("MMI").

Don't Be Beside Yourself Over Set-Asides: The Timing and Strategy of Workers' Compensation MSAs

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Generally, a physician finding of MMI presents an optimal time to obtain an MSA, though MMI does not mean no future treatment is indicated. In addition, an MSA considers the opinions of treating – primary and specialist – providers, so an MSA is ideally done when all treaters have stopped actively treating. In such circumstances, an MSA should provide for limited and/or palliative future care with periodic physician visits, repeat imaging, physical therapy for pain flare-ups and reinforce-ment of home exercises, and management of any medications.

Where all treaters state in writing that no future medical care is required for the work injuries, a medical zero MSA or waiver is indicated. Such physician statements are rarely provided but will support no MSA being needed. Physician statements might also be procured to exclude particular treatment such as surgeries casually discussed in medical records but not specifically recommended for future care. Securing these physician statements will lower MSA costs.

Some claims involve more complex medical conditions with significant ongoing and anticipated costs such as surgeries; spinal cord stimulator and pain pump implants along with associated maintenance and replacement; and other procedures. In such cases, it may be prudent to get an initial idea of future medical costs before a case is in a settlement posture and then strategize about excluding or minimizing expensive items and care. Ultimately, an MSA will focus on the last two years of treatment, which is not necessarily the past two calendar years, and has a six-month shelf life. So timing is important to avoid frequent and repeated MSA updates.

ADDITIONAL STRATEGIES AND CONSIDERATIONS

Another strategy is obtaining a rated age to shorten the period of years over which an MSA plan is projected. A rated age opinion considers history and treatment of co-morbid conditions as documented in medical records.

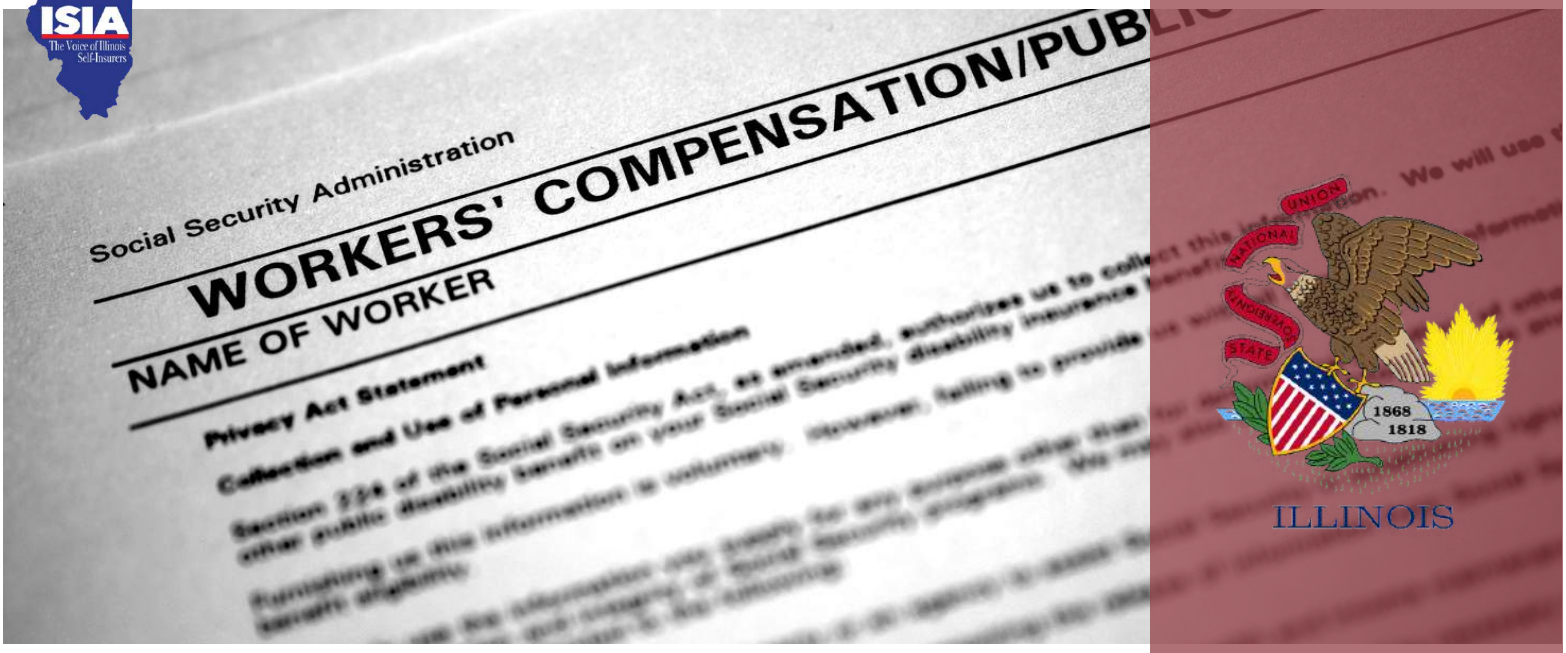
Throughout the process, regular communication among interested parties is key as information is regularly updated and cooperation is required in the MSA process. An MSA specialist should work with employers and their representatives regarding strategy and timing of an MSA. A claimant and his or her counsel often provide essential information and must ultimately sign off on any submission of an MSA to CMS for approval. Nurse case managers and defense counsel can also assist in avoiding excessive future care.

