Background on Workers' Compensation Claims Filed by State Employees and Reforms Proposed by the Office of the Attorney General
March 2012[1]

The Office of the Attorney General (OAG) represents the State in workers' compensation litigation that State employees file with the Illinois Workers' Compensation Commission (IWCC). In defending against workers' compensation claims, the State is in a position similar to private employers. This document will provide the OAG's perspective on how the current workers' compensation litigation system operates and impacts the State. It will also describe the areas in which further reform is critical to reducing the costs of this system to taxpayers while continuing to compensate employees who are injured while working.

I. The Role of the Office of the Attorney General in Workers' Compensation Litigation

The vast majority of workers' compensation claims by State employees do not result in case filings with the IWCC. There are currently approximately 20,000 to 22,000 open State employee workers' compensation files at the Department of Central Management Services (CMS). As of December 31, 2011, the OAG was handling approximately 5,300 State employee workers' compensation cases which were filed with the IWCC. Thus, the OAG plays no role in approximately 75% of State employee workers' compensation claims.

In addition to handling IWCC cases filed by State employees, the OAG also represents the State in workers' compensation cases where any payment of benefits to the employee must come from one of five State funds. Three of these funds pay benefits to private sector employees under certain circumstances described below: the Injured Workers' Benefit Fund, the Group Workers' Compensation Pool Insolvency Fund and the Self-Insurers Security Fund. The other two funds – the Rate Adjustment Fund and the Second Injury Fund – pay benefits to both private sector and State employees when they qualify for these payments under the Workers' Compensation Act.

(1) The Injured Workers' Benefit Fund (IWBF). The IWBF pays benefits to private sector employees when the responsible employer failed to have the required workers' compensation insurance. The State Treasurer is the *ex-officio* custodian of the IWBF and must be named as a party in the Commission proceedings. The OAG represents the Treasurer and defends the case. To receive benefits from the IWBF, an employee must obtain an award against the employer and the IWBF. The OAG does not have legal authority to settle claims on behalf of the IWBF. Thus, a trial is required in any case in which an employee seeks to collect benefits from the IWBF. Since the creation of the IWBF in 2005, private sector employees have filed 1,912 cases with the IWCC naming the IWBF and over 800 of them have been closed. In over 65% of the IWBF cases, the OAG, on behalf of the Treasurer, is the only party presenting a defense because the private employer has chosen not to appear and defend the case. The OAG does not receive funding from the IWBF to handle these cases.

1 This memorandum was originally prepared as a briefing memorandum in spring, 2011. The office updated this memorandum in winter, 2012.

(2) The Group Workers' Compensation Pool Insolvency Fund. This fund is set up to provide benefits to employees whose employer belonged to a qualified Group Workers' Compensation Pool (a permitted alternative to workers' compensation insurance), but the pool became insolvent. Unlike the IWBF, this fund generates a very small number of cases. But in these cases, the employer is typically also insolvent or chooses not to participate in the case and, as a result, the OAG is the only party defending against the claim.

(3) The Self-Insurers Security Fund. Under the law, employers may apply and be permitted to be self-insured. If an approved self-insured employer becomes insolvent, the Self-Insurers Advisory Board assumes the workers' compensation obligations of the insolvent employer. The OAG defends the workers' compensation case on behalf of the Board. Because the employer is insolvent, the OAG provides the sole defense in the case. The OAG is currently handling approximately 20 cases involving this fund.

(4) The Rate Adjustment Fund (RAF). The RAF provides supplemental "cost-of-living" payments to both private sector and State employees while they are receiving permanent and total disability or death benefits. In cases filed by private sector employees, the OAG is not involved in the case during the arbitration proceedings or review by the IWCC. Instead, the OAG has become involved when issues have arisen regarding the calculation of RAF payments by the IWCC, the IWCC's termination of payments or the failure to make payments in the first instance. The OAG is currently handling approximately 15 of these cases.

(5) The Second Injury Fund. This fund provides lifetime payments to both private sector and State employees in certain instances when the law deems an injured worker permanently and totally disabled. This occurs when the employee sustains the 100% loss of a body part after having previously suffered a 100% loss of a different body part. In cases involving private sector employees, the employer is often represented by counsel because the employer may be required to pay up to 100% of the injured body part. In some cases, the private employer concludes that it is beneficial to agree that the accident caused a 100% loss of a body part. If that conclusion is not supported by the evidence, the OAG will challenge it on behalf of the Fund.

The OAG expends considerable resources defending the increasing number of workers' compensation cases. To handle the growing number of cases, we have significantly increased the number of attorneys and staff in the office's two Workers' Compensation Bureaus. In 2003, the OAG had 17 attorneys and support staff members in the Workers' Compensation Bureaus. The OAG currently has 36 attorneys and support staff members handling workers' compensation cases (25 attorneys and 11 support staff), with three new attorneys and another support staff member starting in April and May to bring the total to 40.

II. The Workers' Compensation Claims Process for State Employees

When a State employee sustains a work-related injury, the employee is supposed to quickly report the incident to the immediate supervisor, contact the agency's Workers' Compensation Coordinator (WC Coordinator) to obtain a CMS Workers' Compensation packet and return the completed packet to the WC Coordinator. The WC Coordinator forwards the completed forms to CMS Risk Management (CMS).

