Illinois Self-Insurers' Association

MAY 2022

FROM THE DIRECTOR'S DESK

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

We are pleased to present our second Quarterly Newsletter. Since our last newsletter, winter is in the rearview mirror and spring has arrived. We are at the beginning of a new season of baseball, and both hockey and basketball seasons are in the "second season" of playoffs.

Springtime also means "Nuts and Bolts", and by the time this newsletter reaches you, the ISIA will have concluded its two-day Nuts and Bolts of Illinois Workers' Compensation workshop. We were excited to go back to in-person presentation of this program. We were pleased to welcome back our long-time members. Likewise, we enjoyed meeting our new members.

If you were unable to attend our 2022 Nuts and Bolts program, we are planning to make video recordings available. Please visit the ISIA website at www.illinoisselfinsurance.org for more details.

Based on the level of energy at Nuts and Bolts, we will be returning to in-person presentation of our Annual Educational Seminar this fall. Details will be announced later.

While we are thrilled to be returning to in-person programs, we will continue virtual programs. This summer, we will be featuring our "lunch and learn" webinars. Topics and registration information will be posted on the ISIA website.

In this issue of our newsletter, we are featuring news from the Illinois Workers' Compensation Commission and the Illinois legislature. We are pleased to feature an article from one of the ISIA's Board members, Frank Totton of Caterpillar, Inc., with his thoughts on managing claim costs.

Two of the ISIA's associate members, Athletico and Ringler Associates, contributed articles. Athletico offers valuable information on reducing costs due to musculoskeletal disorders. Don Engels of Ringler Associates offers recommendations for how employers can leverage a petitioner's tax strategies in settlement negotiations involving catastrophic losses.

Finally, we invite you to review the summary of recent Appellate Court and Illinois Workers' Compensation Commission cases. We are providing a summary of the Appellate Court's recent opinion allowing a plaintiff to overcome the exclusive remedy provision of the Illinois Workers' Compensation Act. Additionally, two Commission decisions involving work-place altercations are compared and contrasted.

The ISIA has exciting plans for 2022! We invite you to join us and participate in our programs. The ISIA offers two membership levels. Self-insured and high-deductible (>$250,000.00) employers may join as "voting" members. We also offer a "associate" membership for those organizations that do not qualify as voting members but have interest in the benefits of ISIA membership. If you are already a member, thank you! If you are not a member, please consider joining the ISIA. Membership information is provided in this newsletter.

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

The Commission continues to operate at full speed while simultaneously evolving with the times. There have been many exciting changes over the past two years under the leadership of Chairman Michael Brennan.

Pre-trials are typically conducted via WebEx, while all evidentiary hearings remain in person. The implementation of CompFile has also streamlined our practice, changing how we submit filings, prepare for status calls, and draft settlement contracts.

In his role as Chairman, Michael Brennan regularly meets with attorneys on both sides of the bar via WebEx to address any issues which arise in our practice. He is very receptive to suggestions from the bar and truly wants to improve all aspects of the Commission. During these meetings, Chairman Brennan wants to know what works with our current system and where there is room for improvement. He is a proponent of working as a team to solve issues raised by members of the bar. Chairman Brennan strives to ensure the Commission functions efficiently and all proceedings are conducted in a professional manner.

At judicial training on April 21, 2022, Chairman Brennan discussed the importance of managing dockets, allowing Arbitrators to effectively hear as many cases as possible. In addition to conducting pretrials, Arbitrators remain busy hearing trials and writing decisions. Chairman Brennan mentioned the number of pretrial slots may be reduced in the future to allow extra time for Arbitrators to write decisions. Other issues affecting the Arbitrators' dockets include numerous 19(b) petitions filed each month, many of which are not "true" 19(b) petitions. These filings unfortunately clog up the dockets of many Arbitrators, reducing the number of available pretrial slots for other cases. One proposed solution is to require in person 19(b) pretrials, which may act as a deterrent for those attorneys who file these unnecessary 19(b) petitions.

Chicago oral arguments may be moved to in person, effective June 1, 2022. There is also a discussion as to whether oral arguments in Springfield will still be conducted via WebEx, in person, or a hybrid of both. Another change at the Commission is the addition of a new hearing site in Champaign, the I Hotel and Illinois Conference Center, located at 1900 South First Street. All Urbana in person hearings and review calls will be heard at this location.

The Illinois Workers' Compensation Commission Medical Fee Advisory Board recently approved a 15% increase for evaluation & management (E&M) codes to the workers' compensation medical fee schedule. This is a reduction from the initially proposed 30% increase. There is no definite date for implementation at this time. Anticipating that the Commission will approve the increase, Chairman Brennan indicated that notice will be provided to stakeholders following approval by the Commission and adequate time will be allowed for implementation by the parties impacted.

Passage of HB 1208 will result in changes at the Commission, including how the Commission manages the rotation of downstate Arbitrators and the length of time Arbitrators remain in their appointed positions. HB 1208 awaits the Governor's signature. The bill proposes a four-year appointment for Arbitrators as well as extension of the time downstate Arbitrators remain in their "zone" to a period of four years. This bill will also require that Commissioners have a license to practice law.

We look forward to the continued evolvement of the Illinois Workers' Compensation Commission under the excellent leadership of Chairman Brennan and express our appreciation for the tireless work of the Arbitrators, Commissioners, and their staff.