Settlements that exceed CMS review thresholds ($25,000 for Medicare beneficiaries and $250,000 for those having a reasonable expectation) may be submitted to CMS for approval. Approval provides certainty regarding an Employer's or Insurer's liability for future medical care, but submission should be done at the optimal time to limit unnecessary treatment and costs.

Lastly, there are funding options with annuities often utilized for significant MSAs. An annuity is also advised where a claimant is unlikely to pursue projected and/or CMS-approved future care. In such cases, a reversionary interest could be included in settlement documents. Professional MSA administration is also available to ensure proper use of funds and compliance with spending guidelines.

One final point concerns "legal zero" MSA/waivers, which as of this writing, are still recognized by CMS. If a claim has been denied and disputed in its entirety with no payment of medical expenses or indemnity benefits, a legal zero is available. However, any settlement agreement must be tentative only with no employer responsibility or liability for past or future medical expenses. When submission thresholds are met, CMS' review contractor has become increasingly more reticent about approving legal zero MSAs.

In summary, once employers and their representatives acknowledge the mandate to consider Medicare's interests and to fund MSAs, the focus should turn to close monitoring of claimants' medical status and strategies aimed at limiting future medical costs. Such efforts can produce lower MSA costs and better settlements.



A CAUTIONARY TALE OF DENIAL; MCDONALD'S V. ILLINOIS WORKERS' COMPENSATION COMMISSION

The First District Appellate Court recently issued a cautionary opinion in its decision *McDonald's v. Illinois Workers' Compensation Comm'n*, 2022 IL App 1st (210928WC). While the underlying case facts are what you might expect to see in a workers' compensation case, the award of penalties and attorney fees following the employer's dispute of "accident", "causation" and "notice" may give pause when deciding what issues to place into dispute at trial.

THE BACKSTORY:

Claimant was a 21-year employee injured while trying to grab a box of meat from a top shelf. She alleged injuries to both shoulders, her back, and right hand. Claimant testified she immediately told her supervisors about the accident, and an ambulance was called. While she refused the ambulance, she did take herself to the hospital for evaluation.

A "Form 45" First Report of Injury was completed the date of the accident, and the evidence indicated that a file was "set up" a few days later. Claimant filed an Application for Adjustment of Claim 20 days after her accident, and the employer was provided notice of the filing the following day.

