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SURVEY OF ILLINOIS LAW: WORKERS' COMPENSATION

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I. INTRODUCTION

The past two years have seen roughly three dozen workers' compensation cases decided by the Illinois Appellate Court, Workers' Compensation Commission Division, and the Illinois Supreme Court. Many of these cases touch upon procedural issues and issues impacting the traveling employee doctrine or the concept of "arising out of," which represents the causation aspect of establishing a compensable claim. While workers' compensation law continues to evolve largely through appellate court decisions, in 2011, significant statutory amendments were enacted to help reduce the overall cost of workers' compensation, which has been identified as a goal by the Illinois General Assembly to improve the business climate in the state. Many of these 2011 amendments are just now coming before the appellate court for interpretation, and decisions should be expected in mid-to-late 2014.

This survey article begins with a discussion of the 2011 amendments and then provides an overview of some of the more significant appellate and supreme court decisions in workers' compensation law handed down between January 1, 2012, and December 31, 2013.[1] A handful of the decisions discussed are unpublished Rule 23 Orders, which although non-precedential, can be helpful when addressing certain circumstances in your case. A few civil cases touching on workers' compensation issues are also included. As far as format, the cases are discussed in relation to recognized topics in workers' compensation law rather than in chronological order to help you better see how they relate to the overall practice.

II. THE WORKERS' COMPENSATION APPEAL PROCESS

Before we begin our discussion of the recent workers' compensation cases, it is important to understand the overall process of a workers' compensation case and how decisions by the Workers' Compensation Commission are appealed. The first step is trying the case before an arbitrator, who issues a written decision based on the evidence. That decision is then appealed as of right to the Workers' Compensation Commission, which hears the case *de novo*, owing no deference to the arbitrator's findings

1. The prior survey of this substantive area was published in 2010. *See*, Brad A. Elward, *Survey of Illinois Law: Workers' Compensation*, 34 S. ILL. U. L.J. 1107 (2010).

of fact or law.[2] The Commission is recognized as the ultimate determiner of fact and is given great leeway when it comes to interpreting medical evidence.[3] The Commission's decision is appealed to the circuit court[4] and following that decision, may be appealed to the Appellate Court, Workers' Compensation Commission Division, which hears all cases arising under the Act, regardless of the appellate court district origins.[5]

The appellate process is slightly different in workers' compensation versus a standard civil appeal. Prior to 1984, all workers' compensation cases were appealable directly from the circuit court to the Illinois Supreme Court as a matter of right. However, in that year the Illinois Supreme Court enacted Rule 22(g), which created a special division of the appellate court to hear all workers' compensation cases.[6] The division consists of five justices, one from each of the five appellate court districts, who are selected by the Supreme Court justice of each district.[7]

The Workers' Compensation Commission Division hears all cases under the Act.[8] This promotes uniformity of the law and consistency throughout the state. The Supreme Court retains the ability to review workers' compensation cases, but that ability is discretionary and is rarely exercised. Once the Workers' Compensation Commission Division decides a case, a party wishing to petition the Supreme Court for review must first file a Rule 315(a) petition with the Workers' Compensation Commission Division asking for at least two of the justices to issue a written statement that the case is of such importance that it warrants review by the Supreme Court.[9] Once the statement is issued, the party seeking further review must then file a Rule 315(a) petition for leave to appeal with the Supreme Court, which is reviewed on a discretionary basis as are all other petitions, criminal or civil.

During the two-year survey period, the Workers' Compensation Commission Division issued twenty-seven published decisions, twelve in 2012, and fifteen in 2013.[10] In that same period the court issued 168 Rule 23

2. 820 ILL. COMP. STAT. 305/19(e) (2013).
3. Sisbro, Inc. v. Illinois Industrial Comm'n, 207 Ill. 2d 193, 206, 797 N.E.2d 665, 673 (2003); Long v. Illinois Industrial Comm'n, 76 Ill. 2d 561, 566, 394 N.E.2d 1192, 1194 (1979).
4. 820 ILL. COMP. STAT. 305/19(f) (2013).
5. ILL. SUP. CT. R. 22(i).
6. This is now ILL. SUP. CT. R. 22(i).
7. The current panel consists of Justices Thomas Hoffman (First District); Donald Hudson (Second District); William Holdridge, Presiding (Third District); Thomas Harris (Fourth District); and Bruce Stewart (Fifth District).
8. ILL. SUP. CT. R. 22(i). Interestingly, this does not include petitions to enforce judgment brought under section 19(g) of the Act, which are appealed to the standard appellate court. Ideally, these cases should be heard by the Appellate Court, Workers' Compensation Commission Division.
9. ILL. SUP. CT. R. 315(a).
10. The 2012 statistics are found in the 2012 ANNUAL REPORT OF THE ILLINOIS COURT, STATISTICAL SUMMARY, p. 143, *available at* http://www.state.il.us/court/supremecourt/AnnualReport/2012/StatsSumm/2012_Statistical_Summary.pdf. This compares to 18 published and 125 Rule 23 Orders

Orders (100 in 2012 and 68 in 2013), which is the court's typical means of disposing of workers' compensation on appeal.[11] Published decisions are rare.[12] Likewise, in that same period, the Illinois Supreme Court accepted two cases on petition for leave to appeal, and in both instances reversed a 3-2 majority decision of the Workers' Compensation Commission Division panel.[13]

III. THE 2011 AMENDMENTS

On May 31, 2011, the Illinois General Assembly passed a set of significant reforms to the Workers' Compensation Act meant to help reduce the overall costs of such claims. The legislation was signed into law shortly thereafter and became effective July 1, 2011. While there were numerous amendments as part of the bill, this article focuses solely on those impacting everyday practice.[14] Thus, the amendments have been broken down into three general areas—accident, interim benefits, and permanency.

A. Accident

Section 1(d) of the Act codified the causation standard applicable to workers' compensation claims. According to section 1(d):

> To obtain compensation under this Act, an employee has the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment.[15]

Although this language was not previously found in the Act, it did not change the causation standard in workers' compensation cases, which holds

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in 2011. 2011 ANNUAL REPORT OF THE ILLINOIS COURT, STATISTICAL SUMMARY, p. 134, *available at* http://www.state.il.us/court/supremecourt/AnnualReport/2011/StatsSumm/2011_Statistical_Summary.pdf.

11. These numbers show that in 2012, 11.2 percent of the major court dispositions were by published decision, and in 2013, 20 percent of the major dispositions were by published decision. *See id.*
12. This is evidenced by the low number of published workers' compensation decisions over the past four years: 12 (2010); 18 (2009); 14 (2008); and 14 (2007). *See* ANNUAL REPORT OF THE ILLINOIS COURT, STATISTICAL SUMMARY, for each respective year, *available at* http://www.state.il.us/court/SupremeCourt/AnnReport.asp.
13. These two decisions were Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n, 2013 IL 115728 and Gruszeczka v. Illinois Workers' Compensation Comm'n, 2013 IL 114212, both of which are discussed herein.
14. 820 ILL. COMP. STAT. 305/1(d) (2013). Other provisions of the amendment include: 4(a-2) (employer leasing company; 4(d) (non-compliance); 8(a) (assignment of medical bills/receivables); 8(a)(4) PPOs; 8.1(a) (PP Providers); 13.1 (changes to terms of arbitrators and commissioners); 14 (arbitrator terms); 16(b) (gift ban); 25.5 (unlawful act/penalties); 29.1 (recalculation of premium rates); 29.2 (insurance oversight).
15. 820 ILL. COMP. STAT. 305/1(d) (2013).

that in order to recover an injured employee need only show that the accident was "a" cause of his or her injuries, even if not the primary cause.

The second amendment categorized as relating to the accident aspect of a claim involves the intoxication defense. Section 11 was amended to reduce the instances where an employee can recover for injuries received when intoxicated.[16] Section 11 now reads, in pertinent part:

> Notwithstanding any other defense, accidental injuries incurred while the employee is engaged in the active commission of and as a proximate result of the active commission of (a) a forcible felony, (b) aggravated driving under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof, or (c) reckless homicide and for which the employee was convicted do not arise out of and in the course of employment if the commission of that forcible felony, aggravated driving under the influence, or reckless homicide caused an accident resulting in the death or severe injury of another person.[17]

The full text of the amendment reads as follows:

> No compensation shall be payable if (i) the employee's intoxication is the proximate cause of the employee's accidental injury or (ii) at the time the employee incurred the accidental injury, the employee was so intoxicated that the intoxication constituted a departure from the employment. Admissible evidence of the concentration of (1) alcohol, (2) cannabis as defined in the Cannabis Control Act, (3) a controlled substance listed in the Illinois Controlled Substances Act, or (4) an intoxicating compound listed in the Use of Intoxicating Compounds Act in the employee's blood, breath, or urine at the time the employee incurred the accidental injury shall be considered in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries. If at the time of the accidental injuries, there was 0.08% or more by weight of alcohol in the employee's blood, breath, or urine or if there is any evidence of impairment due to the unlawful or unauthorized use of (1) cannabis as defined in the Cannabis Control Act, (2) a controlled substance listed in the Illinois Controlled Substances Act, or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act or if the employee refuses to submit to testing of blood, breath, or urine, then there shall be a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. The employee may overcome the rebuttable presumption by the preponderance of the

16. 820 ILL. COMP. STAT. 305/11 (2013).
17. *Id*.

> admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries.[18]

The amendment also eliminates the presumption if the individual is acquitted or the charges are dismissed.

> If an employee is acquitted of . . . aggravated driving under the influence, or reckless homicide that caused an accident resulting in the death or severe injury of another person or if these charges are dismissed, there shall be no presumption that the employee is eligible for benefits under this Act.[19]

The amendment to section 11 applies only to accidental injuries that occur on or after September 1, 2011.[20]

B. Interim and Medical Benefits

Interim benefits include those payable from the moment of injury through the time when the employee has improved as much as possible, and is, therefore, ready for a determination of permanency benefits. An amendment to section 8(a) of the Act added a benefit for temporary partial disability, which is similar in operation to a wage differential permanency benefit.[21] According to the new law, "[w]hen the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits."[22]

As with a wage differential award, temporary partial disability benefits,

> shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working.[23]

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18. *Id*. The statute also provides:
> Percentage by weight of alcohol in the blood shall be based on grams of alcohol per 100 milliliters of blood. Percentage by weight of alcohol in the breath shall be based upon grams of alcohol per 210 liters of breath. Any testing that has not been performed by an accredited or certified testing laboratory shall not be admissible in any hearing under this Act to determine whether the employee was intoxicated at the time the employee incurred the accidental injury. *Id*.

19. *Id*.
20. *Id*.
21. 820 ILL. COMP. STAT. 305/8(a) (2013).
22. *Id*.
23. *Id*.

In addition, changes were made to the fee schedule provisions of section 8.2. The fee schedules were introduced in the 2005 amendments.[24] Of the changes, the most significant involved out-of-state treatment, which is now reimbursed at the lesser of that state's fee schedule or the fee schedule amount for the region where the employee resides,[25] and the provision stating that the maximum allowable payment under the fee schedule will be 70 percent of the fee schedule amount adjusted yearly by the Consumer Price Index for all goods and services (CPI-U).[26] Other provisions addressed prescriptions filled outside of a licensed pharmacy[27] and medical implants,[28] and a further provision required that payments to providers for treatment be made within thirty-days (down from sixty-days) upon receipt of the bills, so long as the claim contains substantially all of the required data necessary to adjudicate the bill.[29] Effective January 1, 2012, the fee schedule amounts were grouped into new geographic regions, with four regions for non-hospital fee schedule amounts and fourteen regions for hospital fee schedule amounts.[30]

A further amendment to section 8(a) clarified that the medical fee schedule governs payments of medical bills "even if a health care provider sells, transfers, or otherwise assigns an account receivable for procedures, treatments, or services covered under [the] Act."[31]

The General Assembly further modified the Utilization Review (UR) provisions of section 8.

> Utilization review means the evaluation of proposed or provided health care services to determine the appropriateness of both the level of health care services medically necessary and the quality of health care services provided to a patient, including evaluation of their efficiency, efficacy, and appropriateness of treatment, hospitalization, or office visits based on medically accepted standards.[32]

As with the fee schedule, the 2005 amendments introduced UR procedures to Illinois workers' compensation. The 2011 amendments gave those provisions more teeth by essentially creating a rebuttable presumption that the UR decertification or denial, if otherwise proper, is correct.[33]

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24. 820 ILL. COMP. STAT. 305/8.2 (2013).
25. 820 ILL. COMP. STAT. 305/8.2(a).
26. 820 ILL. COMP. STAT. 305/8.2(a-2).
27. 820 ILL. COMP. STAT. 305/8.2(a-3).
28. 820 ILL. COMP. STAT. 305/8.2(a-1)(5).
29. 820 ILL. COMP. STAT. 305/8.2(d).
30. 820 ILL. COMP. STAT. 305/8.2(a-1)(1)(B).
31. 820 ILL. COMP. STAT. 305/8(a).
32. 820 ILL. COMP. STAT. 305/8.7(a).
33. 820 ILL. COMP. STAT. 305/8.7(j) ("there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation pursuant to Section 19(k) of this Act").

According to subsection (4),

> [w]hen a payment for medical services has been denied or not authorized by an employer or when authorization for medical services is denied pursuant to utilization review, the employee has the burden of proof to show by a preponderance of the evidence that a variance from the standards of care used by the person or entity performing the utilization review . . . is reasonably required to cure or relieve the effects of his or her injury.[34]

An admissible utilization review is to be considered by the Commission, along with all other evidence and in the same manner as all other evidence, and must be addressed along with all other evidence in determining the reasonableness and necessity of the medical bills or treatment.

C. Permanency Benefits

Three remaining amendments concerned permanency benefits. The first of these, an amendment to the specific loss provision in section 8(e)(9), placed a limitation on the number of weeks available for permanency in a carpal tunnel repetitive trauma case.[35] Under the amendment, which applies to accidental injuries occurring on or after June 28, 2011, the total number of weeks available is reduced from 205 weeks to 190 weeks.[36] Moreover, the amendment clarifies that permanent partial disability shall not exceed 15 percent loss of use of a hand, except for cause shown by clear and convincing evidence.[37] It further provides that under no circumstances is the award to exceed 30 percent of a hand.[38]

The second amended area impacting permanency involved adoption of the American Medical Association's rating standards for determining permanent partial disability. The Act effected this amendment by creating a new section, section 8.1b, which applies to all accidental injuries occurring on or after September 1, 2011, and establishes new criteria to determine disability. According to subsection (a):

> A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength;

34. 820 ILL. COMP. STAT. 305/8.7(i)(4).
35. 820 ILL. COMP. STAT. 305/8(e)(9).
36. *Id*.
37. *Id*.
38. *Id*.

> measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.[39]

Subsection (b) then sets forth the considerations:

> In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.[40]

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.[41] Several cases concerning how to interpret section 8.1b will be before the appellate court later in 2014.

The third amendment placed limitations of the duration of a wage differential award made pursuant to section 8(d)(1) of the Act. As amended, a wage differential award is effective only until the employee reaches the age of sixty-seven or five years from the date the award becomes final, whichever is later. This amendment changed prior law, which provided that a wage differential was payable for the injured employee's life.[42]

IV. JURISDICTION

A. Finality and Compliance with Section 19(f)

On almost every oral argument calendar, you can find at least two or three rulings addressing the jurisdiction of the court to hear the case on appeal. These cases, many of which are Rule 23 orders, typically concern the lack of finality of a Commission or circuit court order, or non-compliance with section 19(f) of the Act, which governs the procedures for filing judicial review of a Commission decision to the circuit court.[43] Three published

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39. 820 ILL. COMP. STAT. 305/8.1b(a). The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment. *Id*.
40. *Id*. at 8.1b(b).
41. *Id*.
42. 820 ILL. COMP. STAT. 305/8(d)(1) (2013).
43. As an example of the Rule 23 orders, the appellate court in *Dial Corp. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120332WC-U, held that a circuit court order vacating the Commission's award of medical expenses and remanding the matter to determine whether the claimant had paid any medical bills "out-of-pocket" that he was not reimbursed for later was a non-final and interlocutory order, saying:

decisions, including one from the Illinois Supreme Court, are worthy of discussion in this survey period.