A. CMS Claims Adjusting Process

CMS currently administers workers' compensation claims for all State agencies. As part of the claims management process, the CMS adjuster initially determines:
(1) whether the claim is compensable under the Workers' Compensation Act;
(2) whether the employee's medical condition is causally related to the work injury;
(3) whether the employee has a medical need to be off work and, therefore, is entitled to receive temporary total disability benefits (TTD benefits);
(4) whether to approve and/or pay for any medical care; and
(5) whether there are any legal defenses to the claim.

The analysis of all these issues is handled exclusively by CMS as part of the usual claims management process. The OAG has no involvement in the claims process. As a result of the determinations by CMS adjusters, workers' compensation benefits are paid from the CMS workers' compensation fund. The payments for TTD benefits, medical care, independent medical exams, vocational rehabilitation and any other benefits under the Act are made at CMS's discretion and payments continue unless and until CMS determines that no further benefits are warranted.

It should be noted that CMS's workers' compensation budget is chronically and severely underfunded. A significant portion of each fiscal year's funding is used to pay medical bills from the previous fiscal year, leaving CMS with insufficient funding for all other aspects of this program, such as retaining independent medical experts when needed to defend a case. (As of March 2012, CMS is currently over 23 months behind in paying medical bills.) And CMS has too few adjusters to handle the claims by State employees. There are approximately 20,000 to 22,000 open State employee workers' compensation claims. At present, there are only 8 CMS Claims Adjuster IIs to handle those claims (a Claims Adjuster I was added in recent months to assist them). Quite simply, the agency does not have sufficient funds or staffing to appropriately handle workers' compensation claims.

Prior to the Blagojevich Administration, some of the largest State agencies – IDOT, IDOC, DHS and ISP – each administered their own workers' compensation claims, using their own funds. As a result, those agencies had a direct financial interest in improving the workplace to avoid or minimize workers' compensation claims, defending against workers' compensation claims and ensuring that injured workers could return to work as soon as possible to reduce the cost of TTD payments. Under the consolidated system for workers' compensation claims, however, the employing agencies do not experience any impact to their budgets when their employees file claims or remain off of work and on TTD for an extended period of time, providing those

agencies with no financial incentive to determine the cause of the increase in claims and take steps to eliminate it. The agencies also have little incentive to accommodate employees whenever possible (including with light duty work) to allow them to return to work quickly.

RECOMMENDATIONS:

- Adequately fund and staff CMS to effectively administer and pay claims or consider retaining a third-party administrator.

- Ensure that CMS has an effective procedure and adequate funding in place to obtain Independent Medical Examinations (IMEs) in all cases in which they might be helpful. CMS recently created standard procedures to be followed in obtaining IMEs. The purpose of these procedures is to make sure that IMEs are done on a timely basis, that pertinent medical, accident and job requirement information is provided to the examining physician and that the assigned Assistant Attorney General (if the case has been sent to the OAG) has been consulted prior to forwarding information to the examining physician.

- Require initial and periodic CMS supervisory approval for all TTD and maintenance benefits.

- Increase CMS's use of vocational rehabilitation counselors. Vocational rehabilitation is critical to ensuring that employees who are unable to return to their current State jobs return to gainful employment as soon as possible. In some cases, a State employee may suffer injuries which result in his physician providing permanent physical restrictions, precluding the employee from performing the duties of his previous State job. In such cases, the State has an obligation to assist the employee in finding alternate employment (most commonly outside of State employment) through vocational rehabilitation services such as resume-building and interviewing skills, job search assistance, job skills training, education and other similar services which are provided by a vocational counselor. During this process, the employee is paid a benefit similar to TTD and referred to as "maintenance" benefits, which, like TTD, amounts to 2/3 of the State employee's salary. If the vocational rehabilitation process is not initiated promptly and closely monitored, this significantly increases the length of time that the employee continues to receive maintenance payments. Additionally, a more comprehensive vocational rehabilitation process would lessen the likelihood that the IWCC will find the employee to be permanently and totally disabled if the case proceeds to trial. This is the case because the IWCC often uses the failure of the employer to provide meaningful vocational rehabilitation services to the employee as justification for finding that the employee is entitled to lifetime permanent and total disability benefits. CMS has recently begun to forward cases in which the petitioners need vocational rehabilitation services and/or job search assistance to the Illinois Department of Human Services. DHS has vocational rehabilitation specialists throughout the State. We are hopeful that this new effort will assist in controlling TTD and maintenance benefit costs paid by CMS and also help to diminish the number of petitioners who are adjudicated to be permanently and totally disabled.

- Ensure that CMS establishes a Preferred Provider Program (PPP) covering all State facilities.

- Ensure that State agencies have an incentive to reduce workers' compensation claims by their employees and have them return to work as soon as possible, including, where appropriate, by accommodating employees who have duty restrictions (such as cases where light duty is required) in order to reduce TTD payments.