Two of the Claimant's three treating doctors opined her condition was directly related to the work injury. The employer sent the Claimant for two different Section 12 examinations, and both found she suffered injuries as a result of the accident that were causally related; albeit with some question as to the nature and extent of the injuries.

At trial, the employer disputed "notice", "accident" and "causation". Notice issues are often tied to accident issues. The employer reportedly contested notice because it contested whether an accident occurred. However, the employer presented no material evidence to rebut the accident. The owner of the business acknowledged Claimant suffered an accident; however, the Court acknowledged this was not necessarily dispositive.

The Arbitrator ruled in favor of the Claimant at trial and awarded 17.5% loss of use of a person. The Arbitrator also awarded to the Claimant penalties and attorney's fees pursuant to Sections 19(k) and 16 of the Illinois Workers' Compensation Act, respectively. The Commission essentially affirmed and adopted the decision, while correcting a clerical error and travel expenses.

"As a result of the pandemic, the Illinois Workers' Compensation Commission made many changes to ensure that the Commission remained open for business and to assist with streamlining cases for prompt resolution ..."

Cautionary Tale of Denial; McDonald's v. Illinois Workers' Compensation Commission

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THE PENALTIES AWARD

Section 19(k) of the Illinois Workers' Compensation Act allows an award of penalties where there has been any unreasonable or vexatious delay of compensation by the one liable to pay when the party does not present a real controversy but are "merely frivolous." Section 16 allows for attorneys' fees to be awarded as a penalty when a party has engaged in "frivolous defenses which do not present a real controversy."

The Appellate Court cited a few cases where fee and penalty awards were upheld, including *Residential Carpentry, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 975 (2009). In *Residential*, the employer asserted the claimant should have a rotator cuff surgery but did not require clavicle surgery at the same time. The Court noted both issues could be addressed during the same surgery and found it un-reasonable for the employer to suggest subdividing petitioner's body when that would not be in the normal course of medical practice. The Court upheld the award of fees and penalties under Sections 19(k) and 16.

In the present case, the Court noted penalties and fees under Sections 19(k) and 16 are intended to address deliberate conduct, or that which is undertaken in bad faith or for an improper purpose. The Court reviewed Illinois Supreme Court Rule 137, which provides that beliefs be formed after a reasonable inquiry as well as grounded in fact with a good-faith argument. The Court concluded "[T]here must be some legitimate purpose served by an employer's litigation tactics."

The Court, in upholding the award of penalties and fees, emphasized that the employer received appropriate and timely notice from the Claimant and presented no evidence to rebut the accident. The medical records, including the employer's Section 12 doctors, found the injuries causally related to the work accident. Accordingly, the employer had no legitimate basis to dispute "accident" and "notice". Further, there was no evidence presented to challenge the Claimant's report and the notice given. Therefore, the Court agreed with the Commission finding that the employer's actions were not reasonable given the facts and presented no real controversy. The Court upheld the award of penalties and fees.

THE "TAKE-AWAY"

Injured workers maintain the burden of proving all elements of the case, including "notice", "accident", and "causation". Where there are disputes on these issues, employers must investigate the allegations and present credible, materials evidence in rebuttal. Not every claimed "accident" is compensable. As a result of the pandemic, the Illinois Workers' Compensation Commission made many changes to ensure that the Commission remained open for business and to assist with streamlining cases for prompt resolution; either through trial or settlement. To take a case trial, the parties must first engage in a pre-trial with the Arbitrator and identify the real issues in dispute. The McDonald's case encourages the parties to work together professionally. Most importantly, this decision makes clear that any disputes be based on good faith to avoid the consequences of penalties and fees.

THE PERSONAL COMFORT DOCTRINE STRIKES AGAIN: EMPLOYER ACQUIESCENCE TRIPS-UP THE ACCIDENT DEFENSE

Employees often like to tend to personal matters while on a break or when their shift is nearing its end. This may include retreating to their personal vehicles to use the phone or warming up their car in cold weather. It is natural for the employer to believe that should the employee incur an injury during these breaks, the employer would not be held liable as a workers' compensation matter. However, the employer in *Flint v. Dixon Direct LLC* (30 ILWCLB 3 (Ill. WC Comm. 2021)) learned this is just the complete opposite.