1. Mailbox Rule Applies to Section 19(f).

The most significant of the jurisdictional cases is the Illinois Supreme Court's decision in *Gruszeczka v. Illinois Workers' Compensation Comm'n*,[44] where the court held that the so-called mailbox rule, which equates placing a document into the mail with filing, applied to the filing of a section 19(f) judicial review from the Commission to the circuit court.[45] In *Gruszeczka*, the claimant had lost before the Commission and sought to appeal to the circuit court in DeKalb County. The Commission's decision was received by the claimant's counsel on April 20, 2009; counsel placed the requisite section 19(f) documents in the mail on May 4, prior to the expiration of the twenty-day filing period, but the documents were not file-stamped by the court until May 14, 2009, some twenty-four days after the claimant's attorney's received the decision.[46]

The employer moved to dismiss the judicial review for lack of compliance with section 19(f) arguing the review was not filed within the twenty-day period. In response, the claimant argued for application of the mailbox rule, which would have made May 4 the filing date. The circuit court denied the motion to dismiss and the employer cross-appealed. The appellate court, in a 3-2 decision, found the judicial review was untimely and refused to apply the mailbox rule. The appellate court then issued a statement under Supreme Court Rule 315(a) that the case involved a question of substantial importance warranting Supreme Court review.

On appeal, a majority of the Illinois Supreme Court reversed, finding that the mailbox rule applied to section 19(f) judicial review filings.[47] The question presented to the court was rather straight-forward—whether a proceeding for review is commenced when the request for summons is placed

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> As the court's instructions make clear, upon remand the Commission is required to do more than simply act in accordance with the directions of the court, conduct proceedings on uncontroverted incidental matters, or make a mathematical calculation. Rather, the Commission must resolve a disputed issue of fact, *i.e.*, whether claimant paid any out-of-pocket medical bills for which he was not reimbursed. *Id*. at ¶ 8.

44. Gruszeczka v. Illinois Workers' Compensation Comm'n,, 2013 IL 114212. The appellate court decision is: 2012 IL App (2d) 101049WC.

45. The mailbox rule was first applied in *Harrisburg-Raleigh Airport Authority v. Dep't of Revenue*, 126 Ill. 2d 326, 533 N.E.2d 1072 (1989), to save an otherwise untimely notice of appeal filed in the circuit court. That doctrine was subsequently adopted by Supreme Court Rule 303(a) and has been applied in the context of workers' compensation to equate mailing with filing of a petition for review from the arbitrator to the Commission. *See, e.g.* Norris v. Illinois Industrial Comm'n, 313 Ill. App. 3d 993, 996, 730 N.E.2d 1184, 1187 (3d Dist. 2000).

46. *Gruszeczka*, 2013 IL 114212, ¶¶ 4-5.

47. Justice Thomas authored the majority opinion.

in the mail or when it is file-stamped by the circuit clerk. The court interpreted the judicial review filing as essentially an extension of the appellate process rather than a new filing akin to a complaint. The court observed that, "the 'role of the circuit court in compensation proceedings is *appellate only*, and is limited by section 19(f) of the Workers' Compensation Act.'"[48]

Moreover, the court noted, "a request for summons under section 19(f) is how one commences an appeal of the Commission's decision to the circuit court. It is a continuation of the same action, and the request for summons is as 'closely related to the appellate process' as the notice of appeal considered in *Harrisburg–Raleigh Airport Authority*. . . . Indeed, the request for summons is the functional equivalent of a notice of appeal."[49]

Finally, the court pointed out that adopting the mailbox rule for judicial review filings brings consistency to the overall workers' compensation review process. Specifically, the court said:

> We note that the mailbox rule already applies at the first and third stages of the workers' compensation review process. Pursuant to *Harrisburg–Raleigh Airport Authority*, a party may rely on the mailbox rule when appealing the circuit court's decision to the appellate court. Moreover, the appellate court held in *Norris v. Industrial Comm'n*, . . . that a party may rely on the mailbox rule when seeking review of the arbitrator's decision before the Commission. Thus, in addition to being consistent with the existing legal framework for application of the mailbox rule, a decision in claimant's favor would bring harmony and consistency to the workers' compensation review process, with the same rules applying at every stage of review.[50]

The decision was 5-2, with Justices Freeman and Burke dissenting.

2. Bond Requirements for State When Substituting as Employer.

On the petition for rehearing, the appellate court in *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*,[51] vacated its prior order reversing the Commission's award of benefits[52] on the basis that the employer had not filed an appeal bond in compliance with section 19(f) of the Act, which sets forth the requirements for filing a judicial review with the

48. *Gruszeczka*, 2013 IL 114212, ¶ 23 (emphasis in original).
49. *Id*.
50. *Id.* at ¶ 28.
51. Illinois State Treasurer v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120549WC.
52. The original decision was issued in January 2013 as an unpublished Rule 23 Order, and then publication was granted during the pendency of the employee's petition for rehearing. *Illinois State Treasurer*, 2013 IL App (1st) 120549WC-U. The court in the original decision reversed a unanimous Commission decision finding the claimant's fall was compensable.

circuit court.[53] There, the Commission had concluded the claimant's trip-and-fall accident was compensable and had awarded benefits. The appellate court initially reversed 5-0 and denied the claim. However, on petition for rehearing, the claimant argued the court lacked jurisdiction based on non-compliance with section 19(f).

According to the facts of the case, the claimant worked as a home healthcare provider, caregiver, and companion to an elderly man, Meuse, who was legally blind. One of her job responsibilities was to pick up Meuse's mail. In order to retrieve the mail, the claimant had to walk down a flight of stairs to the front door. On May 10, 2007, the doorbell rang, and the claimant was preparing to go downstairs to pick up a delivery. While attempting to change her shoes at the top of the stairs, the claimant fell and was injured. The claimant filed her claim seeking benefits for her injuries and naming Meuse as the employer/respondent. Meuse died while her claim was pending and the claimant subsequently amended her claim to add Meuse's estate and Ken Schechtel as respondents. Schechtel owned and operated the employment agency that placed the claimant with Meuse. She also added the Injured Workers' Benefit Fund, of which the State Treasurer is ex-officio custodian, as a respondent because Meuse did not have workers' compensation insurance at the time of the claimant's injury.[54]

The claimant's petition for rehearing argued that court lacked jurisdiction for two reasons. First, the claimant argued that the appeal involved a claim against the State of Illinois and was, therefore, barred from judicial review under section 19(f)(1) of the Act, which prohibits an appeal from a Commission decision by the State. Second, and in the alternative, the claimant argued that judicial review was barred by section 19(f)(2), because the State, as employer, failed to file an appeal bond, a prerequisite for the circuit court's jurisdiction under that section. Both of these arguments raised issues of first impression.[55]

Initially, the court determined that the claim was not one against the State in its sovereign role, but was instead a claim against an uninsured employer where the law substituted the state fund for the employer.

> In this case, the judgment entered against the fund could neither control the discretionary actions of the State nor subject the State to liability. The judgment merely requires the disbursement of money from a fund that is

53. 820 ILL. COMP. STAT. 305/19(f). Subsection (1) requires the party seeking review, if the party against whom an award was rendered, to file an appeal bond.

54. 820 ILL. COMP. STAT. 305/4(d). The fund was established to provide workers' compensation benefits to injured workers whose employers have failed to provide coverage under the Act.

55. *Illinois State Treasurer*, 2013 IL App (1st) 120549WC, ¶ 10.

> dedicated entirely to paying claims of eligible claimants whose employers failed to provide workers' compensation insurance.[56]

The court noted that the fund existed "solely to pay compensation claims to injured employees whose employers fail to carry workers' compensation insurance" and was "comprised entirely of penalties and fines imposed against employers who fail to carry workers' compensation insurance."[57] It did not consist of any public revenues. Because of these reasons, the State, standing in the shoes of the employer through the fund, was not "the State" for the purposes of section 19(f)(1).[58]

On the second ground of the petition—that the State, if an employer, did not file an appeal bond—however, the court concluded that the State, because it was acting as the employer, was required to file an appeal bond. "In this case, the Treasurer was joined with the employer as a party respondent in the arbitration proceedings and represented the fund's interests before the Commission. The Commission entered an 'an award for the payment of money' against the Fund."[59] The court went on, "the Treasurer is not expressly exempt from the appeal bond requirement."[60] Thus, "in order to issue a summons and initiate judicial review of the Commission's order, the Treasurer was required to file an appeal bond with the circuit court."[61] Because the Treasurer did not file such a bond, the circuit court and the appellate court lacked jurisdiction over the claimant's appeal.[62]

B. Non-Final Orders—Vocational Rehabilitation

In *Supreme Catering v. Illinois Workers' Compensation Comm'n*,[63] the appellate court, after raising the issue *sua sponte*, found that the Commission's decision remanding the case back to the arbitrator for further proceedings on the issue of vocational rehabilitation was not final and appealable, but rather was interlocutory. Substantively, the question on appeal was whether the claimant was an independent contractor at the time of his accident. However, because of the lack of finality, the court found it lacked jurisdiction to decide the case and remanded it for resolution of the rehabilitation issues. According to the court, "a decision of the Commission

56. Id. ¶ 15.
57. *Id*. at ¶ 18.
58. *Id*. at ¶ 19.
59. *Id*. at ¶ 24.
60. *Id*.
61. *Id*.
62. *Id*. at ¶ 32.
63. Supreme Catering v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 111220WC.

which remands the case to the arbitrator for further proceedings on the issue of vocational rehabilitation is not a final order."[64]

Taking an opportunity to clarify this much confused area of the law, the court further explained:

> In such cases, it does not matter whether the remand is for the purpose of providing the specifics of a generalized plan ordered by the Commission or for a determination of whether vocational rehabilitation should be ordered. In either case, further proceedings are required before an administrative decision is final. Likewise, it does not matter whether the remand arises in an expedited hearing where the nature and extent of permanent disability is not an issue, or in a proceeding where the Commission determines that the claimant's condition has not yet reached permanency and vacates an arbitrator's permanency award.[65]

In either type of proceeding, the court noted, "a remand for further hearing on the issue of vocational rehabilitation requires further administrative involvement, and the decision of the Commission is not final."[66]

V. ACCIDENT

A. Psychological Injuries: "Mental-mental" Claims

In back-to-back months during 2013, the Illinois Appellate Court, Workers' Compensation Division, handed down two decisions addressing the issue of whether a claimant sustained his burden of proving a "mental-mental" claim—a psychological claim involving no preceding physical injury. While the court arguably applied inconsistent standards of review in the decisions written in March and April of 2013, respectively, the court applied broad interpretations of the Illinois Supreme Court's holding in *Pathfinder Co. v. Industrial Commission*.[67] In *Pathfinder*, the Court held that a claimant could recover for psychological injuries in the case of no physical injury, later to be coined as "mental-mental" injury, when the claimant proved that she suffered a "sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm."[68]

In the *Chicago Transit Authority v. Illinois Worker's Compensation Comm'n* case, handed down in March of 2013, the court affirmed a commission decision to award benefits for a mental-mental claim to a bus

64. *Id*. at ¶ 18.
65. *Id*.
66. *Id*.
67. Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 556, 343 N.E.2d 913 (1976).
68. *Id*. at 563.

driver believed to have struck and killed a pedestrian.[69] The undisputed evidence presented at trial revealed that the claimant believed she struck and killed a pedestrian while driving her CTA bus on March 18, 2010. While she did not see the impact, she exited her bus and watched the pedestrian dying on the curb in front of her. She reported the incident and, hours later, found out that the pedestrian had perished. Her supervisor described the claimant as "visibly shaken" and a "little depressed" after learning of the person's death. The supervisor referred the claimant to "comp psych," but the claimant refused to seek treatment until nearly two months later, after her employment with the CTA was terminated.[70]

On May 28, 2010, the claimant began treatment with a clinical psychologist, Dr. Daniel Kelley, who diagnosed her with an adjustment disorder with mixed anxiety and depressed mood due to the accident.[71] Dr. Kelley found the claimant unable to return to work and prescribed anti-depressant and sleep-aid medications. As of the arbitration hearing, the claimant continued treatment with Dr. Kelley.[72] Following the hearing, the arbitrator found that the claimant sustained psychological injuries which arose out of and in the course of her employment with the CTA. The arbitrator noted that the image of the pedestrian dying on the curb continued to recur for the claimant. Citing *Pathfinder*, the arbitrator described the claimant's experience as consistent with a "sudden, severe emotional shock traceable to a definite time and place and cause which caused psychological injury or harm within the meaning of the Act."[73]

The employer appealed the arbitrator's decision, but the Commission affirmed and adopted the arbitrator's decision. The circuit court affirmed. On appeal, the employer argued, as did the dissenting Commissioner, that the claimant had not experienced an immediate onset of emotional injury as required by *Pathfinder* and interpreted by the Illinois Appellate Court, Workers' Compensation Division, in *General Motors Parts Division v. Industrial Comm'n*.[74]

In the instant case, the employer argued that the claimant was required to show that her injury was "immediately apparent." The court quickly distinguished the instant case from *General Motors*, noting that the court denied recovery for a mental-mental claim involving an injury that allegedly developed over time, as opposed to the instant injury which stemmed from a

69. Chicago Transit Authority v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120253WC.
70. *Id*. at ¶ 8.
71. *Id.* at ¶ 11.
72. *Id*.
73. *Id*. at ¶ 13.
74. *Id.* at ¶ 18 (citing General Motors Parts Division v. Industrial Comm'n, 168 Ill. App. 3d 678, 687, 522 N.E.2d 1266 (1st Dist. 1988)).

time and place accident.[75] The *CTA* court rejected any contention that *Pathfinder* requires a showing that the injury was immediately apparent, and articulated the rule as requiring a sudden emotional shock, even if the resulting psychological injury is not immediately manifested.[76]

The court applied a manifest weight of the evidence standard of review in refusing to disturb the Commission's decision to award compensation. The employer argued that the undisputed facts could lead to only one conclusion, and the only question before the court was whether the claimant proved her mental-mental claim as a matter of law. The court articulated its reasoning for applying a manifest weight standard as follows (paraphrasing): while the facts are undisputed, reasonable minds could draw different inferences from the same set of disputed facts, compelling the court to utilize a manifest weight standard, argued for by the claimant.[77]

The issue before the court was whether the claimant proved that she suffered a "sudden, emotional shock" as a result of the incident on March 18, 2010.[78] The court noted, interestingly, that the fact that claimant did not seek treatment for two months may lead to a reasonable inference that claimant did not suffer a severe emotional shock leading to psychological injury, but that was not the inference drawn by the Commission. The court cited the claimant's testimony and Dr. Kelley's medical opinion as sufficient evidence to support the Commission's finding that the claimant met her burden of proving her mental-mental claim. The court noted, "This is exactly the type of 'exceptionally distressing' and 'uncommon' work-related experience that may support an award under *Pathfinder*."[79]

A month later, the same court applied a *de novo* standard of review to find compensability in *Diaz v. Illinois Workers' Compensation Comm'n*,[80] a case involving another mental-mental claim. The claimant was a police officer who filed a claim for psychological injury after he was involved in a stand-off with a disgruntled citizen who was wielding a gun that claimant quickly suspected was a toy or BB gun.[81] Although he was on the premises for approximately five hours, the claimant left before the stand-off had concluded. Two days later, he experienced anxiety after responding to an accident with injuries. A few days later, the claimant sought treatment and was diagnosed with post-traumatic stress disorder. Five months later, the claimant returned to work but continued psychological treatment.[82]

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75. *Id.* at ¶ 19.
76. *Id.* at ¶ 20.
77. *Id.* at ¶ 23.
78. *Id*.
79. *Id.* at ¶ 27.
80. Diaz v. Illinois Workers' Compensation Comm'n, 2013 IL App (2d) 120294WC.
81. *Id.* at ¶ 5.
82. *Id.* at ¶ 16.