B. Issues Relating to State Employees Providing Notice of and Complete Information Concerning Workers' Compensation Claims to the State

The Workers' Compensation Act requires notice of an accident to the employer no later than 45 days after the accident. The Act further provides, however, that this notice may be made to a supervisor either orally or in writing. Under the Act and relevant case law, an employee's failure to provide notice within 45 days is not a bar to the workers' compensation claim unless the employer can prove undue prejudice as a result of the defective notice. Although CMS requires all injured State employees to fill out forms regarding the accident, the Act does not require completion of these forms. As a result, injured State employees often do not complete the CMS forms on advice of their counsel.

The State faces significant difficulty in defending cases on a notice defense particularly in repetitive trauma claims where, as discussed in more detail below, the employee may file the claim long after leaving employment. The IWCC often determines that the notice was defective, but concludes that the employer did not suffer prejudice as a result. To establish that notice has been provided to the employer, the IWCC merely requires testimony that the employee said something to a supervisor at the time of the accident regarding an injury and the fact that it was work-related. In some cases, even the employee's passing mention of an injury or condition of ill-being, however, without specifically informing the supervisor that the injury is work-related, has been deemed sufficient notice by some arbitrators and commissioners. The petitioner is not required to present evidence to corroborate that oral notice was given to a supervisor or to identify, prior to trial, which supervisor received notice.

Under the rules governing workers' compensation cases, the employer is not entitled to pre-trial discovery to determine which supervisor in the chain of command the petitioner alleges received the notice, leaving the employer with difficulty in preparing to present appropriate rebuttal witnesses. If the employer presents a supervisor to rebut the employee's contention that notice was provided, the employee often testifies that a different supervisor was informed about the injury. As a result, unless the employer has present at trial all supervisors/managers who could potentially have received notice to testify that each of them did not receive notice, the employee's testimony is sufficient to establish notice. Another problem arises from the fact that the trial is often held years after the alleged accident. At that time, the employee's supervisor may be called upon to remember and testify that the employee never mentioned anything at all about an accident that may have occurred years ago. Given the passage of years since the alleged accident, such evidence may be impossible to elicit.

RECOMMENDATIONS:

- To ensure that State employees must provide clear notice at the time of an injury, the Workers' Compensation Act should be amended to require that, whenever physically possible, State employees must fully complete the CMS workers' compensation paperwork and to provide that until the paperwork is completed, benefits shall be withheld.

- The Workers' Compensation Act should be amended to require written, signed and verified notice of an accident.

III. Referrals to the Office of the Attorney General for Legal Representation in Litigation

In most State employee workers' compensation claims, CMS agrees to pay TTD and/or medical benefits and the employee does not seek an award for a permanent disability. In these circumstances, the OAG is never involved in the claim. The OAG is only called on to defend the State against a workers' compensation claim if an employee (usually represented by a private attorney) files an Application for Adjustment of Claim (Application) with the IWCC. There are generally two reasons employees file an Application.

(1) When a dispute arises over the non-payment of a benefit which an employee seeks, such as TTD or medical treatment, an Application can be filed with the IWCC.

In the majority of cases that the OAG receives, CMS has previously made a decision that the claim is compensable and paid benefits, but a dispute arose regarding the amount of benefits. In these instances, CMS has reached and determined the threshold issues of compensability and causation. CMS's determinations do not preclude these issues from being raised at trial. Once CMS pays benefits, however, the State cannot recover such payments, even if it is later determined that the employee was not entitled to the benefits. The IWCC cannot order reimbursement of the benefits already paid either to the employee (TTD) or to healthcare providers (medical bills).

(2) If an employee wants to obtain payment for a permanent disability that is claimed to have been suffered as a result of the accident, the case is referred to the OAG and the IWCC must either approve a settlement of permanent partial disability benefits (PPD) or resolve any disputed claim for these benefits through a trial before an Arbitrator.

IV. Litigation of Workers' Compensation Cases

If a dispute concerning an employee's right to a benefit cannot be resolved, the matter is set for hearing before an IWCC Arbitrator. There are two kinds of motions that a State employee can file to obtain a hearing:

(1) A Petition for Immediate Hearing Under Section 19(b) or 19(b-1), or
(2) A Request for Hearing (Trial).

A. Petitions for Immediate Hearing Under Section 19(b) or 19(b-1) – Hearing

Petitions for Immediate Hearing are filed when an employee claims that the State has failed to pay benefits that are required under the Act, such as TTD benefits or medical care. Before an award of any benefits can be made, the Arbitrator must determine whether the employee is entitled to workers' compensation benefits in the first instance. To that end, all threshold issues, such as compensability and causation, must be decided based upon the evidence presented during that hearing. A decision rendered after a section 19(b) or 19(b-1) hearing is considered "final" and the State must seek Commission review of this decision or it cannot later be challenged or re-litigated. 820 ILCS 305/19(b). In contrast with private employees and employers, State employees and the State may not seek judicial review of IWCC decisions.

Under the current IWCC rules, an employee seeking an immediate hearing only needs to provide the employer with 15 days notice prior to the Arbitrator's next monthly status call. As a result, the employer can have as little as 10 business days to prepare for this hearing which conclusively resolves many of the important issues in the case. This time frame is very difficult especially in cases which require the use of an administrative subpoena to obtain the employee's medical records to support any defenses.