INSIDE SPRINGFIELD: UPDATE ON CURRENT LEGISLATION

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

As you may recall from my prior column, the Spring session was scheduled to end early this year, and, in fact, has already ended in Springfield. While we usually run through the end of May and can still return at the call of the Speaker without any drastic changes in how we operate, leadership in both the House and the Senate decided to end Session early by setting an arbitrary date of April 8 to end session. Each Chamber achieved its goal with the Senate concluding their Spring session in the morning of Saturday, April 9 at 3:30 AM and the House concluding its Spring session on the morning of Saturday, April 9 at 6:30 AM.

Of note to this column, very little occurred on the workers' compensation front. The most notable item was that House Bill 1208 passed both Chambers. As of this writing, it is currently sitting in the House and is waiting to be sent to the Governor's office. This bill involved mostly administrative changes at the Commission.

The changes of this bill include:

1. Commissioners must now be lawyers;
2. Arbitrator rotation changed from two years to four years;
3. The Act no longer states the Commission appoints Arbitrators, but keeps more with the practice of the Governor appointing Arbitrators;
4. The Chairman is to conduct performance reviews every other year instead of every year; and
5. The two self-insurance funds, the one to cover costs associated with self-insureds that cannot pay their claims and administrative funds have been consolidated into one fund.

I was the chief co-sponsor of this bill, who along with Rep. Jay Hoffman, saw that it had unanimous support in the House of Representatives. This was done through negotiations between our representation of all interested parties and a bill that everyone agreed they could support. It is fully anticipated the Governor will sign this bill when it reaches his desk.

While House Bill 1208 was the only Bill substantively affecting workers' compensation to pass both Chambers this session, of note was what did not

move through the General Assembly. Specifically, neither the House, nor the Senate took up the issue of the rebuttable presumption on COVID-19. As you will recall, an Amendment to the Act creating this presumption was put in place shortly after the pandemic began. It stated that there was a rebuttable presumption that if a front-line worker, as described included in the Governor's executive order, contracted COVID-19 that it would be presumed to have occurred at work. Based upon negotiations between labor and business, although labor allied legislators held a super majority in both the House and the Senate and a favorable tie to the current administration, business was able to obtain a number of defenses to this rebuttable presumption in the law, as well as other items in exchange for an agreed bill. While

Inside Springfield: Update On Current Legislation

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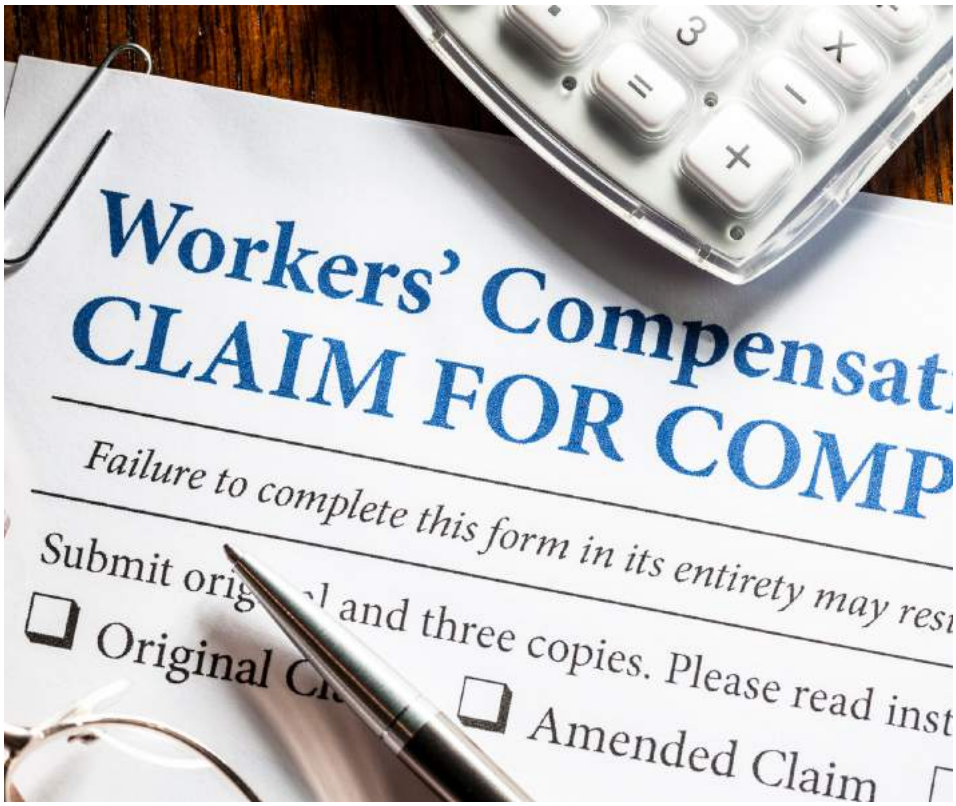
the initial Act passed both Chambers and was signed by the Governor, as well as an initial extension; although requested by labor, business declined to agree to any further extension of the rebuttable presumption and therefore, no one who contracts COVID-19 after June 30, 2021, will be presumed to have contracted it at work. Therefore, if an employee contracts COVID-19 as of July 1, 2021, or later and alleges it occurred at work, they will have to prove their case from the beginning, as it would any other workers' compensation or occupational disease case.