The claim proceeded to trial at which the employer disputed that the claimant had suffered a compensable accident within the meaning of the Act. The arbitrator found for the claimant, relying on *Pathfinder*, and ordered the employer to pay the claimant seventy-five weeks of permanency benefits because he had experienced a fifteen percent loss of use of his person-as-a-whole pursuant to section 8(d)(2) of the Act. On review, the Commission, in a 2-1 decision, reversed the arbitrator, finding that the claimant failed to prove that he sustained a compensable accident. The Commission relied on *General Motors*, stating:

> In *General Motors*, the court interpreted the *Pathfinder* decision and concluded that compensation "is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and *is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment*."[83]

The Commission acknowledged the danger involved in the claimant's experience with the gun-wielding citizen, but noted that the encounter was not uncommon to a police officer in the course of his employment.[84]

The claimant appealed to the circuit court which, in a *de novo* review, affirmed the Commission's decision. The claimant appealed, arguing that the Commission held him to a higher standard of proof than that which is required by *Pathfinder* for proving psychological injury in a mental-mental claim.[85] Agreeing with the claimant, the appellate court found that a *de novo* standard of review was required as the issue before the court was a matter of law.[86]

The court articulated the issue as whether the Commission held the claimant to a unique standard of sudden, severe emotional shock because of his employment as a police officer. The Commission, by its own words, applied a "more narrow" version of *Pathfinder* as interpreted by *General Motors* that judged the alleged accident in the context of the claimant's occupation and training.[87] The court distinguished *General Motors*, noting that it addressed a cumulative trauma type claim, involving a series of alleged

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83. *Id.* at ¶ 18 (emphasis added) (citing General Motors Parts Division v. Industrial Comm'n, 168 Ill. App. 3d 678, 522 N.E.2d 1260 (1st Dist. 1988)).
84. *Id*.
85. *Id.* at ¶ 20.
86. *Id.* (citing Baggett v. Industrial Comm'n, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 912 (2002)). Contrast this decision with *Chicago Transit Authority*, *supra*, wherein the court applied a manifest weight of the evidence standard to determine whether the claimant had proved, based on *Pathfinder*, that she had sustained a compensable psychological injury. Both cases involve inferences drawn from undisputed facts, but the *Diaz* court found that the Commission misapplied the law to the facts.
87. *Id.* at ¶ 18.

work-related events leading to psychological injury. The court held that the mental-mental rule articulated in *General Motors* was intended to weed out claims for mental disability that arise from "ordinary job-related stress common to all lines of employment," rather than to narrow *Pathfinder* which articulated the rule for time and place mental-mental claims.[88] The *Diaz* court held that *Pathfinder* does not require a claimant to prove an uncommon event of extraordinary proportion to his daily encounters in his profession. The court declined to follow *General Motors* to the extent that case required the event to be viewed subjectively through the lens of the claimant's occupation and training. To the extent the Commission did that to bar the claimant's psychological injury claim, it erred as a matter of law. The court reversed the Commission, and remanded the case.[89]

B. Employee or Independent Contractor?

In the opinion handed down in November of 2012, *Labuz v. Illinois Workers' Compensation Comm'n*,[90] the Appellate Court, Workers' Compensation Division, held that the claimant had proved that he was an employee rather than an independent contractor despite a signed independent contractor agreement. The claimant, a Polish-speaking truck driver, brought a workers' compensation claim for alleged injuries to his neck, back and left shoulder as a result of his employment with JKC Trucking Co. ("JKC"), JKC denied the claim based on a lack of employee-employer relationship. The employer relied, in part, on the fact that the claimant had signed an independent contractor agreement.[91]

At arbitration, the claimant testified through a Polish interpreter. He testified that he did not understand the independent contractor agreement because it was written in English. The claimant believed he was required to sign the document to keep his job.[92] He further testified that he drove JKC's trucks, was required to check in with JKC on a daily basis while on the road, and had to obtain JKC's authorization for truck repairs. JKC told him which routes to drive, which gas stations to choose from for fuel. He admitted he received a 1099 as opposed to a W-2. The employer's witness testified that the claimant chose to work as an independent contractor, received no benefits (like JKC's employees did) and was not assigned a truck (like JKC's employees were assigned). The employer's witness admitted that the claimant was paid in accordance with employees' pay schedules rather than

88. *Id.* at ¶ 31. *See also* Chicago Board of Education v. Industrial Comm'n, 169 Ill. App. 3d 459, 468, 523 N.E.2d 912, 918 (1st Dist. 1988).
89. *Diaz*, 2013 IL App (2d) 120294WC, ¶ 37.
90. Labuz v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 113007WC, ¶ 1.
91. *Id*. at ¶¶ 1-3
92. *Id.* at ¶ 4.

contractors' pay schedules. The arbitrator found that the claimant was an employee and the Commission agreed.[93]

On appeal, JKC argued that the Commission erred in finding that the claimant was an employee. The court ruled that the question was one of fact, and the finding would not be disturbed unless it was against the manifest weight of the evidence. No bright-line rule exists regarding whether a claimant is an employee or an independent contractor, but rather, the courts have articulated a series of factors to consider, the most important of which is the employer's right to control the worker.[94] Among the other factors are the type of work performed by the purported employee in relation to the alleged employer's business, the method of pay and taxation, the right to discharge, the degree of skill possessed by the worker, and the provider of tools and other tangible necessities to perform the work.[95] The Commission could reasonably find evidence that the employer hired the claimant to perform the employer's work, enjoyed the right to control the claimant, supplied the equipment needed to complete his assigned duties, and paid him in accordance with the employee pay calendar. Thus, the Commission's finding that the claimant was an employee was not against the manifest weight of the evidence.[96]

C. Borrowed Employees

In *Prodanic v. Grossinger City Autocorp, Inc.*,[97] the widow of a worker killed while attempting to repair a garage door brought a wrongful death action against the automobile dealership at which the decedent was working when he was killed. The dealership contended that the widow's exclusive remedy existed under the Illinois Workers' Compensation Act because the dealership was the decedent's borrowing employer pursuant to Section 1 of the Act. The circuit court granted summary judgment in favor of defendant dealership. The plaintiff appealed arguing that a genuine issue of material fact existed as to whether her decedent was defendant's borrowed employee.[98]

The appellate court, in affirming the circuit court's ruling, examined the pertinent facts surrounding the issue of the decedent's employment. It noted that the automobile dealership was owned by a family as part of a group of area dealerships. Each dealership operated separately. The decedent was

93. *Id.* at ¶ 21.
94. *Id.* at ¶ 30.
95. *Id*.
96. *Id.* at ¶ 37.
97. Prodanic v. Grossinger City Autocorp, Inc., 2012 IL App (1st) 110993 (citing 820 ILL. COMP. STAT. 305/1 *et seq.* (2013)).
98. *Id*. at ¶ 1.

hired by one dealership, Grossinger Chevrolet, but was working at another dealership, City Autocorp, at the time of his fatal injuries.[99] While the dealerships were owned by the Grossinger family, these two dealerships were operated by Gary Grossinger, who hired the decedent to be his driver and to perform maintenance work as needed at the Grossinger dealerships.[100] Gary was the only person with the authority to terminate the decedent's employment. Gary considered the decedent to be an employee of both entities, but no records were kept regarding the number of hours the decedent spent working at either facility. Decedent was paid by Grossinger Chevrolet. He was provided a company cell phone and used both his own tools and those purchased by Chevrolet. When either dealership needed repairs, it would give the decedent money to perform the repairs and the authority to solicit outside bids for work. One workers' compensation policy existed for the employees of all Grossinger dealerships, with each dealership paying its share.[101]

Similar to the independent contractor analysis, the most important factor in establishing a borrowed employment relationship is the borrower's right to control the employee.[102] The court articulated the five relevant factors as follows: (1) the employee worked the same hours as the borrowing employer; (2) the employee received instruction from the borrowing employer's foreman and was assisted by the borrowing employer's employees; (3) the loaning employer's supervisors were not present; (4) the borrowing employer was permitted to tell the employee when to start and stop working; and (5) the loaning employer relinquished control of its equipment to the borrowing employer.[103]

Furthermore, City Autocorp considered the decedent to be their maintenance man. The decedent was on the premises once or twice per week during business hours to complete maintenance tasks assigned to him by City Autocorp management. The decedent was described to be self-sufficient in performing his tasks, but the supervising employees at the dealership could stop the decedent if he were doing something unsafe. The decedent had a "Grossinger credit card" that he would use to purchase items for the dealerships, including City Autocorp.[104] The decedent had keys to the dealership. On the date of the accident, a City Autocorp porter was assisting decedent in his assigned tasks. City Autocorp argued that these facts established that the decedent was "on loan" to it from Grossinger Chevrolet

99. *Id.* at ¶ 2.
100. *Id.* at ¶ 4.
101. *Id.* at ¶¶ 4-5.
102. *Id.* at ¶ 16 (citing Crespo v. Weber Stephen Products Co., 275 Ill. App. 3d 638, 641, 656 N.E.2d 154, 156 (1st Dist. 1995)).
103. *Id.* at ¶ 16.
104. *Id.* at ¶ 10.

at the time of the fatal accident, and hence, was City Autocorp's employee at the time of the fatal accident.[105]

Here, the court found that no genuine issue of fact existed as to whether the claimant was City Autocorp's borrowed employee.[106] The record evidenced support for the five factors noted above, in particular, that the decedent received assignments from City Autocorp management and assistance from its employees in the performance of his assigned tasks. He performed his assignments during the course of a regular workday, and City Autocorp management had the power to prevent decedent from performing unsafe work practices. The decedent's boss, Gary, was not present to supervise the decedent while he performed his assigned tasks at City Autocorp. The decedent was a borrowed employee of City Autocorp. The circuit court's order granting summary judgment was affirmed.[107]

In another decision involving a loaning-borrowing employment situation, *Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc.*,[108] the appellate court examined the issue of whether a borrowing employer's workers' compensation insurance constituted "other insurance" that needed to be exhausted before the Illinois Insurance Guaranty Fund was liable to pay benefits on behalf of an injured employee after the loaning employer's insurer became insolvent. In *Guaranty Fund*, the claimant was on loan from his employer, T.T.C., a temporary employment agency, to MGM Company, Inc. (MGM) when he was injured on the job.[109] TTC was contractually liable for paying the claimant's salary and providing workers' compensation coverage. When the loaning employer's insurer became insolvent, the Fund stepped into its shoes to pay benefits to and on behalf of claimant. The Fund sued the borrowing employer relying on section 1(a) of the Act that provides that borrowing employers are primarily liable for the compensation of workplace injuries and section 546 of the Illinois Insurance Code which provides that a claimant must first exhaust all coverage available pursuant to other available and applicable insurance policies before pursuing benefits from the Fund.[110] Virginia Surety, who insured MGM at the time of the alleged loss, argued that its policy did not cover borrowed employees and it did not collect a premium to do so.[111] The Fund argued that the statutory scheme of borrowing lending employees required MGM to maintain coverage for the claimant.[112]

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105. *Id.* at ¶ 11.
106. *Id.* at ¶ 12.
107. *Id.* at ¶ 24.
108. Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc., 2012 IL App (1st) 113758.
109. Id. at ¶ 2.
110. *Id.* at ¶ 5.
111. *Id.* at ¶ 6.
112. *Id.* at ¶ 13.

The circuit court found in favor of the Fund, but the appellate court reversed, finding that no statutory scheme could "create other insurance coverage" available to the claimant under these set of facts. In examining a similar scenario presented to the Wisconsin Supreme Court, this court noted that the employers can contractually decide between the two of them who is to actually bear the financial burden of the claimant's injuries in the event of a workplace injury, despite the fact that the legislature has mandated shared liability among the two.[113] Here, MGM and T.T.C. agreed that T.T.C. would bear the responsibility and in furtherance of this, MGM did not procure coverage for its borrowed employees. Accordingly, the court found that the Virginia Surety policy did not provide "other insurance" to the claimant and therefore, reversed the circuit court's finding in favor of the Fund.[114]

D. The "Arising Out Of" Element

For a workers' compensation claimant to recover, he must first show his injuries "arose out of" and "in the course of" his employment. Typically, the "in the course of" the employment requirement is readily satisfied because injuries sustained on the employer's premises or at a place where the claimant might reasonably have been while performing his job duties are found to have occurred "in the course of" employment.[115] Whether an injury occurs "in the course of" the employment is usually relatively clear, but the "arising out of" requirement is more frequently litigated.[116]

In recent years, the Appellate Court, Workers' Compensation Division, has written a number of decisions addressing this "arising out of" component which, as is demonstrated in the cases discussed below, signals a general trend toward taking a broader approach to finding accident in cases where previously, the court would have arguably denied compensability.

For a claimant's injury to "arise out of" the employment, the origin of the injury must be associated with some risk connected with, or incidental to the claimant's employment so as to create a causal connection between the claimant's employment and the accidental injury.[117] If the risk is personal to the claimant, *i.e.*, an idiopathic fall, it is generally deemed to not "arise out of" the employment unless some aspect of the employment exposes the claimant to a greater risk of injury. When a claimant sustains injury due to a risk that is neutral—meaning a risk to which the general public is exposed—

113. *Id.* at ¶ 19.
114. *Id.* at ¶¶ 23-24.
115. Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n, 407 Ill. App. 3d 1010, 1013-14, 944 N.E.2d 800, 803-04 (1st Dist. 2011).
116. *Id*.
117. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58541 N.E.2d 665, 667 (1989).

the injury is not compensable unless the claimant's employment exposed him to risk to a greater degree than that which the general public is exposed.[118]

When a court performs this neutral risk analysis, it typically takes a qualitative or quantitative approach to determine whether claimant has been exposed to an increased or greater risk.[119] For example, even though the risk is common, such as walking down stairs, as demonstrated in the court's reasoning in *Village of Villa Park*,[120] the fact that the employee must encounter a common risk more frequently than the general public can result in a compensable workplace injury. In *Village of Villa Park*, the claimant worked for the Village as a Community Service Officer. His job duties included handling ordinance complaints, theft reports, various noncriminal in-progress calls, accident reports, parking enforcement, and police officer backup, among other things.[121]

On April 5, 2007, the claimant was at work and on duty in his assigned police station. In the early evening, he was upstairs in the watch commander's office for a briefing, after which he and another officer began walking towards the back side of the building. The claimant said he turned and started walking down the rear stairwell to the locker room on the lower level. When he reached the third step, his right knee "gave out," causing him to fall down about seven stairs to the landing below, sustaining injuries to his right knee and lower back.[122]

According to the claimant, the back stairwell consisted of about ten steps, a landing, and then another ten steps to the lower level. Locker rooms were on the lower level, as well as the briefing room, the lunch area, and the shooting range. The locker rooms were for the use of the police officers and were not open to the general public. The claimant described the lower level as "a secured area" and stated that the building entrance was accessible only with a pass key.[123] On a typical workday, the claimant said he would enter the building through the back door and descend the stairs to the locker room in order to change from his civilian clothes to his uniform. He would walk back up the stairs to the mailbox area to check for any pertinent information, and then return downstairs to the lower level for his briefing meeting. The claimant testified that, before his shift even began, he would have traversed the back stairs at least two to four times. Moreover, at the end of the day, he would again descend the stairs to the locker room to change into his civilian clothes. The claimant said during most days, he would also use the stairs to

118. *Id*. at 58-59, 541 N.E. 2d at 667.
119. Village of Villa Park v. Illinois Workers' Compensation Comm'n, 2013 IL App (2d) 130038WC, ¶ 20.
120. *Id*.
121. *Id*. at ¶ 2.
122. *Id*. at ¶ 3.
123. *Id*. at ¶ 4.

go to the lunch room for his breaks or lunch, to get a soda, or to get rain gear or other equipment he needed for his duties.[124]

The claimant had suffered a prior injury to his knee in January of 2007, which was wholly unrelated to his employment. The claimant had slipped on a patch of ice at his vacation home and had been treated by various medical providers. The medical care included an MRI of the knee, which revealed small joint effusion with complex tears to the anterior horn, posterior horn, and body of the lateral meniscus.[125]

The arbitrator denied the claim, finding the fall was idiopathic and that the act of walking down stairs by itself did not establish a risk greater than those faced outside the workplace. The Commission reversed, two-to-one, finding that the accident was compensable, but awarding benefits only for the back claim. The majority concluded, based on a post-accident MRI, that the knee condition had not changed since prior to the accident. Concerning the fall itself, the Commission reasoned that the claimant's use of the stairs fell within the "personal comfort doctrine" and, therefore, "arose out of" and "in the course of" his employment.[126] The Commission focused on the claimant's testimony that he used the stairs numerous times per day in order to access the police locker room and for personal breaks. Further, the Commission concluded that the claimant's necessary and repeated use of the stairs for his employment exposed him to a greater risk than the general public.[127]

The circuit court confirmed and the employer appealed, arguing that the fall did not constitute a compensable accident. The appellate court affirmed the Commission majority, concluding the claimant had faced an increased risk while traversing the stairs.[128] According to the appellate court, "[t]he evidence of record supports the Commission's finding that the claimant was 'continually forced to use the stairway' both for his personal comfort and 'to complete his work related activities."[129] Specifically, the court noted the evidence established that the claimant was required to traverse the stairs in the police station a minimum of six times per day. This fact, it reasoned,

> coupled with evidence that the claimant informed his superiors, prior to his fall on April 5, 2007, that he had injured his knee and the testimony of [the] Deputy Chief . . . that he had seen the claimant walk with a limp on numerous occasions prior to April 5, 2007, certainly supports the inference

124. *Id*. at ¶ 5.
125. *Id.* at ¶ 6.
126. *Id.* at ¶ 13.
127. *Id*.
128. *Id*. at ¶ 23
129. *Id.* at ¶ 21.