RECOMMENDATION:

- The IWCC should change its rules (7020.70(b)(1)(B)) to require that the employer receive notice of at least 20 business days prior to a section 19(b) or 19(b-1) hearing.

B. Requests for Hearing – Trial

If a section 19(b) or 19(b-1) hearing has determined any threshold issues, all that remains to be decided is whether the employee is entitled to any additional TTD or medical benefits (for any time periods after the section 19(b) or 19(b-1) hearing) as well as PPD benefits. If there is no prior section 19(b) or 19(b-1) decision, then all disputed matters are at issue. The primary issues that may be disputed in workers' compensation cases are discussed in detail below.

As an initial matter, however, the current process for petitioners' attorneys to provide notice of a hearing to the employer's counsel creates difficulties in preparing for trial and requires reform. Once a case is on the docket of a workers' compensation arbitrator, there are certain procedures required for the case to proceed to a hearing. For cases that are less than three years old, the petitioner's counsel must send a Request for a Hearing to the employer's counsel 15 days prior to the docket call for a case to proceed to a hearing at that docket call. For cases that are three years old or older, however, the petitioner's counsel is not required to send a Request for Hearing. These older cases are "above the red line" cases which can proceed to a hearing without any notice prior to the docket call.

RECOMMENDATION:

- In cases that are less than three years old, the IWCC should amend its rules to require that the employer receive at least 20 business days notice prior to a trial. And in cases that are

more than three years old, the IWCC should amend its rules to require that the employer receive notice at least 20 business days prior to proceeding to trial.

The common issues are set forth below.

1. Whether there was an "Accident"

An injury is accidental when it is traceable to a definite time, place and cause. An inquiry as to whether an accident occurred takes on particular meaning in the context of repetitive trauma cases. As the Illinois Supreme Court has stated:

> When the accident is a discrete event, the date of the accident is easy to determine: it is, obviously, the date that the employee was injured. When the accident is not a discrete event, this date is harder to specify. An employee who suffers a repetitive-trauma injury still may apply for benefits under the Act, but must meet the same standard of proof as an employee who suffers a sudden injury. That means … an employee suffering from a repetitive-trauma injury must still point to a date within the limitations period on which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Durand v. IIC*, 224 Ill.2d 53, 64-65 (2006) (citations omitted).

When the Illinois Supreme Court first considered this issue, it determined that "the date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury 'manifests itself.'" *Peoria Co. Bellwood Nursing Home v. IIC*, 115 Ill.2d 524, 531 (1987). The Court held that "' [m]anifests itself' means the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Peoria Co. Belwood Nursing Home*, 115 Ill.2d at 531.

In 2006, however, the Illinois Supreme Court modified its approach to determining the manifestation date in a repetitive-trauma injury, finding that the fact that the employee believed she had carpal tunnel syndrome and believed that it was work-related did not establish the manifestation date of her injury. *Durand*, 224 Ill.2d at 68-69. The Court held that "the date on which the employee notices a repetitive-trauma injury is not necessarily the manifestation date. Instead, the date on which the employee became unable to work, due to physical collapse or medical treatment, helps determine the manifestation date." *Durand*, 224 Ill.2d at 68-69. In its analysis, the Court explained that "courts considering various factors have typically set the manifestation date on either the date on which the employee requires medical treatment or the date on which the employee can no longer perform work activities." *Durand*, 224 Ill.2d at 72. Under this approach to determining the manifestation date, an employee can know he has suffered a work injury, continue to work for years without treatment while his condition worsens to the point of physical breakdown, and only then have an obligation to report an "accident" to his employer. In *Durand*, the Court specifically "decline[d] to penalize an employee who diligently worked through progressive pain until it affected her ability to work and required medical treatment." *Durand*, 224 Ill.2d at 74.

Given this expansive definition, the manifestation date for a repetitive-trauma injury can be difficult to identify and can even be long after the employer-employee relationship has ended –

essentially preventing the employer from learning about the employee's condition and its possible connection to work activities and taking timely action to ensure that the employee's condition does not become worse. Ultimately, identifying the manifestation date is a fact determination for the IWCC. *Durand*, 224 Ill.2d at 65. The IWCC and the courts typically choose the latest date possible to avoid the employee's claim being barred by the statute of limitations or a notice defense. This approach makes it extremely difficult for the employer to challenge the timing of the employee's notice and filing of the claim.

An example of this is a March 2010 Arbitrator decision in the case of a former correctional officer at Menard. *Vasquez v. Menard Correctional Center*, 10 IWCC 0826 (2010). The petitioner worked as a Menard correctional officer from 1997 to 2007. She began to notice numbness, pain and discomfort in her arms in 2006. Over a year after she left State employment, she saw her regular physician and "complained about weakness, tingling and numbness in her bilateral arms which had been present over the 'last couple of years.'" Her regular physician referred her to another doctor in April 2009 and his notes reflected that he asked her, "Where did this happen?" She responded, "About 3 years ago, at work, turning locks, felt discomfort and felt like I had no strength …." Nonetheless, the Arbitrator concluded that her injury did not manifest itself until May 2009, "the first day she was told by Dr. Brown [the surgeon] that her condition was caused by her work activities for [the State]." According to the Arbitrator, "the law allows Petitioner to select a manifestation date that coincides with her discovery of injury and its relation to work after medical consultation." As a result, the Arbitrator found, and the IWCC affirmed, that the petitioner provided timely notice of the accident to the State.