In the *Flint* case, the Claimant was walking to a parking lot to warm up her car 15 minutes prior to the end of her shift when she tripped over a raised bolt in the floor causing her to fall onto the concrete surface. In denying the claim, the employer argued it should not be held liable because the accident occurred around the time her shift ended and that the Claimant was no longer in the scope of her employment. However, the Commission upheld the Arbitrator's decision finding in favor of the Claimant. The Commission agreed with the Arbitrator that the Claimant was in the scope of her employment by virtue of the Personal Comfort Doctrine. Although the Claimant's shift ended at 11:00 a.m. and the accident occurred at 10:45 a.m., the facts supported that the employer customarily permitted its employees to warm up their cars prior to the end of their shift.

According to the Act, to receive benefits for a work injury, the Claimant has to prove two elements: 1) that the accident arose out of and 2) in the course of the employment. The Personal Comfort Doctrine only applies to the "in the course of" element, which refers to the time, place and circumstances surrounding the injury.

The Personal Comfort Doctrine stands for the proposition that employees engaging in actions for their own personal comfort such as taking a break to eat or drink, seeking warmth or shelter, or using the restroom within their work hours and on the employer's premises, remain in the scope of the employment. Further, such actions are incidental to their employment. In considering the application of the Personal Comfort Doctrine, the Commission will consider evidence as to whether the employer regularly acquiesced in the practice, custom, or habit of allowing its employees to partake in such actions. An employer can rebut this doctrine by showing there was no acquiescence and that the employee's actions were unusual and unreasonable.

In *Flint*, the Claimant's immediate supervisor testified that employees would normally walk outside during their breaks, and he found nothing wrong with allowing Claimant to go out to warm her car. He also testified other employees did the same. Based on this testimony, the Arbitrator found that the employer was aware and acquiesced in the regular practice of allowing its employees to warm their cars while still on duty. Given these facts, as well as the fact the Claimant was still "on the clock", the Commission was satisfied that the Claimant's injuries occurred within the course of her employment.

Arguably, the Personal Comfort Doctrine expands the breadth of the "in the course of" element of a compensable accident. That said, in establishing that the Personal Comfort Doctrine applies, the Claimant must still prove the "arising out of" element of the accident. To be clear, the Personal Comfort Doctrine does not guarantee a compensable case.

The Personal Comfort Doctrine Strikes Again: Employer Acquiescence Trips-Up the Accident Defense

continued...

To establish that an injury "arose out of the employment", the Commission will first consider whether there is an employment risk. If not, then the analysis proceeds as a neutral-risk or personal risk assessment. The Illinois Supreme Court's decision in *McAlister v. IWCC* requires that the "arising out of" element begin with assessment as to whether there is an employment related risk.

An employment risk is one which is distinctly associated with the employment, such as tripping on a defect on the company's premises. A neutral risk is one which is neither personal to the employee nor employment related. Instead, it is a risk to which the general public is equally exposed to as the Claimant, such as weather conditions and activities of daily living. Neutral risk requires the Claimant to prove that he or she was exposed to the risk at a greater degree than the general public. Finally, personal risk is one that is associated specifically with the Claimant and does not have any connection to the employment.

In *Flint*, the Commission held Claimant's accident would pass muster under both employment and neutral risk analysis. Claimant tripped over a bolt that was raised from the concrete floor on the company's premises. The raised bolt represented a defect and hazardous condition in the same context of water, oil, or any other debris on the floor, and this was sufficient to establish an employment risk.

The employer confirmed Claimant's testimony that she walked down the aisle "thousands of times" in doing her job prior the accident. The Commission found Claimant was exposed to the risk of tripping over the raised bolt at a greater degree than the general public, and in the absence of an employment risk, she would meet her burden of proof under a neutral risk assessment.