> that the Village required the claimant to continuously traverse the stairs in the police station, knowing that he had an injured knee.[130]

Additionally, the appellate court found these facts were,

> more than sufficient to support both the conclusion that the claimant's employment placed him in a position of greater risk of falling, satisfying the exception to the general rule of non-compensability for injuries resulting from a personal risk, and that the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed.[131]

In *Accolade v. Illinois Workers' Compensation Comm'n*,[132] the court did not apply a neutral risk analysis to a claim involving a common activity. Rather, the court held that a care-giver who was reaching for soap while assisting a resident in the shower, sustained an accident that "arose out of" and "in the course of" her employment because she was performing an activity that was incidental to her employment.[133] The claimant's job duties required her to assist residents with showering. On the alleged accident date, the placement of the soap dish was such that suds were created on the shower floor as the water ran over the soap dish. When claimant noticed this, she, while hanging onto the resident, attempted to move the soap dish and felt a "pop" in her neck. She timely reported the incident and sought medical treatment. The petitioner's treating physicians, as well as respondent's IME physician, found that the petitioner's condition of ill-being was causally related to the alleged work incident.[134]

The employer argued that the claimant failed to prove an accident "arising out of" her employment because the act resulting in her injury—reaching for a soap dish—was not a risk peculiar to her employment, but rather was one to which members of the public are equally exposed. As a general rule, an injury "arises out of" employment if claimant was performing acts that she was instructed to perform by her employer, acts which she had a common law or statutory duty to perform, or acts which she might reasonably be expected to perform incidental to her assigned duties.[135] A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling her duties. If the employee is performing a task which is not incidental to her employment, and is not personal to the employee, then the Court must do a neutral risk analysis to

130. *Id*.
131. *Id*.
132. Accolade v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120588WC.
133. *Id*. at ¶ 18.
134. *Id.* at ¶ 10
135. Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989).

determine whether the claimant was exposed to a risk greater than that faced by the general public. Here, the court did not conduct a neutral risk analysis even though the employee was engaged in the common activity of reaching. Rather, it upheld the Commission's finding that the claimant's injury occurred while engaged in activities that she might be reasonably expected to perform incidental to her assigned duties—assisting residents with showering.[136]

The employer argued that the Commission's decision was inconsistent with two prior Illinois Supreme Court decisions, and one appellate court decision that have long provided the legal backbone of the employer's "arising out of" defense when concerning common acts.[137] In *Board of Trustees of the University of Illinois v. Industrial Comm'n*, the Commission awarded benefits to a teacher's assistant who injured his back while turning in his desk chair. The appellate court reversed the Commission's decision, finding that the claimant failed to prove that the chair was defective or unusual in any way and held that the Commission's decision was against the manifest weight of the evidence.[138] The *Board of Trustees'* court further noted however, that the claimant's medical history—the claimant had a severely degenerated spine prior to the alleged work occurrence—supported a denial of compensability.[139]

In *Greater Peoria Mass Transit*, the Illinois Supreme Court set aside the Commission's decision awarding benefits to a claimant who lost her balance and stumbled when she leaned over to pick up work documents.[140] The claimant dislocated her shoulder as a result of the alleged accident. The *Greater Peoria* court relied heavily on medical testimony, specifically that the claimant had previously dislocated her shoulder.[141] The court found, as it did in *Board of Trustees*, that any normal activity could have precipitated the dislocation of the claimant's shoulder. Again, in *Hansel and Gretel*, the Illinois Supreme Court relied on medical testimony concerning the claimant's significant pre-accident medical condition and setting aside the Commission's decision.[142] In *Hansel and Gretel*, the claimant was simply in the process of standing up when she caught and injured her knee.[143] The *Accolade* court distinguished the instant case from the three cases the

136. *Accolade*, 2013 IL App (3d) 120588WC at ¶ 13.

137. *Id*. at ¶ 20 (citing Hansel and Gretel Day Care Center v. Industrial Comm'n, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (3d Dist. 1991); Board of Trustees of the University of Illinois v. Industrial Comm'n, 44 Ill. 2d 207, 254 N.E.2d 522 (1969); Greater Peoria Mass Transit District v. Industrial Comm'n, 81 Ill. 2d 38, 405 N.E.2d 796 (1980)).

138. Board of Trustees of the University of Illinois v. Industrial Comm'n, 44 Ill. 2d at 214-15, 254 N.E.2d at 526.

139. *Id*. at 215, 254 N.E.2d at 256.

140. *Greater Peoria Mass Transit*, 81 Ill.2d at 43-44, 405 N.E.2d at 799.

141. *Id*. at 41-42, 408 N.E.2d at 797-98.

142. *Hansel and Gretel*, 215 Ill. App. 3d at 294, 574 N.E.2d at 1251.

143. *Id*. at 286, 574 N.E.2d at 1246.

employer relied on, asserting each involved risks that were not distinctly associated with the claimants' respective job duties.[144] Furthermore, the employer in *Accolade* did not have a medical causation defense like the employers did in the three above-mentioned cases.[145] Arguably, a strong medical causation defense may have defeated the employee's claim in *Accolade*.

In *Springfield Urban League*, the appellate court held that a bus driver who tripped on a kinked mat on her way out of a meeting sustained an accident that arose out of her employment.[146] Despite affirming the finding of accident, the court upheld the Commission's finding that the need for a large portion of the medical treatment related to a pre-existing condition, as opposed to the acute slip and fall.[147] The court, in finding that the risk of tripping over the mat was incidental to the claimant's employment, cited the following facts in support of its finding: that the claimant had to attend the meeting as part of her employment; the meeting place was controlled by her employer; and she was performing tasks required by her work.[148]

For argument's sake, the act of walking over a mat outside a building is a neutral risk, and requires an analysis of whether the claimant was somehow exposed to a greater risk than that of the general public by virtue of her employment. A quantitative analysis—the number of times claimant is exposed to the risk—would result in a denial of compensation because there was no evidence to suggest that the claimant was required to traverse this area multiple times as a result of her employment. A qualitative analysis—some aspect of the employment contributes to the risk—would not result in a finding of accident either because the claimant presented no testimony that anything about her employment, other than the fact that she walked over the mat, contributed to the risk of falling. The court did not conduct a neutral risk analysis here even though prior decisions would suggest that a neutral risk analysis may be appropriate when a claimant falls while walking.

The *Springfield Urban League* court here did focus on the fact that the arbitrator and the Commission found that the mat was kinked or bunched, suggesting that the mat presented a dangerous condition.[149] If a claimant is injured as a result of a defect or dangerous condition on the employer's premises, then the injury arises out of the employment.[150] The testimony of the claimant's witnesses regarding the condition of the mat conflicted with that of the employer's witnesses in that the parties did not agree that the mat

144. Accolade v. Illinois Workers Compensation Comm'n, 2013 IL App (3d) 120588 WC, ¶ 23.
145. *Id*.
146. Springfield Urban League v. Illinois Workers' Compensation Comm'n, 2013 IL App (4th) 120219WC, ¶ 4.
147. *Id*. at ¶¶ 2, 4.
148. *Id*. at ¶ 28.
149. *Id*. at ¶ 30.
150. *Id*.

was bunched or kinked when the claimant tripped on it and fell. Thus, the Commission found in favor of the claimant on this issue, and the employer could not overcome the manifest weight of the evidence standard on appeal because an opposite conclusion was not clearly apparent from the record.[151]

The court's holdings in *Accolade*, *Springfield Urban League*, and *Village of Villa Park*, suggest that the court may be casting a wider net to find common risks compensable where previously they would been found to be personal or neutral. The court is broadening its interpretation of what will be deemed a risk distinctly associated with or incidental to a claimant's employment for purposes of satisfying the "arising out of" prong of the critical element of accident. The decisions further demonstrate the impact of medical evidence on the causal relationship between the accident and the claimed conditions of ill-being.

In addition to the published decisions discussed, the court handed down a number of unpublished Rule 23 Orders addressing the arising out of component of the accident element in recent years. This is a notable increase in decisions in this particular area of workers' compensation. In *Parkland College*,[152] the court suggested that the claimant sustained compensable injuries that arose out of his employment under either an increased risk or incidental to employment analysis. In this case, the claimant was a janitor at Parkland College. Part of his assigned duties was to empty trash in an outdoor dumpster. While doing this on the day in question, the claimant was bitten by an insect.[153] He received medical treatment and lost time from work. The employer argued that the claimant's injury was not compensable because the claimant was not exposed to a risk of injury greater than that which the general public was exposed—essentially, any person outside is at risk of being bitten by an insect. However the claimant testified, without rebuttal, that he had seen insects in the area prior to the accident date.[154] The arbitrator awarded benefits and the Commission affirmed in a two-to-one decision. The circuit court confirmed, and the employer appealed.[155]

On appeal, the court pointed out that more is required to prove a workplace accident within the meaning of the Workers' Compensation Act than mere "positional risk"—the fact of an occurrence at the claimant's place of work.[156] The facts were undisputed that the claimant was performing the work he was instructed to do by his employer, thereby making his actions incidental to his employment. Additionally, and as the Commission so found, the claimant was exposed to a greater risk of insect bite than the

151. *Id.* at ¶ 32.
152. Parkland College v. Illinois Workers' Compensation Comm'n, 2012 IL App (4th) 110216WC-U.
153. *Id.* at ¶ 3.
154. *Id.* at ¶ 8.
155. *Id.* at ¶ 1.
156. *Id.* at ¶ 16.

general public because he was required to work in conditions and places where the general public at Parkland College would not be. The Commission could reasonably find, according to the court, that by requiring the claimant to dump trash in an insect-infested area, the employer exposed the claimant to a risk greater than he would experience as a member of the general public.[157] Compensability was upheld because the claimant was performing work incidental to his employment but, additionally, the court found that he was exposed to an increased risk of injury because of his assigned work duties.[158]

In *A-Lert Construction Services*,[159] the Court reiterated the strict requirements for proving an intoxication defense. In *A-Lert*, the evidence did not show that the injury arose out of the intoxication rather than the employment, nor did it show that the claimant was so intoxicated it constituted an abandonment or departure from his employment.[160] This claimant was an ironworker who, after a couple of hours on the job on the morning in question, fell when his foot slipped on a wet I-beam. When he became stuck, he unhooked his safety harness and fell even further. He sustained serious injuries, resulting in extensive medical treatment, lost time, and a permanency award of 50 percent loss of use to his person-as-a-whole. Post-accident drug screening was positive for cocaine and other substances. The claimant admitted to drinking alcohol and ingesting cocaine on the evening before the day of his fall, but denied any impairment on the day in question.[161] Furthermore, his coworkers, including his supervisors corroborated the claimant's testimony that he was not impaired on the day in question.[162] The Commission affirmed the arbitrator's decision, but reduced permanency to 40 percent loss of use of the person-as-a-whole. The circuit court confirmed and employer appealed.[163]

On appeal, the employer argued that the claimant's injuries did not arise out of his employment, but rather arose out of his intoxication. The employer retained a toxicologist who testified at trial that the claimant's intoxication was *a cause* of his injuries. The toxicologist did not opine that the intoxication was *the cause* of the claimant's injuries.[164] In order to prevail on an intoxication defense, the employer must present evidence that the claimant's intoxication resulted in such impairment that it caused the injuries

157. *Id.* at ¶ 17.
158. *Id*.
159. A-Lert Construction Services v. Illinois Workers' Compensation Comm'n, 2012 IL App (5th) 110079WC-U.
160. *Id.* at ¶ 1.
161. *Id.* at ¶ 37.
162. *Id*. at ¶¶ 38-41.
163. *Id*. at ¶ 4.
164. *Id.* at ¶¶ 34-36.

or that it resulted in a departure from his employment.[165] The toxicologist could not entirely support the employer's theory and none of the claimant's coworkers did either. The Commission noted, and the court agreed, that even if the claimant was intoxicated at the time of the accident, the intoxication was not the sole cause of his injury.[166] The circuit court's decision confirming the Commission's decision was affirmed.[167]

In *Ross*, the appellate court denied benefits to a widow whose husband's death was the result of a late-night "family errand."[168] The court held that the decedent's death did not arise out of and in the course of his employment with International Truck. The decedent was a design engineer and project manager. He left home for work at 4:00 a.m. each day and returned home at approximately 6:00 p.m. On most evenings, he would work on his laptop, answer calls on his work-issued cell phone, and test company vehicles.[169] On the night of the incident in question, the decedent was working on his laptop at home. Around 9:30 p.m., he decided to drive his motorcycle to buy snacks for his children and a cappuccino for himself so he could "wake up."[170] His wife accompanied him. The two were struck by another vehicle, killing the decedent. The arbitrator found that the claimant failed to prove the compensability of the claim for death benefits, the Commission affirmed, and the circuit court confirmed.[171] The claimant appealed to the appellate court.[172]

On appeal, the claimant argued that the Commission should have found that her husband's death arose out of and in the course of his employment with International Truck.[173] The claimant presented evidence that the decedent was working from home on the night of the incident in question and intended to resume that work once the two returned from buying snacks for their children and cappuccino for the decedent. The appellate court, in finding that the decedent was not a traveling employee on the night in question, pointed out that the decedent was not required to travel away from the employer's premises on the night in question.[174] Thus, the analysis is not whether the decedent's actions were reasonable and foreseeable, but rather whether: (1) he was instructed by his employer to perform the acts in question; (2) he had a statutory or common law duty to perform the acts; or (3) he was performing acts that he might reasonably be expected to perform