RECOMMENDATION:

- The legislature should amend the Act to provide a clear method for determining the date upon which a repetitive-trauma injury manifests itself for purposes of the Act's notice requirements and the statute of limitations.

2. Compensability – Whether the accident arose out of and in the course of employment

For a claim to be compensable, the accident or injury must arise out of and in the course of employment. For an accident to "arise out of" employment, it must have its origin in some risk connected with or incidental to the employment. In other words, the employment must subject the employee to some increased risk beyond that faced by the general public. The issue of whether an accident arises "in the course of" employment typically involves whether the accident occurred at a time, a place and under circumstances related to the employment.

The IWCC and courts have taken a very broad approach to determining whether an injury "arises out of" the petitioner's employment. For example, in a case involving a State employee who slipped off of a curb in a parking lot and was injured, the IWCC reversed the Arbitrator's denial of benefits and found that the employee sustained injuries arising out of and in the course of his employment. *Rossi v. State of Illinois, Secretary of State*, 06 IWCC 0492 (2006). The employee in this case had arrived at work and parked in the employee designated parking garage as he had for many years. As he was walking into the building, he "stepped off the edge of a curb," his

foot twisted and he fell. In reversing the decision of the Arbitrator, the IWCC found that the sidewalk in the parking garage "was a hazard in that it was raised several inches above the surface level of the parking garage floor" and, as a result, the employee was subject to a risk "beyond that which the general public would be subjected." In dissent, one Commissioner noted: "[t] here is no evidence that the sidewalk/curb was either hazardous or defective. Petitioner's foot simply went off the edge. Therefore, Petitioner was not subjected to a greater degree of risks than the general public because of his employment."

In 2009, the Second District Appellate Court reinstated benefits to an employee who was injured when he threw himself up against a vending machine in an attempt to dislodge a bag of Fritos that had become stuck after a co-worker attempted to purchase them. *Circuit City Stores, Inc. v. IIC*, 391 Ill. App. 3d 913 (2d Dist. 2009). The IWCC had awarded benefits to the employee by finding that the personal comfort doctrine applied and that because the employee's use of physical force to shake the machine to dislodge a bag of chips was neither unusual nor outrageous, the employer was liable for workers' compensation benefits.[2] The Circuit Court reversed, finding that the personal comfort doctrine did not apply. The Appellate Court then reversed and reinstated the benefits.

While acknowledging that the personal comfort doctrine did not apply, the Appellate Court found the claim was nevertheless compensable under the "Good Samaritan" doctrine. The Appellate Court noted that prior cases applying the Good Samaritan doctrine involved an employee providing aide to someone in urgent need (such as rescuing someone who fell into a lake, protecting a young child from physical harm or providing transportation to a stranded motorist and her children). The Appellate Court, however, extended the doctrine to cover an injured worker's attempt to rescue a co-worker's stranded bag of chips because the Court found that it was reasonably foreseeable to the employer that this may occur. In addressing the "arising out of" employment analysis, the Appellate Court concluded that a reasonable trier of fact could find that the "injury originated in a risk incidental to [the employee's] employment" because (1) the employer provided the vending machine for the convenience of its employees, (2) the machine was defective and (3) the defect "creat[ed] a need for action to dislodge the bag of Fritos." *Circuit City Stores, Inc.* 391 Ill. App. 3d at 990-91.

The Illinois Supreme Court has made it clear that Illinois employers are not liable for accidents or injuries solely because they occur at work. The IWCC and the lower courts, however, have increasingly applied an expansive approach to determining whether an accident or injury arose out of and in the course of employment. These decisions have created significant challenges for employers in defending claims on the issue of compensability.

3. Compensability – Whether the accident arose out of and in the course of employment and the "traveling employee" doctrine

The IWCC and the courts also have significantly expanded the concept of compensability through the "traveling employee" doctrine, a theory of compensability that is not found in the

2 The IWCC awarded 12 4/7 weeks of temporary total disability benefits, $60,306.83 in medical benefits and 35% loss of use of the right leg, resulting in a total award of $74,107.74.

Workers' Compensation Act. Historically, the doctrine was intended to broaden the scope of compensability for those employees whose work required that they travel. The reasoning behind this approach was that such employees would be exposed to unfamiliar surroundings which, in and of themselves, increased an employee's risk of injury. In such cases, if the employee was injured in circumstances that were not normally compensable (such as when engaging in recreational activities, slipping and falling when no defect was identified, or suffering an injury in the hotel where the employee was staying), the accident would be considered compensable under the traveling employee doctrine as long as the employee's conduct was "reasonably foreseeable" to the employer. The IWCC and the courts, however, have expanded this doctrine in two significant ways.