Concerning the other Bills outlined in my previous column, none moved through Committee. In fact, I unfortunately must report that none of my eight workers' compensation reform bills were allowed a committee hearing. However, please note that if I am re-elected this Fall, I will continue to push for these reforms that will bring significant cost savings for employers while still protecting and caring for injured workers if enacted.

In a tangentially related matter, and what could be included under a heading "In Case You Missed It," at the end of last year the majority party and the Governor passed a law over the objections of the business community to allow for pre-judgment interest in personal injury and wrongful death cases. This would allow Plaintiffs to collect 6% interest from the date the suit is filed and would accrue during the pendency of the suit through judgment.Interest would not apply to punitive damages, sanctions, statutory attorney's fees or costs. Furthermore, a pre-resolution settlement offer offsets accrual of any further interest on that amount in the final award. This law applies to cases involving negligence, willful and wanton misconduct, intentional conduct, and strict liability.State and public entities are excluded.It is not believed that the law applies to workers' compensation cases.



MANAGING CLAIM COSTS THROUGH MANAGER ENGAGEMENT

By: Frank Totton, U.S Workers' Compensation Manager; Caterpillar Human Resources

Over the years, I have found that managing claim costs doesn't have to be expensive or involve hiring outside organizations. What I am going to suggest is completely free and can be easily implemented by anyone reading this.

I am talking about manager engagement in the workers' compensation process. Caterpillar has many facilities around the country. Without fail, I have seen a reduction in costs, sometimes by as much as 50%, by simply involving each location's management with workers' compensation. If top management has "buy in", the rest of the management team is sure to follow.

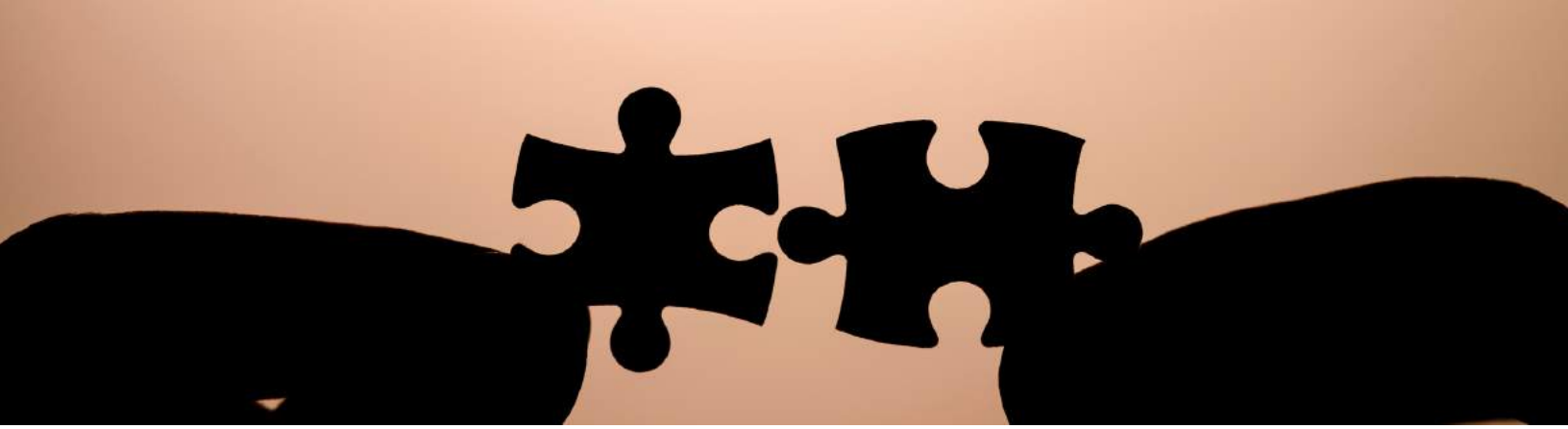
This starts with regular monthly reports. It can also start with a claim review. These give you an opportunity be an advocate and to show current costs and explain where there may be opportunities for improvement. I have yet to find a facility manager that is not interested in reducing workers' compensation costs. When you present opportunities, I promise there will be a willingness to listen.

It is also critical to be sure there is an understanding of claim costs and the data shared. If misused, this can work against the team. Explanation of the monthly reports as well as claim reviews are both an opportunity for education and a springboard for future action. It may also open the door for additional information requests which can be used for other cost saving opportunities. Also, although I work for the same company as the facilities, I treat them as my customer, much like an insurance company would.

"What I am going to suggest is completely free and can be easily implemented ..."

One of the first conversations I like to have with a newly engaged facility is a robust return to work program. I like to explain that just simply getting employees back to work sooner will reduce the other associated costs of the claim such as medical and potentially PPD. This is where management "buy in" can help build momentum in getting the rest of the team involved. It is important not to oversell immediate cost savings. Since workers compensation has a long tail, it is important to explain that progress is very much long term. But that is why future reports and claim reviews are needed to keep these conversations fresh and relevant.

Without fail, if i see a location that is not engaged with our workers compensation team, it is an opportunity for cost savings. I have built many great relationships through these opportunities. Over the many years of advocating engagement, I am not aware of anyone that was disappointed in the results.