165. *Id.* at ¶ 35.
166. *Id.* at ¶ 42.
167. *Id.* at ¶¶ 45-46.
168. Ross v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 112389WC-U, ¶ 19.
169. *Id.* at ¶ 3.
170. *Id.* at ¶ 5.
171. *Id.* at ¶¶ 8-10.
172. *Id.* at ¶ 1.
173. *Id.* at ¶ 11.
174. *Id.* at ¶ 16.

incidental to his assigned duties.[175] The court held that buying snacks and cappuccino that night was not an activity he was instructed to do, he had no duty to do it, and he was not expected to do it incidental to his employment. The court found that the shopping trip was purely a "family errand" and in doing so, affirmed the circuit court.[176]

E. Traveling Employees

As the court mentioned above in *Ross*, a traveling employee is subject to a different set of rules with respect to proving that his injuries arose out of and in the course of employment, which results in greater protection under the Act. A traveling employee is one who is required to travel away from his employer's premises in order to perform his assigned work duties. Once an employee proves himself to be a traveling employee, the relevant inquiry regarding an accident is whether the claimant's actions were reasonably foreseeable. In a much-anticipated decision, the Illinois Supreme Court drew the line on traveling employees in the 6-1 *Venture-Newberg* decision in 2013.[177]

In *Venture-Newberg*, the claimant was a pipefitter who resided in Springfield, Illinois, and was a member of the local plumbers and pipefitters union, also based in Springfield.[178] Venture–Newberg was a contractor hired to perform maintenance and repair work at a nuclear power plant in Cordova, Illinois, which is located between 200 and 250 miles from Springfield. The Cordova plant positions were temporary and were expected to last only a few weeks. Those hired for the Cordova job were expected to work between six 10-hour days and seven 12-hour days and could be called in on an emergency basis.[179]

The claimant reported to work at the Cordova plant in March 2006, and after completing his day shift, he and another worker spent the night at a local lodge some thirty miles from the jobsite rather than drive back to Springfield. Both men were scheduled to begin work at 7:00 a.m. the following day. The next morning both men were injured in an automobile accident en route to coffee before work. The arbitrator denied benefits, but the Commission reversed in a split decision, and awarded compensation based on the traveling employee doctrine. The circuit court reversed, but the appellate court reinstated the Commission majority findings.[180] In doing so, the appellate

175. *Id.* at ¶ 17.
176. *Id.* at ¶ 19.
177. The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n, 2013 IL 115728.
178. *Id*. at ¶ 1.
179. The Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n, 2012 IL App (4th) 110847WC, ¶ 13.
180. *Id*. at ¶ 17.

court majority found: (1) the claimant was employed by Venture-Newberg; (2) he was assigned to work at a nuclear power plant in Cordova, Illinois, operated by Exelon in excess of 200 miles from his home; and (3) the premises at which the claimant was assigned to work were not the premises of his employer.[181] These facts, the court observed, established the claimant's status as a traveling employee.[182]

The appellate court majority further found the claimant's actions at the time of his accident were reasonable and foreseeable, thus deeming his injury compensable under the Act.[183] According to the majority, the Commission found that Venture-Newberg,

> must have anticipated that the claimant, recruited to work at Exelon's facility over 200 miles from the claimant's home, would be required to travel and arrange for convenient lodging in order to perform the duties of his job, and that it was reasonable and foreseeable that he would travel a direct route from the lodge at which he was staying to Exelon's facility.[184]

Therefore, the court concluded the Commission properly found the claimant's injury, sustained when the vehicle in which he was riding to work from the lodge at which he was staying skidded on a public highway, arose out of and in the course of his employment. Alternatively, the majority found the accident compensable because it believed the demands of the job required the claimant to travel and work away from the employer's business, and to be available to work on short notice.[185]

In a 6-1 decision authored by Chief Justice Garman, the majority found that the claimant Daugherty was not a traveling employee at the time of his accident. In rejecting application of the traveling employee doctrine, the Court drew heavily on two prior decisions which involved injuries to an employee required to frequently travel (*Wright*) and periodically travel (*Chicago Bridge & Iron*).[186] The Court observed that Wright was a permanent employee who was regularly required by his employer to travel out of state and that his employer reimbursed him with *per diem* and mileage expenses. It further noted that Reed, the claimant in *Chicago Bridge & Iron*, was not a permanent employee, but he had worked exclusively for the employer for nineteen years. Both workers were reimbursed for mileage expenses and were "required" to travel to a remote location for the position,

181. *Id*. at ¶ 13.
182. *Id*. at ¶¶ 13-14.
183. *Id*. at ¶ 15.
184. *Id*. at ¶ 15.
185. *Id*. at ¶¶ 8, 15.
186. Venture-Newberg, 2013 IL 115728 (citing Wright v. Industrial Comm'n, 62 Ill. 2d 65, 338 N.E.2d 379 (1975); Chicago Bridge & Iron, Inc. v. Industrial Comm'n, 248 Ill. App. 3d 687, 618 N.E.2d 1143 (5th Dist. 1993)).

and both were held by the court to be traveling employees, unlike the claimants in *Venture-Newberg*.[187]

According to the majority, the claimant Daugherty was not a permanent employee of Venture-Newberg and was not working on a long-term exclusive basis. Moreover, nothing in Daugherty's contract required him to travel out of his union's territory to take the position with Venture. At arbitration, Daugherty acknowledged he made a personal decision that the benefits of the pay outweighed the personal cost of traveling. The court observed, "Daugherty was hired to work at a specific location and was not directed by Venture-Newberg to travel away from this work site to another location."[188] Daugherty merely traveled from the premises to his residing location, as did all other employees. Finally, the court noted Venture-Newberg did not reimburse Daugherty for his travel expenses, nor did it assist Daugherty in making his travel arrangements.[189]

The majority concluded that Daugherty made the personal decision to accept a temporary position with Venture-Newberg at a plant located approximately 200 miles from his home. Venture-Newberg did not direct him to accept the position at Cordova, and Daugherty accepted this temporary position with full knowledge of the commute involved. As such, Daugherty was not a traveling employee.[190]

In addition to concluding that the claimant did not qualify for the traveling employee exception, the majority noted that Daugherty's course or method of travel was not determined by the demands and exigencies of the job. "Venture [Newberg] did not reimburse Daugherty for travel expenses or time spent traveling. Venture [Newberg] did not direct Daugherty's travel or require him to take a certain route to work."[191] Instead, the majority observed, "Daugherty made the personal decision to accept the position at Cordova and the additional travel and travel risks that it entailed."[192] The Supreme Court reversed the appellate court majority decision and reinstated the circuit court's decision reinstating the arbitrator's denial of benefits.[193]

At one end of the spectrum, the recent *Venture-Newberg* decision establishes an outer limit on what actions fall within the traveling employee doctrine. The decision clarifies the existing law as to employees who are hired temporarily to perform a specific job at a distant location and makes it clear that these individuals are not subject to the traveling employee doctrine and are instead judged by the traditional "coming and going" test, which precludes recovery for accidents while coming and going to work. The

187. *Id*. at ¶ 24.
188. *Id*.
189. *Id*. at ¶¶ 7, 22, 24.
190. *Id*. at ¶ 36.
191. *Id*. at ¶ 35.
192. *Id*. at ¶¶ 36-38.
193. *Id*. at ¶¶ 7, 22, 24.

Venture-Newberg decision also seems to define the employer's premises as that location where the employee is working. Indeed, this definition would be consistent with how the appellate court dissenting opinion viewed the case. Recall that the appellate court dissent advocated the following rule: "where an employee is hired on a temporary basis only and is assigned by the employer to work at one specific jobsite other than the employer's premises, the assigned location becomes the employer's premises for the purposes of applying the traveling employee rule."[194]

Several recent traveling employee decisions from the appellate court, such as *Kertis*[195] and *Mlynarczyk*,[196] have also strayed from the doctrine's original purpose and expand the doctrine to encompass areas not originally intended—*i.e*., traveling between two office locations or preparing for work. These two decisions, while clearly evoking broader interpretations of the traveling employee doctrine, have not been overruled by *Venture-Newberg*.

In *Kertis*, the claimant filed an application for benefits for low back injuries he sustained after he fell in a pothole in a public parking lot he utilized while working out of one of his assigned work locations.[197] The arbitrator found that the claimant failed to prove that the claimant's injuries arose out of and in the course of his employment because he failed to prove that he was exposed to a risk greater than that to which the general public is exposed. While the Commission found that the claimant was a traveling employee, it affirmed the arbitrator's decision, with one commissioner dissenting. The dissenting commissioner, in citing the Illinois Supreme Court's decision in *Wright*, urged that a neutral risk analysis was the wrong analysis and that the appropriate inquiry for the arising out of element in a case involving a traveling employee is simply whether the employee's actions are reasonably foreseeable.[198]

The circuit court confirmed the Commission's decision, and the claimant's appeal followed.[199] The claimant, a bank employee, was regularly required to travel between two branches to complete his assigned work duties. He argued that his use of the public lot was reasonably foreseeable because the employer did not provide parking and the lot was convenient to his employer's premises.[200] The appellate court agreed with the claimant, and the dissenting commissioner, that his actions were foreseeable to the employer, citing the fact that he was required to park on the street or in a nearby lot when he arrived at this particular bank location. The court did not

194. The Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n, 2012 IL App (4th) 110847WC, ¶ 16.
195. Kertis v. Illinois Workers' Compensation Comm'n, 2013 IL App (2d) 120252WC.
196. Mlynarczyk v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120411WC
197. *Kertis*, 2013 IL App (2d) 120252WC.
198. *Id.* at ¶ 10.
199. *Id.* at ¶ 2-3.
200. *Id.* at ¶ 6.

address the claimant's alternative argument that he was exposed to a neutral risk to a greater degree than that to which the general public is exposed.[201] Arguably, given what the court has done in the recent arising out of cases, it may well have found that the claimant was exposed to a neutral risk to a greater degree than the general public.

In *Mlynarczyk*, the court stretched the traveling employee doctrine even further to find that a cleaning company employee could recover for injuries sustained walking to her personal vehicle on the way to work.[202] On the day of the alleged accident, the claimant left her home around 6:30 a.m. to head to her first cleaning assignment. She then drove, with her husband—an employee of the same cleaning company—to their next cleaning job. The two concluded that job at around 2:30 p.m. They usually worked until 4:00 p.m., but that day had some cancelations, so their workday concluded early.[203] The employer told them that they could assist another cleaning crew around 4:30 p.m., if they chose to do so. The claimant and her husband then returned home to eat lunch, where they stayed until shortly after 4:00 p.m. Ten minutes later, the claimant left home for the scheduled 4:30 p.m. cleaning job. As she walked to her vehicle, she slipped and fell on a public sidewalk adjacent to her driveway, sustaining injuries.[204] The arbitrator found in claimant's favor and assessed penalties against the employer.[205]

The employer reviewed the arbitrator's decision to the Commission who reversed. In reversing the arbitrator, the Commission found that the claimant failed to prove that she sustained injuries that arose out of or in the course of her employment.[206] Regarding the arising out of component, the Commission noted that the claimant did not fall due to a dangerous condition on the premises and could otherwise not prove that she was exposed to a neutral risk to a greater degree than that to which the general public is exposed. The Commission further reasoned that the claimant's injuries did not occur in the course of her employment either. She had not yet left her personal property, her fall occurred outside her regularly scheduled work day, she was not directed to go home and take a break before the next cleaning job, nor was she directed to work the 4:30 p.m. cleaning job. The Commission did not find the claimant to be a traveling employee, but even if it did, it would find that the claimant's injuries were not compensable because the claimant had not yet left her personal property when she was injured. The Commission explained: "If the Commission were to find accident in this case, then ANY movement by [claimant] at any time during the day or night

201. *Id.* at ¶ 20.
202. Mlynarczyk v. Illinois Workers' Compensation Comm'n, 2013 IL App (3d) 120411WC.
203. *Id.* at ¶ 5.
204. *Id.* at ¶ 6.
205. *Id.* at ¶ 9.
206. *Id.* at ¶ 10.

would lead to a compensable claim."[207] The circuit court confirmed, and the claimant filed timely notice of appeal.[208]

The appellate court, in a unanimous decision, found that the claimant was a traveling employee who sustained injuries that arose out of and in the course of her employment.[209] Applying a *de novo* standard of review, the court found that the employer required the claimant to travel to various locations to complete her assigned duties; thus, the Commission erred as a matter of law in finding that the claimant was not a traveling employee.[210] The court further noted that traveling employees are deemed to be within the course of their employment from the time the employee leaves home until the time he or she returns.[211] Furthermore, traveling employees are "compelled to expose themselves to the hazards of the streets and the hazards of automobiles . . . much more than the general public."[212] The court seemingly ignored the employer's argument that the claimant had not been exposed to the dangers of the street as she had not yet left her private property when she was injured. In applying the reasonably foreseeable test, the court found that the claimant's walk to the vehicle constituted the initial part of her journey to her work assignment which was entirely reasonable and foreseeable for the claimant to do given that she is a traveling employee.[213] The court reversed and remanded the matter to the Commission for reinstatement of the arbitrator's award and a reassessment of penalties.[214]

VI. INTERIM AND MEDICAL BENEFITS

Interim benefits consist of temporary total disability (TTD), maintenance, medical benefits, and vocational rehabilitation.[215] Temporary total disability benefits are awarded for the period from when an employee is injured until he or she has recovered as much as the character of the injury will permit.[216] A person is totally disabled when he or she cannot perform any services except those that are so limited in quantity, dependability, or quality that there is no reasonably stable market for them.[217] A claimant

207. *Id.* (emphasis in original).
208. *Id*.
209. *Id*. at ¶ 16.
210. *Id.* at ¶ 15.
211. *Id.* at ¶ 14 (citing Cox v. Illinois Workers' Compensation Comm'n, 406 Ill. App. 3d 541, 545, 941 N.E.2d 961, 965 (1st Dist. 2010)).
212. *Id.* at ¶ 19 (citing Illinois Publishing & Printing Co. v. Industrial Comm'n, 299 Ill. 189, 197, 132 N.E.2d 511, 514 (1921)).
213. *Id.* at ¶ 19.
214. *Id*. at ¶ 26.
215. 820 ILL. COMP. STAT. 305/8 (2013). These are largely found in sections 8(a) and (b).
216. Land and Lakes Co. v. Industrial Comm'n, 359 Ill. App. 3d 582, 594, 834 N.E.2d 583, 594 (2d Dist. 2005).
217. Dolce v. Industrial Comm'n, 286 Ill. App. 3d 117, 122, 675 N.E.2d 175, 179 (1st Dist. 1996).

seeking TTD benefits must prove not only that he did not work, but that he was unable to work.[218] The dispositive inquiry is whether the employee's condition has stabilized, that is, whether the employee has reached maximum medical improvement (MMI).[219] Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits.[220]

A. Section 8(b) Total Temporary Disability (TTD) Benefits

In *Curtis v. Illinois Workers' Compensation Comm'n*,[221] the appellate court addressed the question of whether a claim for recurring TTD benefits must be brought under section 19(h) and if so, whether that petition must be filed within thirty months of the award, as is traditionally done with petitions attacking an award of permanency under section 19(h). In that case, the arbitrator rendered a decision on all issues on January 25, 2005. No appeal was taken to the Commission. On January 21, 2010, the claimant filed a petition under section 8(a) seeking additional medical expenses under his open medical rights and additional TTD benefits associated with that treatment. The Commission awarded the medical benefits but denied the request for additional TTD, finding the claimant was governed by section 19(h) and as such, was untimely because it was filed more than sixty months after the date of the arbitration decision.[222]

The appellate court affirmed, finding that section 19(h) was the appropriate vehicle for the claim for additional TTD benefits.[223] Section 19(h) allows either party to petition the Commission to reopen an installment award for a limited period of thirty months following the decision. The appellate court concluded that the language of section 19(h), which conditions the change in benefits on whether the disability "has subsequently recurred, increased, diminished, or ended," clearly referred to TTD benefits by its use of the modifier "recurred."[224] "Since only temporary disabilities can recur, it necessarily follows that only TTD payments may be 'reestablished.'"[225] Thus, the court concluded that any request for additional

218. Pietrzak v. Industrial Comm'n, 329 Ill. App. 3d 828, 832, 769 N.E.2d 66, 70 (1st Dist. 2002).
219. Land and Lakes Co. v. Illinois Industrial Comm'n, 359 Ill. App. 3d 582, 594, 834 N.E.2d 583, 594 (2d Dist. 2005). The factors to consider in deciding whether a claimant's condition has stabilized include: (1) a release to return to work; (2) the medical testimony about the claimant's injury; and (3) the extent of the injury. Beuse v. Industrial Comm'n, 299 Ill. App. 3d 180, 183, 701 N.E.2d 96, 98 (1st Dist. 1998).
220. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072, 820 N.E.2d 570, 575 (5th Dist. 2004).
221. Curtis v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120976WC.
222. *Id*. at ¶ 7.
223. *Id*. at ¶ 11.
224. *Id*. at ¶ 10.
225. *Id*. at ¶ 15.