First, the IWCC and the courts have applied the doctrine to employees who are not traveling to areas that are unfamiliar and who are only engaged in incidental "travel" as a part of their job duties. In *Metropolitan Water Reclamation Dist. of Greater Chicago v. IIC*, 407 Ill. App. 3d 1010 (1st Dist. 2011), for example, a clerical worker was taking a short walk to the local bank to make a deposit for her employer and tripped on a "dip" in a driveway – a risk to which the general public was also exposed. In awarding benefits to the employee, the Appellate Court found that the "street risk" doctrine (the functional equivalent of the traveling employee doctrine) applied to make the accident compensable.

Second, the IWCC has chosen not to apply the traditional compensability analysis (whether the accident arose out of and in the course of employment) in cases where the employee can be considered a "traveling" employee. Specifically, in these cases, the IWCC has replaced the traditional compensability analysis with the expansive notion of "foreseeability." As a result, the IWCC essentially applies a form of strict liability to provide the "traveling" employee with portal-to-portal coverage for accidents which would normally not be considered work accidents under the Act.

For example, in *Leung v. United Airlines*, 08 IWCC 0535 (2008), a flight attendant with a long history of right shoulder dislocations was in an airline lounge for a three-hour layover. When she was preparing to head to the plane to start boarding the next flight, the flight attendant dislocated her shoulder while putting on her coat. The IWCC found that because she was traveling, the "Petitioner need not show that the injury is connected or incidental to her employment or that she is exposed to a greater risk than the general public." Likewise, in *Smith v. Downers Grove Fire Department*, 07 IWCC 1339 (2007), two firefighters were out of town for a seminar. While in their hotel room, they were engaged in what would normally be characterized as "horseplay" ("wrestling, like a couple of over-sized kids"), when the Petitioner injured his knee. In awarding benefits, the IWCC determined that whether the conduct was considered horseplay (and therefore not compensable under a traditional compensability analysis) was not relevant because the Petitioner was considered a traveling employee and therefore "the standards for determining whether an injury arose out of and in the course of employment are governed by the employer's foreseeability of the employee's conduct and the reasonableness of the employee's conduct." Finally, in *Cortey v. Sara Lee*, 11 IWCC 1197 (2011), the employee traveled out of state to take some of the employer's customers to a coffee plant. While riding in a rented limousine with the customers, the employee (who had a history of knee problems) stood up to move from one seat to another. At that point, he felt a sharp pain in

his knee and felt something pop. The IWCC found the injury compensable and agreed with the Arbitrator's holding that "it [is] important to note Petitioner was a 'traveling employee' for the Respondent[.] Case law is well-settled when an employee[']s work duties require travel, injuries sustained by that employee will be found to arise out of and in the course of his employment so longs[sic.] as the employee's conduct was reasonable and the risk of injury was foreseeable."

By broadening the concept of the traveling employee and holding that the traditional compensability analysis (whether the accident or injury arose out of or in the course of employment) does not apply to a traveling employee, the IWCC has greatly expanded the workers' compensation liability of employers without legislative involvement.

RECOMMENDATION:

- The legislature should enact reforms to clarify the accidents that are covered by the Workers' Compensation Act, including by adding a definition of "traveling employee" to the Act and detailing the scope of the Act's coverage to such employees.

4. Causation – Whether the employee's condition is causally connected to a work injury

The Workers' Compensation Act provides for a "no-fault" system for the compensation of injuries due to work-related accidents. As a result, assumption of the risk and comparative negligence principles do not – and should not – play a role in determining whether the employee has a ***compensable*** claim under the Act. Separate from the issue of compensability, however, is the issue of whether the condition of ill-being claimed by the employee is causally related to a work accident as opposed to being related to a pre-existing condition, or a condition which later develops, but is not a result of the work accident. An employee's condition must be causally connected to an accidental work injury for him to obtain benefits under the Act.

The issue of causation in a workers' compensation case is considered a question of fact to be resolved by the IWCC. Under current Illinois law, the work accident need not be the sole proximate cause or even a primary cause of the employee's injury. *Sisbro, Inc. v. IIC*, 207 Ill.2d 193, 205 (2003). "[E]ven though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. … Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." *Sisbro, Inc.*, 207 Ill.2d at 205. Thus, if a work accident aggravates or accelerates (even slightly) a pre-existing condition, the employer is liable for workers' compensation benefits. And once the employee establishes causation, the employer is liable for the costs of ***all*** resulting care and disability even for the pre-existing condition.

A few examples illustrate the extraordinary difficulty employers face in defending cases based on this causation standard.

a. Degenerative Condition Cases

Workers' compensation cases involving a degenerative condition of a body part (such as the body parts that naturally degenerate through aging – back, neck and knees) are increasingly common and extremely difficult to defeat before the IWCC. For example, if an employee with a pre-existing diagnosis of a severe degenerative condition of the lumbar spine picks something up at work and experiences pain, or an increase in pre-existing pain, he can claim that he suffered a work accident entitling him to workers' compensation benefits and the employer's defense to this claim is limited. It is not a defense to show that the employee had a pre-existing severe degenerative disc disease. If the employee's physician states that the condition was aggravated by work, even only slightly, then the employer is liable for ***all*** medical care the employee will need for his back regardless of the fact that the employee's work did not cause the development of degenerative disc disease. Additionally, the IWCC does not require that the aggravation of a pre-existing injury be supported by objective medical evidence that the employee's condition has worsened (such as a comparison of a pre- and post-accident MRI demonstrating an objectively verifiable aggravation of the condition). The IWCC accepts the employee's subjective complaints about an increase in pain as sufficient.