ELIMINATING MSD SPEND: TAILORING THE RIGHT STRATEGY FOR YOUR ORGANIZATION

By: Athletico Employer Solutions

Self-insured employers can reduce workers' compensation spend up to 80% by strategically implementing injury prevention programs for their workforce. Selecting the appropriate strategy for your organization depends on several variables. The right approach provides a cost-effective solution with measurable improvements to worker performance, job satisfaction, and reductions in injuries, lost time, and overall medical spend. Below are options that have been demonstrated to reduce musculoskeletal disorders in the workforce.

JOB ANALYSIS AND ERGONOMICS

An essential first step is to understand the nature of the work being performed – some questions we often ask are who is the workforce? What work do they do? What do they do well? What are their challenges? How does their work impact their physical health? This process is known as a job analysis and is a critical piece to any effective musculoskeletal disorder risk mitigation strategy.

Job analysis: Job analysis data is used to: establish and document competencies required for a job; identify the job-relatedness of the tasks and competencies needed to successfully perform the job; and provide a source of legal defensibility of assessment and selection procedures. [2]

When implementing risk management controls for musculoskeletal disorders, a valid job analysis is essential. A critical component of a valid job analysis is thorough understanding of the physical demands of the job.

> *Per the U.S. Department of Labor: "Physical Demands data elements provide a systematic way of describing the physical activities that an occupation requires of a worker. The assessment of these elements is focused primarily on the physical demands of the job - not the physical capacities of the worker. Physical Demand refers to the level and/or duration of physical exertion generally required to perform occupational tasks (sitting, standing, walking, lifting, carrying, reaching, pushing, and pulling).* [1]

The outcome provides a blueprint of the work, on which all prevention efforts can be designed.

EMPLOYMENT TESTING

These programs go by a lot of names in industry – post offer pre-employment testing, physical abilities testing, agility testing, to name a few. What is important to understand is what they are, why they are used, and how to properly utilize them.

What is a POET? *A POET evaluates a candidate for hire on their ability to safely perform the physical demands associated with the essential functions of the job offered to them. Some employers seek to screen employees out if they are unable to successfully complete the POET. Others simply use it as another data point in the big picture and will attempt to work around any limitations identified in the POET to ensure the candidate is placed based on their strengths.*

Self-insured employers can reduce workers' compensation spend up to 80% by strategically implementing injury prevention programs for their workforce.

ELIMINATING MSD SPEND: TAILORING THE RIGHT STRATEGY FOR YOUR ORGANIZATION

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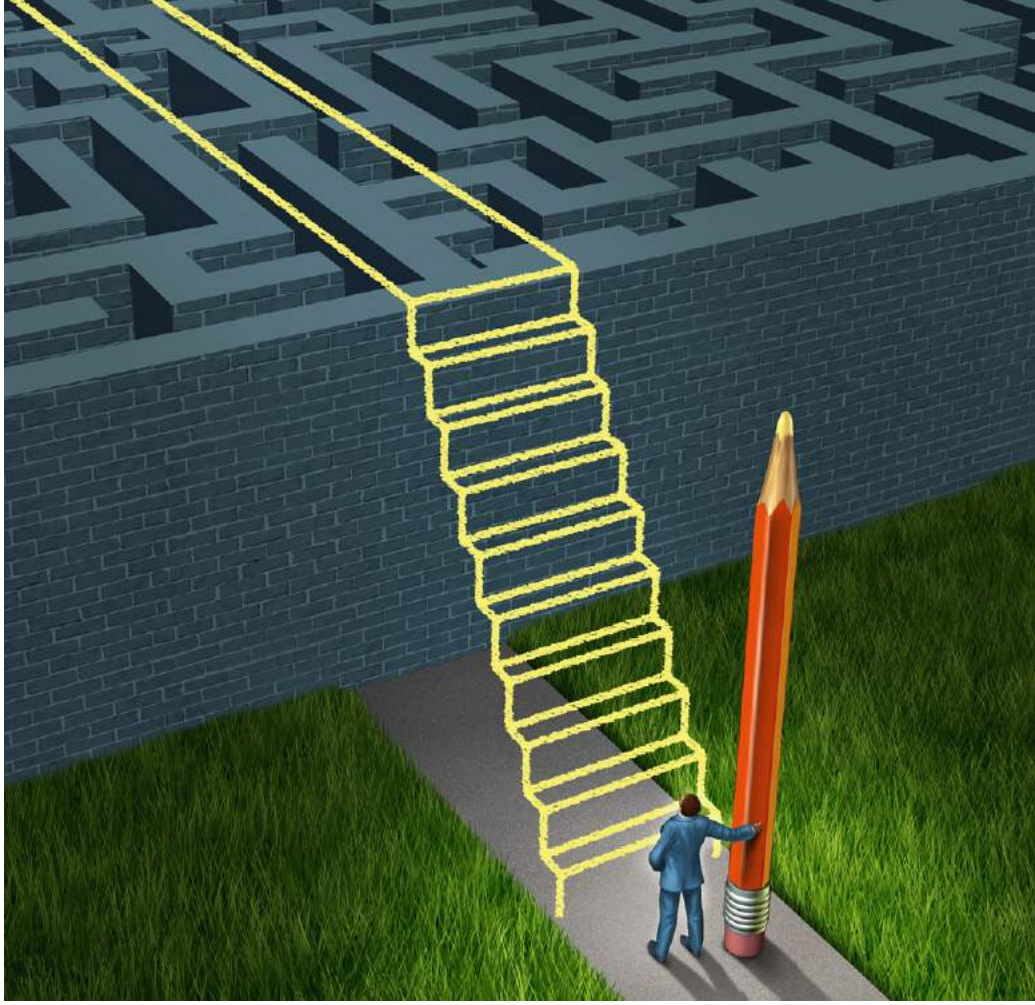
Screen out or train in? In today's tight labor market, workforce talent is essential to business performance. Some employees may have all the essential cognitive skills to perform the job but may lack specific physical abilities. To boost talent retention, forward thinking employers are now using the POET as a baseline and task matching tool, then providing the candidate with job coaching and on the job work conditioning to help them adapt to the job in a safe and productive manner.