TTD benefits must be made pursuant to section 19(h), and that the thirty-month period for filing such a petition applies.[226]

In another TTD case, *American Airlines, Inc. v. Illinois Workers' Compensation Comm'n*,[227] the appellate court held that an employee's statement of applicable TTD benefit dates did not preclude the employee from seeking additional benefits. Addressing this point, the court observed:

> We recognize, as claimant concedes, that the parties' stipulation sheet at the time of the arbitration did not make a claim for benefits for the period of January 12, 2006, through January 26, 2006. However, we do not find that dispositive. "[T]he [Act] is a remedial statute intended to provide financial protection for injured workers and should be liberally construed to accomplish that objective."[228]

The court added,

> [t]o hold that claimant is not entitled to TTD benefits because the stipulation did not contain a claim for that period, even though claimant had previously filed an application for adjustment of claim for her injury and testified about the January 8, 2006 injury without objection from respondent, would undermine the spirit and the purpose of the Act.[229]

Although the case disposition was by Rule 23 Order, the case demonstrates the liberal interpretation given to the Act.[230]

B. Section 8(a) Medical Benefits

In *Dye v. Illinois Workers' Compensation Comm'n*,[231] the appellate court reversed the Commission's decision to deny prospective medical benefits in a case where the claimant had sought cosmetic treatment for a work-related head injury. In that case, the claimant had bumped her head and suffered an indent, which measured two-by-one centimeters; no information on the depth was provided. The neurologist in the case had opined the claimant needed no further treatment; however, the claimant had seen a dermatologist, who offered to perform a fat injection to remove the indentation.[232]

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226. *Id*. at ¶ 11.
227. American Airlines, Inc. v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 120107WC-U.
228. *Id*. at ¶ 41.
229. *Id*.
230. The case also remanded back to the Commission for the resolution of the employer's credit. The claimant had stipulated that a credit was owed, but the amount had not been set.
231. Dye v. Illinois Workers' Compensation Comm'n, 2012 IL App (3d) 110907WC.
232. *Id*. at ¶¶4-5.

The arbitrator viewed and denied the request for prospective medical for the injection procedure. That denial was later unanimously affirmed by the Commission. In denying the prospective medical, the Commission noted, "the evidence is at best unclear as to whether [claimant] has an observable disfigurement."[233] The appellate court, in a 4-1 decision, reversed, ordering that the procedure be required.[234] According to the court, disfigurement means, "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner."[235] Moreover, the court found the procedure was necessary to make the claimant whole, noting that section 8(a) provided that, "The employer shall provide and pay . . . all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury."[236]

One justice dissented, noting that the claimant could have provided a photograph of the alleged indent had she wanted to clarify the record.[237]

> Instead of providing photographs of the indent, she simply showed it to the arbitrator, who did not describe the indent for the record. The lack of photographs raises a red flag as to how observable the indentation is. The arbitrator's statement after seeing the indentation provides no information as it is vague and subject to different interpretations.[238]

VII. PROCEDURAL ISSUES

A. Service

Section 19(f) of the Act articulates the jurisdictional requirements for perfecting a post-Commission appeal. Specifically, with regard to effecting service of process, section 19(f) requires, "Service upon any member of the Commission or the Secretary or Assistant Secretary thereof shall be service upon the Commission."[239] In *Labuz*, discussed above in the Accident section, the employer argued that the claimant did not satisfy the service requirements stated in section 19(f) because service was directed to the Commission generally and not to a particular Commission representative, thereby

233. *Id*. at ¶ 8.
234. *Id*. at ¶ 18.
235. *Id*. at ¶11.
236. *Id*. at ¶ 10.
237. *Id*. at ¶ 22.
238. *Id*.
239. Labuz v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 113007WC, ¶ 24 (citing 820 ILL. COMP. STAT. 305/19(f)(1) (West 2008)).

stripping the circuit court of jurisdiction to hear claimant's appeal. In applying a *de novo* review, the court turned to the legislative intent behind section 19(f) which is evidenced in the language surrounding that quoted by the employer. In pertinent part, section 19(f) goes on to read that service is affected by mailing notice to the "office of the Commission."[240] The court held that the intent of section 19(f)—to generally give the Commission notice of a party's intent to appeal a decision—is accomplished if the Commission, as it did here, receives notice as an entity rather via individual member.[241]

B. Jurisdiction—Intervention by an Insurer

A number of decisions each year address the court's jurisdiction over a workers' compensation appeal. The court can raise the issue *sua sponte* as it did in *QBE,* in which the employer's insurer intervened in an employer's appeal of a Commission decision.[242] The claimant sought benefits from his employer for injuries sustained as a result of is work duties on May 12, 2009. He did not name the employer's insurer as a respondent. He alleged a repetitive trauma. He later amended his application to allege a manifestation date of October 14, 2010. The arbitrator found that the claimant sustained injuries that arose out of and in the course of his employment on or about October 14, 2010.[243] The employer and its insurer filed separate reviews of the arbitrator's decision to the Commission.[244]

QBE requested to be added as a named party because the claimant's amended application brought his claim within QBE's coverage period.[245] It claimed that it did not receive notice of the amendment until after the matter proceeded to hearing, but now sought to defend against the claim. The presiding commissioner granted QBE's motion over claimant's objection. QBE and the employer filed separate statements of exceptions requesting the Commission to reverse the arbitrator. The Commission affirmed the arbitrator, and QBE and the employer reviewed the decision to the circuit court who confirmed the Commission's decision. QBE appealed, but the employer did not.[246]

On appeal, the court initially noted its obligation to determine whether jurisdiction is proper and dismiss any appeal that lacks jurisdiction.[247] In examining the authority of the Commission, it turned to applicable statutory

240. *Id*. at ¶ 27.
241. *Id.* at ¶ 28.
242 QBE Insurance Co. v. Illinois Workers' Compensation Comm'n, 2013 IL App (5th) 120336WC, ¶ 16.
243. *Id.* at ¶ 4.
244. *Id*. at ¶¶ 6-7
245. *Id*. at ¶ 8.
246. *Id.* at ¶ 13.
247. *Id*. at ¶ 15.

authority. The court noted that the Commission had no statutory authority under the Act, or elsewhere, to enter an order allowing QBE to be named a respondent to the claimant's claim on review where the claimant had not named the insurer as a party and the insurer had not previously been party to the proceedings.[248] Therefore, the court vacated the Commission's order and dismissed QBE's appeal for lack of jurisdiction.[249]

In *Ingrassia*, another decision that addressed jurisdiction, the court found that the fact that the arbitration transcript had not been filed within the statutory thirty-day time period did not defeat the Commission's jurisdiction over the claimant's review.[250] This requirement for perfecting the Commission's review under section 19(b) is well-settled. At issue was whether the employer had effectively withdrawn the standard stenographic stipulation included on the request for hearing form, waiving the jurisdictional requirement, when it had signed the form and then at the hearing asked to draw a line through the stipulation:

> Both parties agree that if either party files a Petition for Review of the Arbitration Decision and orders a transcript of the hearings, and if the Commission's court reporter does not furnish the transcript within the time limit set by law, the other party will not claim the Commission lacks jurisdiction to review the arbitration decision because the transcript was not filed timely.[251]

If the respondent effectively withdrew the stipulation, then the Commission would not have jurisdiction.

The relevant administrative rule addressing the request for hearing provides that the parties shall complete and sign the request for hearing form as the stipulation of the parties and a settlement of the questions in dispute in the case.[252] The employer and trial court interpreted the rule to state that the request for hearing becomes binding when it is filed with the arbitrator. In agreeing with the Commission's interpretation of the rules governing the request for hearing form, the appellate court noted that the administrative rule does not speak to "when" the request for hearing becomes binding, and further noted that the parties' agreement, *i.e.* signature, on the request for hearing is what makes it binding.[253] The court noted that the Commission's

248. *Id*. at ¶ 24.
249. *Id*.
250. Ingrassia Interior Elements v. Illinois Workers' Compensation Comm'n, 2012 IL App (2d) 110670WC, ¶ 2.
251. *Id*. at ¶ 4.
252. *Id*. at ¶ 6 (citing 50 Ill. Adm. Code 7030.40 (1996)).
253. *Id*. at ¶ 13. The court noted "It would be an odd rule indeed that would allow a party to recant such an admission on the eve of a hearing, thereby depriving an opponent of the opportunity to conduct discovery on an issue." *Id.* This comment is noteworthy because the rules governing practice at

interpretation of the rule was reasonable and the trial court should have deferred to it. Accordingly, the court held that the Commission did have jurisdiction over the review.[254]

Edmonds presented an initial jurisdictional question to the court: whether a trial court order, which set aside a Commission decision and ordered the Commission to "enter a decision consistent with [the trial court's] findings" was final and appealable.[255] Briefly, the claimant filed a workers' compensation claim alleging he developed coal workers' pneumoconiosis (CWP) that developed within two years of his last exposure, which is required by the Act. The arbitrator found in claimant's favor and the Commission affirmed and adopted on review. The employer won at the circuit court and the circuit court set aside the Commission's decision due to collateral estoppel, citing a finding made by the United States Department of Labor (DOL) in a Black Lung Benefits Act proceeding that claimant had not developed CWP within two years of his last exposure.[256] The claimant appealed.[257]

The claimant retired from coal mining in 1999 after thirty years of employment in the industry. He testified at arbitration, that in the five years preceding his retirement, he experienced shortness of breath, but had not been diagnosed with CWP. Prior to filing his workers' compensation claim, the claimant, then unrepresented, applied for benefits under the federal Black Lung Benefits Act.[258] After undergoing examinations and testing, a proposed decision was issued in 2002 by the Department denying the claimant benefits because he had failed to prove that he had CWP. The decision provided that claimant could seek a hearing for his claim, but the claimant failed to do so.[259]

The claimant subsequently filed a workers' compensation claim for his injuries. At arbitration, the claimant introduced medical evidence that he developed CWP within two years of his last occupational exposure. Respondent introduced medical evidence to refute this, but the arbitrator found in claimant's favor. The Commission affirmed, with one commissioner dissenting.[260] The dissenting commissioner concluded that the claimant failed to prove that he contracted CWP within two years after his last exposure to conditions that could bring about the disease. The circuit court reversed, citing the 2002 DOL decision for the finding that claimant had failed to prove that he developed CWP within two years of last exposure,

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neither at the Illinois Workers' Compensation Commission, nor the Act, allows for formal discovery regarding any issue.

254. *Id*. at ¶ 16.
255. Edmonds v. Illinois Workers' Compensation Comm'n, 2012 IL App (5th) 110118WC, ¶ 19.
256. *Id.* at ¶ 1.
257. *Id*. at ¶ 17.
258. *Id.* at ¶ 5 (citing 30 U.S.C. § 901 *et seq.* (2000)).
259. *Id*. at ¶ 8.
260. *Id*. at ¶ 17.

which was arguably 1999 when claimant retired.[261] The circuit court's order remanded the case to the Commission to enter an order consistent with its decision.[262]

Initially, on appeal, the court addressed the finality of the circuit court's order. Generally, an order remanding the case to the Commission for further proceedings is not final and appealable.[263] However, when the order simply directs the Commission to act in accordance with the order and conduct proceedings on incidental matters, the order is considered final and appealable. Under the circumstances, the circuit court's order was final and appealable.[264]

Turning to the merits of the appeal, the court framed the issue as follows: whether a DOL decision denying benefits under the Black Lung Benefits Act precludes a favorable decision under the Workers' Compensation Act based on the doctrine of collateral estoppel.[265] Collateral estoppel prohibits relitigation of an issue decided in an early proceeding. Collateral estoppel will apply if: (1) the issue decided in the prior adjudication must be identical to the issue in the current action; (2) the party against whom estoppel is asserted must have been a party or in privity with a party in the previous action; and (3) the prior adjudication must have resulted in a final judgment on the merits.[266] The court further noted that the party against whom the estoppel is asserted must have had the opportunity to fully litigate the issue in the prior proceeding. Additionally, collateral estoppel will not bar a subsequent litigation if it results in an injustice.[267]

The court easily satisfied the first two threshold requirements, but questioned whether the DOL's decision was adjudicatory in nature.[268] In finding that it was not an adjudication, the court noted that the DOL administrative officer's role is administrative and investigative in nature rather than adjudicatory; the claimant was restricted in the amount of evidence he could introduce; and the proceedings are informal in nature. The court held that the claimant did not have the opportunity to truly the litigate the issue before the DOL, so collateral estoppel did not apply to bar the favorable finding claimant received at the Illinois Workers' Compensation Commission.[269] The circuit court's order was reversed.[270]

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261. *Id*. at ¶ 20.
262. *Id*. at ¶ 19.
263. *Id.*
264. *Id*.
265. *Id.* at ¶ 20.
266. *Id.* at ¶ 21.
267. *Id*.
268. *Id*. at ¶ 22.
269. *Id.* at ¶ 27.
270. *Id*. at ¶ 30.

C. Power to Compel Functional Capacity Evaluation

In *W.B. Olson*, the court held that the Act provided no basis to compel the claimant to a functional capacity evaluation to further assess his work capabilities.[271] The claimant sought benefits for a knee injury he sustained while in the scope of his employment for W.B. Olson. The claimant underwent an extensive amount of medical treatment.[272] The claimant was placed on permanent restrictions which the employer accommodated at one of its locations two hours away from the claimant's residence. The claimant experienced pain while driving this distance and obtained additional work restrictions to limit his driving. Additionally, he sought a second opinion regarding treatment recommendations. He eventually underwent another course of physical therapy, followed by a functional capacity evaluation (FCE) which found he was capable of work within the light-medium level of physical demand and recommended work hardening. The claimant's treating physician disagreed with the work hardening recommendation, but the claimant participated anyway and subsequently experienced increased pain, swelling, and limitations.[273]

At the request of his employer, the claimant underwent an independent medical examination (IME) with a specialist who opined that the claimant could work within the parameters of the FCE and did not require a driving restriction.[274] He found the claimant may require treatment in the future, but not in the foreseeable future. The treating physician disagreed with the IME's opinions regarding work capabilities and driving. The employer offered the claimant work within the restrictions identified by the IME physician, again at its location two hours from the claimant's residence.[275] At a section 19(b) hearing, the arbitrator ordered the employer to pay additional TTD benefits, but denied penalties. Neither party reviewed the decision.[276]

The claimant resumed treatment with a new orthopedic physician and ultimately underwent a total knee replacement. He participated in yet another FCE in which he demonstrated capabilities in the light-medium demand category. The FCE evaluator recommended work conditioning. The treating physician agreed with the restrictions, but not with the recommendation for work conditioning. She noted the claimant was capable of driving an automatic tractor-trailer.[277] The claimant was unable to find work driving an

271. W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 113129WC, ¶ 43.
272. Id. at ¶ 4.
273. *Id.* at ¶¶ 8-9.
274. *Id.* at ¶ 10.
275. *Id.* at ¶ 12.
276. *Id.* at ¶ 13.
277. *Id.* at ¶ 17.

automatic tractor-trailer with the assistance of vocational rehabilitation specialist. The employer's IME thought he could drive a manual tractor-trailer and ordered another FCE which the claimant did not attend. At the second section 19(b) hearing, the main issue was the appropriateness of the vocational rehabilitation plan. Experts testified for both sides and ultimately, the arbitrator found the claimant's expert more credible. The arbitrator found the vocational rehabilitation plan was appropriate and ordered the employer to pay for outstanding charges associated with the claimant's vocational rehabilitation efforts and maintenance benefits accordingly.[278]

The employer reviewed the second section 19(b) decision, arguing for reversal of the arbitrator's decision. In addition to its factual contentions, the employer argued that the Commission should have ordered the claimant to submit to an FCE, per the recommendations of its IME physician.[279] The claimant argued that the Commission had no statutory authority to do so. In citing section 12 of the Act, which allows the employer to compel an IME, the appellate court noted that the section limits the employer's rights in that it is limited to selecting a "medical practitioner or surgeon."[280] Relying on the dictionary definitions of medical practitioner and physical therapist, the appellate court found that section 12 afforded the employer no right to compel an FCE.[281] Similarly, section 19(c) of the Act, which confers similar power to the Commission to order an examination, limits that power to examinations by "a member or members of a panel of physicians."[282] Thus, the Act provided no legal basis for the Commission or the employer to compel an FCE.