The same scenario is becoming more prevalent in workers' compensation cases involving knees. An employee with a documented pre-existing degenerative knee condition (which has progressed to the point of a doctor recommending knee replacement in the near future) can have a minor incident at work which causes knee pain, or an increase in pain, which sends the employee back to the doctor for the knee replacement that the employee would nevertheless have had in the near future. If the employee makes a claim that the work "accident" *accelerated* the need for a knee replacement, the employer is required to pay for the knee replacement, all related time off work, and 45-50% loss of use of the leg in PPD benefits. The employee can establish this claim simply by testifying that there were no symptoms or minor symptoms before the work accident, but the employee became symptomatic, or more symptomatic, after the accident.[3]

b. Repetitive-Trauma Cases

In repetitive-trauma cases, as in cases involving pre-existing degenerative conditions, the fact that the employee had pre-existing carpal tunnel (wrist) or cubital tunnel (elbow) syndrome is not a defense under Illinois law. Additionally, because the work injury need only be ***a*** causative factor in the development of the carpal or cubital tunnel syndrome, the presence of one or more other known risk factors for these conditions (such as diabetes, obesity and arthritis) is ***not*** a defense that will prevent the IWCC from finding the claim compensable and ordering the employer to pay all benefits.

If an employee asserts that there was a worsening or aggravation of the ***symptoms*** (not even of the condition itself) as a result of her work activities, the employer will be liable for all of the medical care and for the time the employee needs to remain off work while recovering from

3 This current causation standard applied by the IWCC essentially amounts to a reversal of the burden of proof in cases involving pre-existing degenerative conditions or repetitive trauma. In these cases, to be successful, the employer is basically required to prove that the employee's work could not have caused any aggravation of his pre-existing condition.

surgery on one wrist or elbow and then another (as these conditions often occur bilaterally). Many employees have one or more risk factors, but if they testify that the pain in their wrists or hands got worse while doing their duties at work, and their physicians agree that the work ***could*** have caused or aggravated this condition, the IWCC will award compensation. In the cases involving Menard Correctional Center, for example, correctional officers have obtained workers' compensation benefits simply by presenting evidence that work could have caused or aggravated their carpal or cubital tunnel syndrome. The State cannot succeed in defending against these cases unless it can present independent medical testimony stating that it is ***not possible*** that the correctional officer's work even slightly aggravated his pre-existing condition.[4] It is extremely difficult, if not impossible, for the State to obtain credible, independent medical testimony concluding that a correctional officer's work at Menard Correctional Center could not have even slightly aggravated the carpal or cubital tunnel syndrome. Moreover, many cases demonstrate that even when the State obtains independent medical testimony challenging the causal connection opinion offered by the employee's physician, Arbitrators tend to place little value in the opinion of a State expert who never treated the employee and offered his opinion years after the work accident at issue. Finally, although repetitive trauma to the wrist and the elbow are the most common repetitive-stress injuries, we are increasingly seeing cases involving repetitive trauma to the shoulders, knee and neck.

RECOMMENDATIONS:

- To protect taxpayer dollars, the legislature must address and change the causation standard that is currently applied by the IWCC and the courts. Senate Bill 2521 addresses the causation standard and provides an opportunity to discuss the appropriate language to make this needed change.

- The legislature should consider defining repetitive-trauma claims which will be considered compensable under the Act. For example, the legislature could define compensable repetitive-trauma claims to include only those injuries in which the

4 The following Arbitrator decision demonstrates the significant difficulty employers face in defending against repetitive trauma claims. In this particular case, the State employee asserted that in 2001 she began experiencing pain and swelling in her non-dominant hand. She stated that she never provided any written notice of her work accident, but did mention to her supervisor in July 2001, that her hand was bothering her and she was going to see a doctor. In February 2002, she completed a SERS Disability Form specifying that her condition was ***not*** work-related. Despite these facts, the IWCC Arbitrator determined that a work accident occurred and that proper notice was provided to the employer. With regard to causation, none of the employee's treating physicians stated that her condition was work-related. In January 2009, over seven years after the alleged date of accident, the employee was seen by a specific doctor at her attorney's request. This physician opined that her condition was causally related to her work. In his deposition, the physician acknowledged other risk factors for carpal tunnel syndrome such as arthritis, diabetes and being overweight but stated that he had ruled out these risk factors because the employee did not have them. In contrast, the Arbitrator noted that the Petitioner was overweight, and said that the physician "is clearly wrong. Her medical records are replete with notations that she suffers from high blood pressure and diabetes. She also has arthritis in other parts of her body." The Arbitrator also noted that the physician did not review any job description or any evidence of the employee's work activities and, instead, relied solely upon the employee's description of what she did. After identifying the physician's faulty factual conclusions, the Arbitrator nonetheless credited the physician's opinion on causal connection and awarded the employee 15% loss of use of her non-dominant hand and 20 weeks of TTD benefits ($11,067.90). *Frieson v. DHS*, 03 WC 26709. Our office sought review of this case, and the IWCC affirmed the Arbitrator's decision. *Frieson v. DHS*, 12 IWCC 0323.

employee's job duties were the "primary" cause or a "major" cause of the condition of ill-being and excluding those conditions which are primarily caused by the natural degenerative process which occurs during aging.