JOB SPECIFIC BIOMECHANICS TRAINING

Once you have hired the right candidate, they need to be trained to perform at a high level and remain injury free. For most organizations, this means teaching about hazardous materials, how to properly use equipment and PPE, and how to perform each essential function. Incorporating biomechanics coaching into the onboarding process is a cost-effective way to ensure that every employee is given an opportunity to learn how to use their own body properly to safely perform the job.

Musculoskeletal injuries are complex in nature. Research indicates that wellness and employee assistance programs can help reduce lost time and work injuries, overexertion injuries are not often solved with ergonomics training alone We all [3] have a story, unique health issues, and a personal life. To properly address the MSD problem, we need to take a root-cause approach and should explore individualized solutions that extend beyond the job.



LEVERAGING MOVEMENT HEALTH PROGRAMS TO REDUCE WORKPLACE MSDS

Providing the employee with a movement screen and tailored corrective action plan has been shown to reduce injury quantity and DART rate. [4] When strategically implemented as part of a workforce musculoskeletal health program, this "upstream" approach can help employers dramatically reduce the cost and performance issues caused by musculoskeletal disorders. Movement screens can easily be added to a Post Offer Pre-Employment Testing program.

More generalized movement health programs such as a dynamic start of shift warmup that incorporates balance and proprioception or job specific injury resilience programs can be effective in reducing rates of common musculoskeletal injury such as low back strain or shoulder impingement.

ACCESS TO INJURY PREVENTION EXPERTS FOR EARLY INTERVENTION

It is estimated that 50% of Americans are affected by a musculoskeletal condition.[5] Given the cost of a serious musculoskeletal disorder, many employers are focusing on implementing an early reporting culture and musculoskeletal early intervention is a key piece of the puzzle. As seen by one Athletico customer, providing employees with access to musculoskeletal OSHA first aid at first sign or symptom of discomfort has reduced OSHA record-able instances by nearly 80%, dramatically reduced DART rate, and save millions in medical spend.

Timely access to early intervention is as important as who is providing it. If your organization is interested in this approach, look for a provider that is an expert and can tailor an approach

ELIMINATING MSD SPEND: TAILORING THE RIGHT STRATEGY FOR YOUR ORGANIZATION

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that makes sense. Athletico's early intervention program is available onsite, near site, and virtually – ensuring that all employees have access, no matter when they need it or where they are.

TIMELY REFERRAL TO THE RIGHT PROVIDERS, WHEN NECESSARY

In a properly designed early intervention program, employers will have a clear medical escalation workflow with all providers in sync to ensure the appropriate and best possible care is delivered to the employee. A thoughtful strategy and aligned team can eliminate lost time, opioids, and even surgery.

JOB SPECIFIC REHABILITATION

When an injury escalates beyond early intervention but is not severe enough to require surgery, savvy employers are leveraging a direct-to-PT approach to manage medical costs and keep the employee working. Having a medical team that understands the physical demands of the work can be helpful in reducing lost time. A job-specific approach also reduces the deconditioning by ensuring the injured worker is continually exposed to job demands while going through physical therapy.

RETURN TO WORK PROGRAMS

When the employee is ready to return to full duty, you may consider a return-to-work program. Many clients with physically demanding jobs leverage onsite job coaching on day 1 of return to work to ensure that the worker feels comfortable, safe, and is effective at translating skills learned in therapy back to the job site.

SUMMARY

Each of these pieces has its own use case and should be considered as part of a larger strategy. Simply picking a POET program without understanding the root cause of the MSD issue may not yield the intended result. Conducting a thorough gap analysis can help employers understand exactly which approach might yield the best return on investment. If your organization has identified the "sprain/strain/overexertion" injury as a strategic focus, make sure the partners you choose have your best interest in mind, set baselines, and have the expertise to craft a program that will deliver measurable results.

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HOW THE RESPONDENT CAN LEVERAGE PETITIONER TAX STRATEGIES IN SETTLEMENT NEGOTIATIONS

By: Don Engels CSSC, CLU, AIC; Ringler Associates, Inc.

Respondents negotiating a settlement can often control petitioner's ability to use tax strategies. Without risk, that control can significantly improve respondents' negotiating leverage. This short article provides an overview of the basis and risks of this "Respondent Strategy." It offers a win-win scenario: respondents pay less, and petitioners keep more.

The nature of workers' compensation does not lend itself as readily to these as liability claims. But there are a couple of strategies that can result in significant savings on the workers' compensation side, especially in catastrophic cases.

The IRS and courts have regularly said that plaintiffs' taxation "hinges on the payor's dominant reason for making the payment." *Green v. Commissioner*, 507 F.3d 857, 868 (5th Cir. 2007). To determine the "dominant reason," courts "first look to the language of the [settlement] agreement." *Id*. Thus, a respondent's intent and consent to language at settlement are critical and a source of leverage.