The employer argued that the above statutory construction analysis constituted a deprivation of its due process rights because it denies the employer a "meaningful hearing and a 'level playing field'" on which to defend claims.[283] The due process clauses of the Illinois State and United States Constitutions exist to prevent arbitrary and unreasonable uses of the State's police power.[284] To assess a potential violation of the clauses, the courts look to determine whether the State has selected reasonable means for accomplishing its goals. The court noted that the purpose of the Act is to promptly and equitably compensate injured workers.[285] The court pointed out the Act provides a statutory scheme that allows the employee to select the doctors of his or her choice, but that section 12 "level[s the] playing field"

278. *Id*. at ¶ 27.
279. *Id.* at ¶ 43.
280. *Id.* at ¶ 45 (citing 820 ILL. COMP. STAT. 305/12 (West 2008)).
281. *Id.* at ¶¶ 45-47.
282. *Id.* at ¶ 46 (citing 820 ILL. COMP. STAT. 305/19(c) (West 2008)).
283. *Id*. at ¶ 48.
284. *Id*. at ¶ 49.
285. *Id.* at ¶ 50.

for the employer.[286] The court, in acknowledging that section 12 does not confer any power on an IME physician to order additional treatment, found the statutory scheme is reasonably necessary to accomplish the purposes of the Act and does not constitute a due process violation.[287]

D. Penalties

In a 3-2 decision addressing the assessment of section 19(k) penalties, the appellate court majority held that the Commission was without authority to do so base on the employer's unreasonable delay in authorizing additional medical treatment after a claim had proceeded to hearing on all issues.[288] In *Hollywood Casino,* the employer waited approximately sixty days before authorizing additional treatment which was prescribed post-arbitration. Once the treatment was authorized, the employer promptly paid the medical bills generated as a result of the treatment. The court agreed with the employer that section 19(k) provides for assessment of penalties only for the unreasonable *delay of payment* or *intentional underpayment* equal to 50 percent of the amount payable at the time of such an award.[289] When no charges are outstanding at the time of the award, an assessment of penalties is contrary to section 19(k).[290] Thus, the Commission had no authority to assess section 19(k) penalties against this employer.

E. Section 19(g)—Circuit Court Judgments

At issue before the court in *Patel* was whether section 19(g) allows an employer to claim an offset for credit awarded by the arbitrator and the Commission when the employee seeks to enforce the award in circuit court.[291] Here, the arbitrator ordered the employer to pay additional TTD benefits of approximately $22,000 but awarded the employer a credit for benefits previously paid which exceeded the TTD award.[292] The court held that section 19(g) provided no basis for the employer to claim credit for benefits paid.[293] The court noted that the employer's credit could not defeat the circuit court's entry of judgment pursuant to section 19(g). Rather, the

286. *Id*.
287. *Id*.
288. Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Comm'n, 2012 IL App (2d) 110426WC, ¶ 29.
289. See id at ¶¶ 1-7.
290. *Id.* at ¶ 18.
291. Patel v. Home depot USA, Inc., 2012 IL App (1st) 103217, ¶ 6.
292. *Id.* at ¶ 15. The employer overpaid TTD for certain periods, but the arbitrator found that the claimant was entitled to TTD during an additional time period during which the employer did not pay benefits. The arbitrator's award for additional TTD was for benefits during that time period.
293. *Id*. at ¶ 20.

employer's remedy to collect its credit was a common law action against the claimant. The court held that entry of judgment pursuant to section 19(g) was legally appropriate even when the employer's credit for benefits paid exceeded the arbitrator's award for benefits.[294]

VIII. PERMANENCY BENEFITS

Permanency benefits are awarded once the claimant reaches maximum medical improvement. Permanency benefits can consist of a permanent partial disability award,[295] disfigurement,[296] a wage differential,[297] or a permanent total disability.[298] Permanency benefits can also be in the form of death benefits.[299]

A. Permanent Partial Disability (PPD)

In what is perhaps the most controversial decision of the past two years, the appellate court in *Will County Forest Preserve Dist. v. Illinois Workers' Compensation Comm'n*,[300] held that a shoulder injury, which had previously been compensated as part of an arm under section 8(e)(10), should be compensated under section 8(d)(2)'s person-as-a-whole provision.[301] The Commission awarded section 8(d)(2) person-as-a-whole benefits based on injuries sustained to the claimant's right shoulder, finding that the claimant sustained injuries, which "partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, which is the exact language of section 8(d)(2)."[302] In support of this finding, the Commission found that in performing certain work activities, claimant "[could] only apply the forces necessary with his left, non-dominant arm." The Commission also pointed

294. *Id.*
295. 820 ILL. COMP. STAT. 305/8(d)(2) (2013) (person-as-a-whole) or (e) (scheduled loss). Hearing and vision loss is governed by section 8(e)(16). A person-as-a-whole loss is limited to 500 weeks, while specific loss of use is categorized by body part. For example, total loss of use of a leg is valued at 200 weeks if the accidental injury occurs prior to February 1, 2006, and 215 weeks if it occurs afterwards. 820 ILL. COMP. STAT. 305/8(e)(12).
296. *Id*. at 8(c).
297. *Id*. at 8(d)(1).
298. *Id*. at 8(f).
299. *Id*. at 7.
300. Will County Forest Preserve Dist. v. Illinois Workers' Compensation Comm'n, 2012 IL App (3d) 110077WC.
301. Under section 8(e)(10), an employee who suffers the physical loss of an arm or the permanent and complete loss of use of an arm is compensated at 253 benefit weeks. Under section 8(d)(2), benefits are awarded based on the "percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability." 820 ILL. COMP. STAT. 305/8(d)(2), 8(e).
302. Will County Forest Preserve Dist., 2012 IL App (3d) 110077WC at ¶ 10.

out that the claimant commenced other work activities using his right arm, "but it tires easily, requiring him to switch to his left arm."[303]

According to the employer, the claimant returned to work at full duty resuming all prior job activities and was under no medical restrictions. Moreover, he did not seek any additional treatment for his right shoulder. Thus, the employer argued, it was improper to award claimant benefits under section 8(d)(2) on the basis that the claimant proved a partial incapacity, which prevents him from "pursuing the duties of his usual and customary line of employment." Instead, the employer maintained, the Commission should have awarded claimant benefits for a scheduled loss to the right arm as set forth in section 8(e)(10) of the Act, which would also have permitted the employer to take advantage of a section 8(e)(17) credit for the award the claimant previously received as a result of a prior settlement.[304]

> Section 8(d)(2) provides for benefits in any of the following three situations: (1) where a claimant sustains serious and permanent injuries not covered by sections 8(c) (relating to injuries resulting in disfigurement) or 8(e) (specific loss provisions); (2) where a claimant covered by sections 8(c) or 8(e) of the Act also sustains other injuries which are not covered by those two sections and such injuries do not incapacitate him from pursuing his employment but would disable him from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; or (3) where a claimant suffers injuries which partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity. The Commission's decision was grounded in the third subpart.[305]

The appellate court rejected the Commission's reliance on the third subpart, finding that the claimant could return to his former job, albeit by using his left arm to compensate.[306] The court then considered whether benefits were appropriate under another subsection of the Act, namely the specific loss provisions governing injuries to an arm. Observing that the court had not previously had occasion to consider the classification of a shoulder injury, the court looked to various dictionary definitions and concluding that the shoulder is not part of the arm.[307]

Since the claimant's shoulder injury did not qualify as a scheduled loss to the arm, the appellate court turned to the first subpart of section 8(d)(2),

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303. *Id*.
304. *Id*. at ¶ 12.
305. *Id*. at ¶ 14 (citing 820 ILL. COMP. STAT. 305/8(d)(2).
306. *Id*. at ¶ 15.
307. *Id*. at ¶ 19. "The word 'arm' is defined as 'the segment of the upper limb between the shoulder and the elbow; commonly used to mean the whole superior limb.' STEDMAN'S MEDICAL DICTIONARY 127 (27th ed. 2000); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 118 (2002) (defining "arm" as "a human upper limb . . . the part of an arm between the shoulder and the wrist").

which provides for a person-as-a-whole award where the claimant sustains serious and permanent injuries not covered by sections 8(c) or 8(e) of the Act. Section 8(c) did not apply because there was not disfigurement. Since no other provision offered compensation for the shoulder—which was not a part of the arm—the court concluded that the first subpart of section 8(d)(2) was the appropriate section under which to award compensation.[308] In the end, the appellate court unanimously affirmed the Commission's ultimate decision to award benefits under the person-as-a-whole provisions, albeit for different reasons.[309]

Will County Forest Preserve District causes significant consternation in practice and has led to calls for legislative intervention. Legislation is currently before the Illinois General Assembly to return shoulder injuries to the specific loss provisions, which would allow employers to take advantage of the credit provisions for compensation awarded from prior workers' compensation claims.

Another permanency decision during the survey period concerned the relationship between permanency from one work-related injury and a second work injury found to constitute an intervening act. In *National Freight Industries v. Illinois Workers' Compensation Comm'n*,[310] the claimant filed two claims resulting from two work-related accidents. The first injury resulted from the claimant unloading boxes; the second injury resulted from a motor vehicle accident. Both accidents produced back injuries, although they were different. Following the consolidated section 19(b) arbitration, the Commission affirmed the arbitrator's findings, which held that the employer's obligations for injuries resulting from the first accident ended with the second accident. The arbitrator had concluded the employer owed no further TTD or medical benefits and no permanency as of the second accident, which constituted an intervening accident.[311]

The appellate court upheld the finding of an intervening act, noting that the claimant's symptoms, pathology, treatment and work restrictions all changed following the motor vehicle accident.[312] However, the court reversed that portion of the Commission's decision denying future permanency. First, the court considered the fact that the claims were arbitrated under section 19(b), which is an immediate hearing provision and one which does not determine permanency. According to the court, "it is not clear what the arbitrator meant when he stated that 'no permanency is

308. *Id*. at ¶ 21.
309. *Id*. at ¶ 24.
310. National Freight Industries v. Illinois Workers' Compensation Comm'n, 2013 IL App (5th) 120043WC.
311. *Id*. at ¶ 20.
312. *Id*. at ¶ 28-33.

awarded.'"[313] It continued questioning, "Was he denying claimant a permanency award from Fischer Lumber outright? Or did he conclude that it was premature to assess permanency given that claimant had yet to reach maximum medical improvement?"[314] Moreover, the court stated,

> [o]ur difficulty in interpreting the arbitrator's finding is compounded by the fact that, although the Commission affirmed and adopted the decision of the arbitrator, it also remanded the case to the arbitrator 'for further proceedings for a determination of a further amount of temporary total compensation *or of compensation for permanent disability, if any*.[315]

Since claimant suffered separate and distinct injuries arising from two different accidents, the court concluded he should be allowed to seek a permanency award for each accident. "If the two injuries are divisible, as the Commission found, it should be able to assign separate permanency awards for each of the two accidents."[316] Accordingly, the appellate court vacated the Commission's finding that claimant was not entitled to a permanency award from his employer and remanded the matter to the Commission with instructions that it determine the permanency attributable to each separate injury.[317]

In *University of Illinois Hospital v. Illinois Workers' Compensation Comm'n*,[318] the appellate court addressed the finality of a Commission decision whereby all three Commissioners reached a different conclusion concerning the claim's compensability and the type of permanency to award. The arbitrator had denied permanent total disability benefits, but had awarded permanent partial disability (PPD) based on a loss of use of both the claimant's right and left hand.[319] Both parties filed for review and the Commission entered a decision with one Commissioner upholding the PPD award, one Commissioner awarding permanent total disability benefits, and one Commissioner finding that the claimant had failed to establish an accident arising out of and in the course of the employment.[320]

On its own motion, the appellate court determined that the Commission's decision was not final and dismissed the appeal for lack of jurisdiction.[321] The court looked to section 19(e) of the Act, which states, "a

313. *Id*. at ¶ 38.
314. *Id*.
315. *Id*. (emphasis in original).
316. *Id*. at ¶ 43.
317. *Id*. at ¶ 45.
318. University of Illinois Hospital v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st) 113130WC.
319. *Id*. at ¶ 5.
320. *Id*. at ¶ 6.
321. *Id*. at ¶ 8. Subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties. *See, e.g.*, Supreme Catering v. Illinois Workers' Compensation Comm'n, 2012 IL App (1st)

decision of the Commission shall be approved by a majority of a panel of 3 members of the Commission."[322] In this case, the court observed, "the record affirmatively demonstrates that there was no approval by a majority of the three-member panel of commissioners with regard to the claimant's entitlement to a permanent disability award."[323] The two Commissioners who found that the claimant was entitled to receive benefits did not agree with regard to a permanency award. "In light of the fact that a majority of the commissioners did not approve the PPD award, the decision issued by the Commission is not final because it does not dispose of the claimant's request for permanent disability benefits in accordance with the unambiguous language of section 19(e)."[324]

B. Section 8(d)(1) Wage Differential Benefits

Two cases decided during this term concerned wage differential benefits under section 8(d)(1) of the Act. To qualify as a wage differential award a claimant must prove: (1) a partial incapacity which prevents him from pursuing his "usual and customary line of employment;" and (2) an impairment of his earnings.[325] For claims that arose prior to September 1, 2011, the wage differential was payable for life.[326] For claims filed after that date, a wage differential award "shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later."[327]

In *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*,[328] the appellate court held that a wage differential award must be determined as of the time of the arbitration hearing and without reference to the potential for increased earnings in new employment. In that case, the claimant worked as a ramp service worker at the time of his accident, earning $20.66 per hour, which included a shift differential and line pay. The claimant was later returned to work with restrictions and accepted a position as a station operations representative (SOR) with UAL, which paid $9.92 per hour based on a union agreement mandating that he start at the lowest wage for the SOR position.[329]

111220WC, ¶ 7. "Although the parties did not raise the issue of the circuit court's jurisdiction in this appeal, this court is required to do so *sua sponte*, for if the circuit court lacked subject matter jurisdiction, then its orders are void and of no effect."

322. 820 ILL. COMP. STAT. 305/19(e). *See, e.g.*, University of Illinois Hosp., 2012 IL App (1st) 113130WC, ¶ 10.
323. *University of Illinois Hospital*, 2012 IL App (1st) 113130WC, ¶ 10.
324. *Id*. at ¶ 11.
325. 820 ILL. COMP. STAT. 305/8(d)(1).
326. *Id*.
327. *Id*.
328. United Airlines, Inc. v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 121136WC.
329. *Id*. at ¶¶ 3-4.