The reality of the workplace incorporates the need for employees to seek personal comfort during a work shift. Employers must be mindful that benevolent acts, such as allowing employees to warm up their cars in cold weather before the end of a shift, can result in exposure for injuries sustained by employees during this time. When an injury does occur within the realm of the Personal Comfort Doctrine, further investigation should be completed relative to the nature of the risk that resulted in the injury.

DOES AN EMPLOYEE'S ATTENDANCE VIOLATIONS CONSTITUTE A "REFUSAL TO WORK"?

In *Connely v. North American Lighting, Inc.* 30 ILWCLB 48 (Ill. W.C. Comm. 2022), the Illinois Workers' Compensation Commission was faced with the question of whether an employee's termination for attendance violations could be construed as a "refusal to work" for purposes of cutting TTD.

The Claimant, Connely, a materials handler, injured his right elbow and arm at work. His doctor placed light duty restrictions, which the employer accommodated. A month later, while still working light duty, the Claimant was terminated for attendance issues. The employer argued that the Claimant refused his light duty work because he continuously called off work, which resulted in his termination, and that suspending TTD was therefore warranted.

The Arbitrator cited to two cases in support of finding in favor of the Claimant. First, *Interstate Scaffolding v. IWCC*, 236 Ill. 2d 132, 923 N.E.2d 266 (Ill. 2010) held that a claimant is entitled to benefits regardless of the reason for termination. Second, the Arbitrator cited to *Matuszczak v. IWCC*, 2014 IL App (2d) 130532WC for the proposition that the determinative inquiry for deciding entitlement to TTD benefits remains whether the claimant's condition has stabilized.

The Act provides incentives for the injured employee to strive toward recovery and a return to gainful employment. TTD benefits may be suspended or terminated if (a) the employee refuses to submit to medical, surgical, or hospital treatment essential to his recovery, (b) the employee fails to cooperate in good faith with rehabilitation efforts, or (c) the employee refuses work falling within the physical restrictions prescribed by his doctor.

In *Connely*, the Claimant was placed on light duty work restrictions following his work accident, and he remained under those restrictions through his termination date. The Claimant had not yet reached MMI, and his condition had not stabilized. The Arbitrator concluded that at the time of the Claimant's termination, he remained temporarily totally disabled as a result of the work-related injury.

"... question of whether an employee's termination for attendance violations could be construed as a "refusal to work" for purposes of cutting TTD."

The Arbitrator awarded TTD benefits from the date of Claimant's termination through the date of Arbitration.

The Arbitrator in *Connely* also levied penalties against the Respondent for failure to pay benefits. On review, the Commission affirmed and adopted the decision of the Arbitrator, including penalties.

The Commission's decision regarding TTD is not entirely unanticipated given the earlier decisions in I*nterstate Scaffolding* and *Matuszczak*. Arguably, the employer presented a good faith basis against the imposition of penalties. Specifically, the Claimant had violated the employer's attendance policy, which resulted in his termination and, therefore, he could not work light duty. The employer clearly offered a light duty position within Claimant's light duty restrictions.

In *Sharwarko v. Ill. Workers' Com. Comm'n., 2015 IL App (1st) 131733WC*, the Appellate Court considered TTD benefits for a claimant who voluntarily retired from the workforce when accommodated work was offered by the employer. In denying benefits, the Court explained in *Sharwarko* that the purpose of the Act is to compensate an employee for lost earnings resulting from work related injuries. When, as in *Sharwarko*, work was refused due to voluntary retirement, continued payment of TTD benefits did not serve to further the purpose of the Act.

In *Connely*, the employee did not voluntarily retire. However, by calling off work on multiple occasions, the employee arguably committed a volitional act by removing himself from the workforce. Unfortunately, the Commission in *Connely* did not discuss when – if ever – excessive attendance violations could be construed as a "refusal to work."

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