WAYS TO SAVE

Maximizing Medical Deductions

In general, proceeds paid on account of work comp claims are received tax-free. IRC § 104(a)(1). But whether the petitioner can deduct future medical expenses largely depends what portion of the recovery compensates for those medicals. See IRS Rev. Rul. 75-232. Allocation language in the settlement agreement is key, and the petitioner cannot secure the language they need without the respondent's consent.

Structured Settlements

A more common strategy is saving taxes through structured settlements (i.e., payments over time), which can take a variety of forms. Typically, in a structured settlement, the respondent is permanently released from liability in exchange for facilitating the petitioner's indirect investment in annuities or market-based products. In a tax-free case, this offers a subsidized tax-free investment opportunity. In a taxable case, this provides tax-deferred investing similar to an IRA.

The respondent plays a pivotal role in both strategies. Without the respondent's consent, the petitioner cannot secure the desired tax savings. The Respondent Strategy leverages the petitioner's need for the respondent's consent.

FINAL THOUGHTS

Tax is technical and many avoid thinking about it even when significant savings are available. This article focused on the first step: recognizing respondents' leverage. We believe that a respondent who considers this influence, and looks to exercise it, can pay less while becoming the petitioner's greatest source of tax savings.

For a more in-depth analysis on how the defense can leverage plaintiff tax strategies on liability settlements, see the Professional Liability Defense Federation bulletin titled How the Defense Can Leverage Plaintiff Tax Strategies at

https://cdn.ymaws.com/www.pldf.org/resource/resmgr/pldq/pldq_v14n1.pdf

Once respondents recognize their leverage, the next step is to recognize opportunities for petitioner savings. With that, respondents can choose whether and when to unblock, or even suggest steps to secure those savings.

ASSESSING COMPENSABILITY OF WORKPLACE ALTERCATION CLAIMS

An unexpected but grim result of our post-COVID-19, "new normal" has been an increase in violence. As the world grapples to discern the exact cause of discontentment, we've seen an up-tick in decisions coming from the Illinois Workers' Compensation Commission involving workplace altercations.

Recently the Commission issued two decisions involving workplace altercations. One decision finding a compensable injury under the Workers' Compensation Act, and a second, not compensable. What factors make a workplace altercation compensable? We believe these two decisions help illustrate that fine line.

Miller v. Illinois, State of/Dept. of Transportation (21 IWCC 0456) highlights considerations of when a case is not compensable. In Miller, Claimant was a traveling inspector for the State of Illinois. After traveling to the nearest field office to use their restroom, Claimant sat in a desk chair, waiting for his shift to end. A few workers were gathered and talking. Claimant was sitting in the chair, looking at his personal cell phone.

A few minutes later, another employee arrived and demanded Claimant get out of his chair. Claimant refused and the employee demanded a second time, emphatically swearing at the Claimant. Claimant testified that he thereafter looked down at his phone when the other employee "tossed" him out of the chair.

Though Claimant did not notice any symptoms immediately, he later felt symptoms while driving his personal vehicle home. Claimant's treating physician opined Claimant had sustained an aggravation of the underlying conditions at L4-L5 and L5-S1.

At arbitration, the Arbitrator found Claimant's case compensable noting that all witnesses confirmed that the employees were sitting in an IDOT field office. Sitting in a field office discussing work is within the normal course and scope of employment for IDOT employees. The Arbitrator opined the altercation was over a work chair, bringing it under the coverage of the Act.

The Commission summarily reversed, finding that Claimant's accident did not arise out of his employment. The Commission cited the Illinois Supreme Court case of Castaneda v. Industrial Comm'n, 97 Ill. 2d 338, 342 (1983), in that "[w]here a physical confrontation is purely personal in nature, the resulting injuries cannot be said to have arisen out of the employment." The Com-mission concluded that the altercation was personal in nature, not employment related.

The Commission noted that Claimant was sitting in a chair, facing away from the desk. Claimant was looking at personal items on his personal cell phone. The Commission opined Claimant was "running out the clock on the last approximately 20 minutes of his workday."

The Commission held that nothing about the altercation related to either employees' work duties or need to perform work at the particular desk. The Commission concluded that they were "faced with two men behaving like children and tussling over a chair in a personal dispute." As such, the Commission refused to award benefits, noting Claimant failed to prove the altercation arose out of his employment.

ASSESSING COMPENSABILITY OF WORKPLACE ALTERCATION CLAIMS

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The facts of *Miller* are contrasted to that of *Romero v. Atkore International Group* (21 IWCC 0475), a case where the Commission found a workplace altercation compensable. In Romero, Claimant was a loader who worked in a dock area. Claimant testified that he was assisting a truck driver tarp an 18-wheeler's load when the driver experienced difficulty with the tarping process. The tarp weighed approximately 180 pounds and had to be hooked in various locations.