Evidence was presented at arbitration showing that the claimant would have earned $19.81 per hour as a ramp service worker had he still been employed in that position.[330] He further testified that he was subject to a union contract as far as his SOR position pay. An UAL employee testified that under that labor agreement the claimant's wages would have risen over a period of ten years and would have leveled off at $21.77 by March 2018.[331] By the same date, his former ramp service job would have paid $21.08 per hour. At that point, the claimant would make more money per hour as an SOR than he would have if he had continued working as a ramp service worker.[332]

The arbitrator found the claimant was entitled to a wage differential and awarded benefits for a period of ten years or until March 2018, when the wages of the new job would surpass the wages of his prior position.[333] During this period, the wages were to systematically decrease in accordance with increases in the union wage scale. However, the Commission modified the award and struck the diminishing payment scale, awarding the claimant a wage differential of $277.06 per week for life.[334]

On appeal, the appellate court concluded the Commission had properly awarded the wage differential benefit irrespective of the fact that under the union contract the claimant's wages as an SOR would increase and eventually surpass the wages of his former job.[335] According to the appellate court,

> [t]he statute does not provide for a varying amount to be paid out at various future dates. Rather, as the statute states, the award must be based upon the *average* amount of the claimant's wages at the time of the accident and the *average* amount which the claimant is earning or able earn in some suitable employment after the accident.[336]

The statute, it was observed, "under its plain and ordinary language, does not contemplate multiple figures to be computed and awarded at future dates."[337]

Looking at the award rendered by the Commission, the appellate court affirmed, finding that it was too speculative to rely solely on the union contracts as written at the time of arbitration.[338] Although noting that the Commission should factor the future pay schedule into its determination of

330. *Id*. at ¶ 4.
331. *Id*. at ¶ 10.
332. *Id*. at ¶ 14.
333. *Id*.
334. *Id*. at ¶ 15.
335. *Id*. at ¶ 22.
336. *Id*. (emphasis in original).
337. *Id*.
338. *Id*. at ¶ 29.

the wage differential at the time of the hearing, the court noted the Commission had properly discounted the impact of the union pay schedule:

> Given that [UAL's employee] Cooney's projections did not factor in potential changes in the union agreement and changes in UAL's performance, we cannot hold that the Commission's finding is against the manifest weight of the evidence. Cooney's projections were speculative, because she could not predict changes in future union contracts and UAL's future performance, and the Commission could have discounted such speculative evidence when determining the amount of the claimant's award.[339]

As a result, the court affirmed the Commission's decision to award a non-diminishing wage differential for life.[340]

In another case involving a wage differential award, the appellate court found that an employer could not take a credit for the claimant's pension benefits against its obligation to pay temporary total disability (TTD) or wage differential benefits. In *Wood Dale Electric v. Illinois Workers' Compensation Comm'n*,[341] the arbitrator and Commission awarded the employer a section 8(j) credit for the amount of pension benefits received by the claimant as against the employer's obligation to pay TTD benefits and wage differential award.[342] The circuit court set aside the credit, which was affirmed by the appellate court.[343]

The appellate court began its analysis with the critical language of section 8(j):

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339. *Id*.

340. *Id*. at ¶¶ 30-31. *United Airlines* also addressed the propriety of the Commission's refusal to consider the claimant's overtime, noting that the alleged overtime was not shown to be regular or continuous or mandatory.

341. Wood Dale Electric v. Illinois Workers' Compensation Comm'n, 2013 IL App (1st) 113394WC.

342. Section 8(j) provides:

> In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act. In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments. This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to the extent of such credit. 820 ILL. COMP. STAT. 305/8(j)(1).

343. *Id*. at ¶¶ 20, 25.

> Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment.[344]

In construing this language, the appellate court looked to two prior decisions—*Tee-Pak, Inc. v. Industrial Comm'n*[345] and *Elgin Bd. of Educ. School Dist. U-46 v. Illinois Workers' Compensation Comm'n*[346]—which had previously addressed the issue and set forth the legal framework for the issue. In *Tee–Pak*, the claimant argued that the Commission had erred in allowing the employer a credit for money paid to him under "a benefit program which ensure[d] a full salary to . . . employees who are off work due to an accident or illness."[347] In reversing the Commission's decision, the appellate court cited section 8(j) generally for the proposition that "[u]nder the Act, the employer receives no credit for benefits which would have been paid irrespective of the occurrence of a workers' compensation accident."[348]

In *Elgin*, the employer argued that it was entitled to a credit under section 8(j)(2) for "wages paid to claimant in lieu of [temporary total disability payments] for the period of time [she] was off work due to her injury."[349] The appellate court there distinguished *Tee–Pak* on the basis that, in *Elgin*, unlike in *Tee–Pak*, there was evidence that the employer intended its employees to be able to collect both salary and workers' compensation payments.[350] As a result, the limitation of section 8(j) imposed in *Tee–Pak* did not apply.[351]

In *Wood Dale*, the appellate court noted that the parties did not dispute the pension payments, unlike those in *Tee–Pak* and *Elgin*, were the result of normal pension retirement benefits, wholly unrelated to the claimant's workers' compensation accident.[352] Accordingly, under the rule in *Tee–Pak* and *Elgin*, those payments did not entitle the employer Wood Dale to a credit

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344. 820 ILL. COMP. STAT. 305/8(j)(2). *See also* Wood Dale Electric, 2013 IL App (1st) 113394WC, ¶ 14.
345. Tee-Pak, Inc. v. Industrial Comm'n, 141 Ill. App. 3d 520, 490 N.E.2d 170 (4th Dist. 1986).
346. Elgin Bd. of Educ. School Dist. U-46 v. Illinois Workers' Compensation Comm'n,, 409 Ill. App. 3d 943, 949 N.E.2d 198 (1st Dist. 2011).
347. *Tee–Pak*, 141 Ill. App. 3d at 522, 490 N.E.2d at 172.
348. *Id*. at 529, 490 N.E.2d at 176.
349. *Elgin*, 409 Ill. App. 3d at 952, 949 N.E.2d at 206.
350. *Id*. at 954, 949 N.E.2d at 208.
351. *Id*.
352. *Wood Dale Electric*, 2013 IL 113394WC, ¶ 20.

against its liability under the Act. As an aside, the appellate court also rejected the employer's argument that the claimant was not entitled to a wage differential because he had voluntarily removed himself from the work force by electing to retire. Relying on its 2010 decision in *Copperweld Tubing Products Co. v. Illinois Workers' Compensation Comm'n*,[353] the court concluded that a claimant's voluntary decision to remove himself from the work force does not preclude a wage differential award. Instead, a wage differential award is determined by comparing the claimant's prior earning capacity to the amount he "is earning or is able to earn in some suitable employment or business after the accident."[354]

C. Section 8(f) Permanent Total Disability (PTD)

Only one case during the survey period addressed permanent total disability benefits. In *Professional Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, the employer had appealed a Commission award of permanent total disability (PTD) benefits in favor of the claimant based on the finding the claimant was an "odd-lot."[355] The claimant did not offer any medical evidence that he was unable to work and did not present evidence of a diligent, but unsuccessful, job search. As such, the appellate court concluded that the claimant, who was not obviously unemployable, carried the burden of proving by a preponderance of the evidence that he was so handicapped that he could not be employed regularly in any well-known branch of the labor market.[356]

In reversing the Commission's odd lot PTD determination, the appellate court observed that the employer's vocational rehabilitation expert concluded that the claimant was capable of performing the duties of an entry level cashier for an employer willing to accommodate the claimant's restrictions.[357] In addition, the vocational report stated that the occupation of cashier would likely increase by 6.2 percent in the Kankakee area based upon the National Labor Force Statistics. In contrast, the claimant failed to introduce any evidence that there was no stable job market for a person of his age, skills, training, work history, and physical condition. In the absence of any such evidence, the court held that the Commission's finding that the claimant is entitled to PTD benefits as an "odd-lot" permanent total under section 8(f) was against the manifest weight of the evidence.[358]

353. Copperweld Tubing Products Co. Illinois Workers' Compensation Comm'n, 402 Ill. App. 3d 630, 634, 931 N.E.2d 762, 766 (1st Dist. 2010).
354. 820 ILL. COMP. STAT. 305/8(d)(1).
355. Professional Transportation, Inc., v. Illinois Workers' Compensation Comm'n, 2012 IL App (3d) 100783WC ¶ 27.
356. *Id*. at ¶ 36.
357. *Id*. at ¶ 22.
358. *Id*. at ¶ 37.

IX. INTERACTION WITH THE ACT AND OTHER LEGISLATION

Appellate court cases dealing directly with issues arising under the Workers' Compensation Act are decided by the Workers' Compensation Commission Division. However some cases, such as those dealing with application of the exclusive remedy doctrine, are handled by the traditional Illinois appellate courts. In this section we talk about some of those cases to the extent they address the more significant issues.

A. Medicare Set-Asides and Divorce Awards

In *In re Marriage of Washkowiak*,[359] the husband, also a claimant in a workers' compensation proceeding, had filed for divorce. As part of the husband's workers' compensation settlement, funds were placed in a Medicare set-aside account (MSA) for the payment of future medical bills that Medicare might otherwise be responsible for paying.[360] The circuit court in the divorce proceeding awarded the wife a portion of the husband's workers' compensation settlement that had been placed in a Medicare set-aside account, finding it constituted a "net proceeds" of the workers' compensation settlement. A majority of the appellate court affirmed, finding that the proceeds, even though earmarked for the MSA, belonged to the husband.[361] According to the majority, "[the husband] present[ed] no evidence that the funds in the MSA are not 'net proceeds.' There is no question the money is his."[362] The court continued, "The settlement was between [the husband] and [employer]; [the husband] was given the money. It is not Medicare's or [the employer's] money."[363]

Moreover, "[t]he MSA clarifies how much of the settlement is intended to pay for future medical costs associated with the injury and places that amount in a separate account so that it can be shown that those funds were used to pay [the husband's] medical costs caused by the injury."[364] One justice dissented, arguing the MSA funds were intended to pay for future medical bills so that Medicare would not be forced to pay for expenses that should be covered by another responsible party.[365]

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359. *In re* Marriage of Washkowiak, 2012 IL App (3d) 110174.
360. *Id*. at ¶ 14. An individual claimant receiving a lump-sum settlement that includes a future medical care component is obligated to exhaust those funds before Medicare can be made responsible for medical payments.
361. *Id*. at ¶ 15.
362. *Id*.
363. *Id*.
364. *Id*.
365. *Id*. at ¶ 28.

B. Exclusive Remedy

Known as the exclusive remedy provisions, sections 5 and 11 of the Act insulate employers from civil liability for injuries sustained by an employee "while engaged in his line of duty as such employee."[366] Three cases were decided during the survey period re-affirming the exclusive remedy provisions are still firmly entrenched in Illinois jurisprudence. In *Glasgow v. Associated Banc-Corp.*,[367] a bank teller was injured during a bank robbery and brought a civil action against her employer for an intentional tort. The plaintiff alleged that the bank had been robbed twice before and that had she known of this, she would not have taken the job. Her complaint also alleged the bank lacked a security guard, bulletproof glass, and preventive windows which would have prevented the robbers from climbing over the counter to attack the tellers. She also alleged the bank should have had a male employee working with the female tellers.[368]

The plaintiff also filed a workers' compensation claim against the bank, which was still pending and which was paying her benefits. The employer moved to dismiss the complaint based on the exclusive remedy provisions and further on the ground that the employee had accepted benefits under the Act, and therefore, made her choice of benefits.[369] "Once an employee has collected compensation on the basis that his or her injuries were compensable under the Act, the employee cannot then allege that those injuries fall outside the Act's provisions."[370]

The circuit court granted the defendant's motion to dismiss, which the appellate court affirmed on the basis that the teller's workers' compensation claim was her sole remedy.[371] The appellate court relied on established law to the effect that once the plaintiff applied for and accepted the workers' compensation benefits she could no longer pursue an intentional tort action in the circuit court.[372] Alternatively, the court held that the teller had failed to plead a specific intent to harm, as required to fulfill the elements of her intentional tort claim. Noting that an intentional act was an exception to the traditional exclusive remedy provision, the court observed in order for the claim to be "not accidental," the complaint must allege the employer knew with substantial certainty that its actions would injure the employee or specifically intended that its actions injure the employee. The court concluded,

366. 820 ILL. COMP. STAT. 305/5, 11.
367. Glasgow v. Associated Banc-Corp., 2012 IL App (2d) 111303.
368. *Id*. at ¶ 3.
369. *Id*. at ¶ 7.
370. *Id*. at ¶ 10 (citing Collier v. Wagner Castings Co., 81 Ill. 2d 229, 241, 408 N.E.2d 198 (1980)).
371. *Glasgow*, 2012 IL App (2d) 111303, ¶¶ 17-18.
372. *Id*. at ¶ 22.

> [a]lthough the amended complaint did allege that defendants "knowingly, willfully, [and] purposely failed, with obvious intent and outrageous conduct, [to] provide adequate bank security to deter and/or prevent the . . . robbery," [the] plaintiff did not allege that defendants specifically intended that its actions would injure her. Moreover, [the] plaintiff did not allege that defendants commanded or expressly authorized her injuries.[373]

In *Rodriguez v. Frankie's Beef/Pasta and Catering*,[374] the appellate court upheld the entry of summary judgment in favor of an employer where the special administrator of a deceased employee's estate brought a claim for negligent hiring and retention of a coworker who fatally shot the decedent employee. There, the two coworkers had quarreled over the selection of one to work as a fry cook. The two employees were told to go home and cool off, but the next day one returned with a gun and shot and killed the other. The employer had moved for summary judgment based on the exclusive remedy provisions of the Act. The circuit court granted the motion and the estate appealed.[375]

The appellate court affirmed, finding the exclusive remedy provision applied since the dispute between the two workers arose out of their employment duties.[376] Both employees were at the jobsite when the shooting occurred. Moreover, the shooting resulted directly from the dispute the two workers had concerning the selection of the decedent as a fry cook. The court also noted there was no evidence the employer had reason to expect the shooting would occur, especially since he had encouraged the two to go home and cool off before returning to work the next day.[377]

Finally, the appellate court dealt with a more unusual application of the exclusive remedy provision in *Mockbee v. Humphrey Manlift Co., Inc.*,[378] where the employee brought suit not against the employer, but rather against contractors hired by the employer to perform safety surveys of a man-lift platform system at the workplace. The complaint at law alleged the contractors were negligent in failing to inform the employer of the need for guardrails to comply with OSHA. The circuit court granted the contractors' motion for summary judgment, relying on the exclusive remedy provisions of section 5, which specifically precludes recovery of damages from "the employer, his insurer, his broker, any *service organization* retained by the employer, his insurer or his broker to provide safety service, advice or recommendations for the employer or the agents or employees of any of

373. Id. at ¶ 21.
374. Rodriguez v. Frankie's Beef/Pasta and Catering, 2012 IL App (1st) 113155.
375. *Id*. at ¶ 3.
376. *Id*. at ¶¶ 18-24.
377. *Id*. at ¶ 20.
378. Mockbee v. Humphrey Manlift Co., Inc., 2012 IL App (1st) 093189.

them."[379] The appellate court affirmed, finding, "[u]nder the plain meaning of section 5(a), a qualifying service organization is any organization that provides "safety service, advice or recommendations for the employer."[380]

X. CONCLUSION

This summary of cases from 2012 and 2013 provides a good overview of how the appellate court and Supreme Court have construed the provisions of the Workers' Compensation Act and some of the emerging trends. As with all summaries, please consult the actual decisions and statutory language prior to rendering legal opinions to your clients.

379. 820 ILL. COMP. STAT. 305/5(a) (emphasis added).
380. *Mockbee*, 2012 IL App (1st) 093189, ¶ 45.