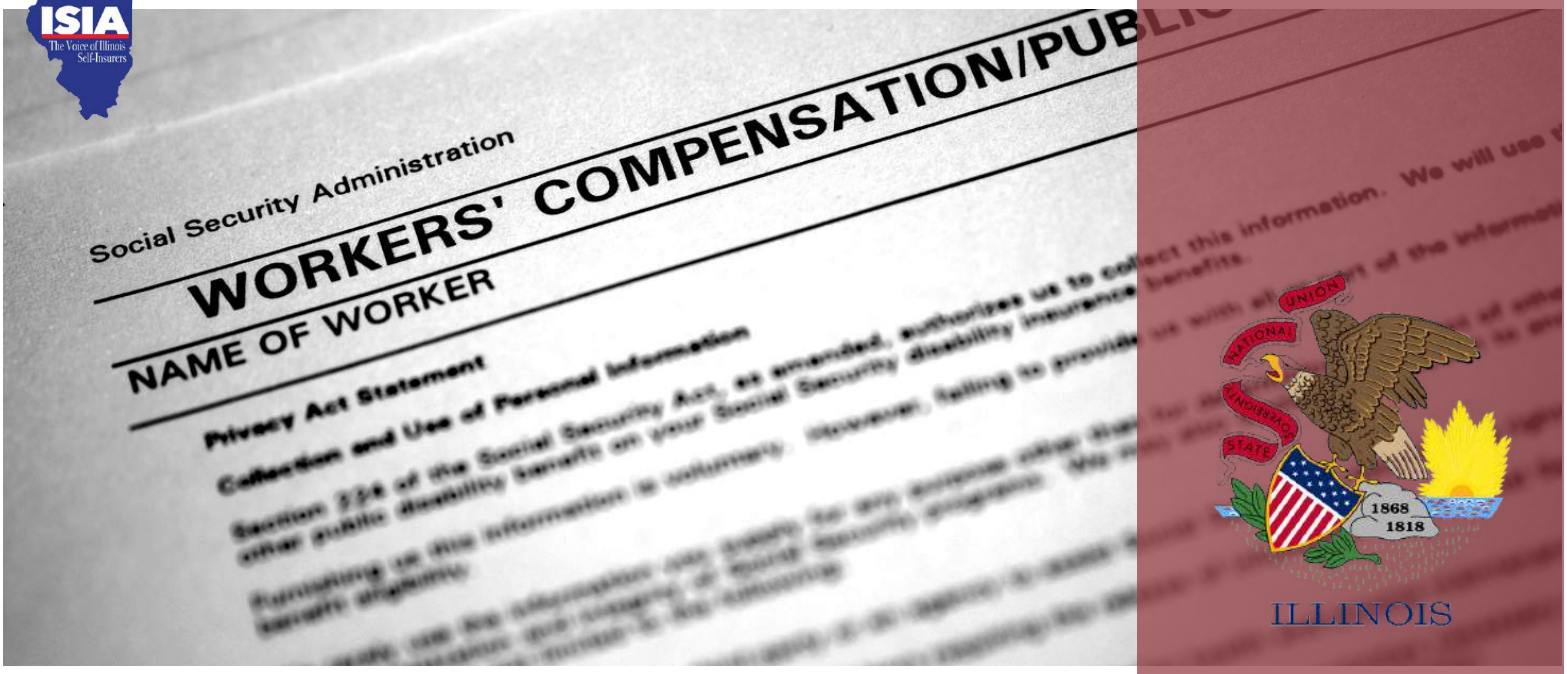
The Claimant and Driver exchanged profanities with each other as they continued to attempt to tarp the load. Ultimately the Claimant went to the Driver's side with the intention of providing assistance. When turning the corner, the Driver pushed the Claimant with sufficient force to knock off his hard hat, causing Claimant to strike his head. Claimant thereafter claimed injuries to the head, neck and back.

At trial, testimony was offered that there had been an exchange of words prior to the altercation, also involving the tarping of the load. A co-worker testified that the Driver was irritated about the tarping process and had become short-tempered.

At trial, the Arbitrator found that the altercation was clearly work-related. The Claimant and Driver were having difficulty tarping the truck. The Arbitrator noted that though both parties were annoyed, and both parties had exchanged profanities, when the conduct of Claimant was examined within the context of the situation, the disagreement was work related. On appeal before the Commission, the Commission affirmed and adopted the Arbitrator's findings.

These two cases illustrate that, *sometimes*, a work-place altercation can be compensable under the Illinois Workers' Compensation Act. A close examination of whether the altercation was work related or personal in nature must be performed. Personal altercations are not compensable, whereas work related altercations can be compensable.

In Miller, the Claimant argued that the chair in question was a work chair and, therefore, work related. The Commission rejected this contention noting that all evidence pointed to the Claimant not performing any actual work. In Romero, the Driver and Claimant were working on tarping a load when the Driver pushed Claimant out of frustration. In that case, the Commission found that the injuries arose out of a work-related activity. It's an unfortunate but important differentiation that needs to be made when looking at workplace altercations.



EXCLUSIVE REMEDY PROVISION OF THE ILLINOIS WORKERS' COMPENSATION ACT; THE IMPACT WHEN A BUSINESS ENGAGES IN AN ILLEGAL ACTIVITY

The Illinois Appellate Court recently issued its decision in the case *Anna Daniels v. Venta Corp., et. al.*, 2022 IL App (2d) 210244. The Plaintiff, Anna Daniels, was Special Administrator of the Estate of Darnell Daniels.

Darnell Daniels worked for a staffing company.Through the staffing company, he began working for American Bare Conductor ("ABC"). ABC manufactured wire. ABC subsequently became Venta Corp. ("Venta"), Sycamore Industrial Park Associates ("SIPA") engaged ABC as an independent contractor to remove materials and scrap from a structure on SIPA's property. The materials were known to contain asbestos, and SIPA engaged ABC on the project despite ABC lacking licensure and credentials to manage asbestos removal.

One week after he started working for ABC in August, 1996, Daniels' supervisor directed him to dispose of materials that contained asbestos; a fact not known to Daniels. Daniels was also unaware that he was being asked to perform work outside the premises leased by ABC. Two weeks after working on the scrap removal project, an ABC wire inspector informed Daniels that he was working with asbestos. The inspector gave Daniels a paper mask.

Daniels' temporary assignment with ABC ended in October, 1996. He left the staffing company and took a full-time position with ABC until 2003.In 2017, Daniels was diagnosed with mesothelioma. He filed suit against the defendants, including Venta (f/k/a, "ABC") and SIPA, alleging premises liability, negligence, willful and wanton misconduct, and intentional tort. The circuit court dismissed multiple counts filed by Daniels, including the negligence and willful and wanton misconduct counts against Venta. The circuit court dismissed those counts on the premise that the counts were barred by the exclusive remedy provisions of the Illinois Workers' Compensation Act and Occupational Diseases Act. Daniels succumbed to mesothelioma in March, 2021. His widow, Anna Daniels, pursued appeal before the 2nd District Appellate Court.

"there is no common law or statutory right to recover compensation or damages from the employer for or on account of any injury to health, disease, or death therefrom, other than for the compensation herein provided"

The Court noted in its analysis that the exclusive remedy provisions are embodied in two separate sections of the Acts; Section 5(a) of the Workers' Compensation Act provides in part that "there is no common law or statutory right to recover compensation or damages from the employer for or on account of any injury to health, disease, or death therefrom, other than for the compensation herein provided" 820 ILCS 310/5(a) (West 2016). Similarly, Section 11

EXCLUSIVE REMEDY PROVISION OF THE ILLINOIS WORKERS' COMPENSATION ACT; THE IMPACT WHEN A BUSINESS ENGAGES IN AN ILLEGAL ACTIVITY

continued...

of the Act provides that the compensation herein provided shall be the full, complete and only measure of the liability of the employer bound by election under this Act, and such employer's liability for compensation and medical benefits under this Act shall be exclusive and in place of any and all other civil liability whatsoever, at com-mon law or otherwise, to any employee or his legal representative on account of damage, disability or death caused or contributed to by any disease contracted or sustained in the course of the employment." Id. §11. Cases that have construed the exclusive remedy provisions in the context of the Workers' Compensation Act also apply in the context of the Workers' Occupational Diseases Act.

An employee can escape the exclusive remedy provisions of the Workers' Compensation Act if the employee establishes that the injury (1) was not accidental, (2) did not arise from his employment, (3) was not received during the course of employment, or (4) was not compensable under the Workers' Compensation Act. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229 (1980).

The Appellate Court also addressed the borrowing/lending relationship that existed when Daniels worked for ABC on assignment from the staffing agency. To determine whether a borrowed employee relationship existed, the Court noted that the analysis requires evidence first that the borrowing employer had the right to direct and control the borrowed employee's performance, and second, that there existed a contract of hire between the borrowed employee and the borrowing employer; either express or implied. *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341 (1980).

The Appellate Court noted that both the exclusive remedy provisions the borrowing/lending provisions of the Act require a contract of service. However, the Court found that when ABC directed Daniels to remove the asbestos, that directive violated the Commercial and Public Building Asbestos Abatement Act because ABC was not licensed to do that work. Accordingly, the subject matter of ABC and Daniels's alleged contract was illegal and, therefore, unenforceable. Absent a valid contract of service, the exclusive remedy provision of Workers' Compensation Act would not bar Daniels from suing ABC. The Court held that the circuit court improperly dismissed the negligence and willful and wanton misconduct claims against Venta. The Court remanded the case back to the circuit court.

Attempts to erode the exclusive remedy provision of the Workers' Compensation Act have been largely unsuccessful to date. In this case, it is difficult to disagree with the Court's analysis and its finding that disregard for the laws regarding asbestos mitigation nullified the contract of service; thereby removing the protection of the exclusive remedy provision. However, the concern with opening the gate in any capacity to allow a claimant to overcome the exclusive remedy provision of the Acts is that once the gate is open, there is no telling how wide it will open. How far with the courts go in negating contracts of service? To what extent will the courts look at an employer's violation of health and safety laws? The answers remain to be seen.

UPCOMING event

Self-Insurance Plus

The Illinois Workers' Compensation Commission is making the switch from paper processes to digital filing for self-insurance! Self-Insurance Plus is the IWCC's new public web portal that will allow for electronic submission of applications, subsidiary/affiliate applications, renewals, assessments, and more!

User Manual & How-To's

Instructional materials will be available on the IWCC's Self-Insurance webpage: http://iwcc.il.gov/siplus.

Self-Insurance Plus will deliver advantages to work processes including reduced turn-around time, around-the-clock access, and digital-age convenience.

Contact: wcc.selfinsurance@illinois.gov

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- Processes and distributes relevant information to members through email updates, as well as website updates

- Sponsors an annual educational seminar in conjunction with the full membership meeting
- Sponsors educational workshops on the subjects of vital interest to the membership
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