5. Partial Permanent Disability

In addition to TTD benefits and medical benefits, an employee is entitled to a partial permanent disability benefit (PPD) if the employee has suffered any permanent functional loss of use of a body part (or of the "person as a whole") as a result of the work injury.[5] The IWCC has sole discretion in determining whether an employee is entitled to PPD benefits and, if so, the permanency value of the injury. In assessing the level of permanent disability, the IWCC considers a number of factors, including age, occupation, whether the injury was to a dominant body part, disability from engaging in specific types of employment or physical activities, skill, training, experience, pain, stiffness, weakness, atrophy, limitation of motion, and interference with or absence of normal bodily structures or organs. Prior to the recent amendments to the Act, the IWCC routinely awarded partial permanent disability benefits without requiring any medical evidence establishing that the employee had suffered a loss of use of a body part.

For example, in *McGovern v. US Steel*, 07 IL.W.C. 19395, 10 IWCC 0354 (2010), the petitioner underwent surgery for carpal tunnel syndrome in his right hand. After the surgery, his physician released him to return to work without any restrictions. With regard to permanent disability, the petitioner testified "that he has a little ache in his hand and a little grip problem but he was doing okay. He said he wears a glove on his hand when he uses the hammer at work. He is able to do all aspects of his job. He does not take any prescription medicine for his hand and he has not been to the doctor for his hand since [his surgeon] released him." Nonetheless, the Arbitrator found that "[a]s a result of his work injury Petitioner has sustained the loss of 20% of the right hand." The IWCC affirmed that decision.

As a result of the recent amendments, however, section 8.1b of the Act now requires that for injuries occurring after September 1, 2011, the Arbitrator must consider (i) the level of impairment as reported in an AMA Impairment Rating if introduced into evidence by a party; (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. Under the law, no single factor is determinative of disability and the Arbitrator must explain the weight given to each factor in the decision.

Along with this critical change to the Act, the IWCC should require that an Arbitrator's award of permanency benefits must be made on a case-by-case basis as supported by the evidence of permanent disability. Permanency benefits should not be awarded based on a pre-conceived notion that certain categories of injuries automatically result in a certain level of permanent disability. In addition, regular advances in medical technology must be considered when

5 In cases involving severe injuries where the employee cannot return to work, other benefits may be available to her such as vocational rehabilitation, wage differential (to offset any loss of earnings due to her inability to return to her usual occupation), or even permanent and total disability benefits should her condition render her unemployable.

determining an employee's level of permanent disability.[6] A clear example of why this is important comes from the IWCC's treatment of carpal tunnel cases in recent years.

Advances in medical technology have made carpal tunnel surgery less invasive and with fewer complications. Most carpal tunnel surgeries now result in the complete relief of symptoms with no residual problems. Yet, prior to the recent amendments to the Act placing a cap on the permanency value of a carpal tunnel claim, the value of an operated carpal tunnel case continued to increase. Ten years ago, an employee who underwent carpal tunnel surgery on her dominant hand could expect a permanency award of about 15% loss of use of the dominant hand. In recent years, that same case has been valued in the Chicago area IWCC dockets at 17.5% loss of use of the hand and in the downstate IWCC dockets at 22.5% loss of use of the hand. And these numbers were just the starting point for carpal tunnel cases – they represented the ***minimum*** amount of permanency awarded even with the complete relief of symptoms, no residual effects and the treating physician's determination that the employee could return to her previous job without any restrictions. If there were any complications in a particular case, the value increased. Critically, the recent amendment to section 8(e)(9) of the Act caps carpal tunnel injuries at 15% (up to 30% with clear and convincing evidence of disability). Even with this change in the law, it is important that arbitrators analyze the evidence of permanent disability on a case-by-case basis and not simply award 15% loss of use of the hand in all carpal tunnel cases.

The IWCC's routine approach to awarding partial permanent disability benefits is not, however, limited to carpal tunnel cases. Cubital tunnel syndrome (typically repetitive trauma to the elbow), an injury which involves a surgical procedure to reduce the compression of the nerve running through the cubital tunnel at the elbow, typically commands an automatic 15 - 17.5% loss of use of the affected arm in the Chicago area dockets and 20 - 25% in the downstate dockets, without any requirement that the petitioner demonstrate actual permanent disability. Given that the same problem exists in awards for both carpal tunnel and cubital tunnel claims, the legislature should consider placing a statutory cap on cubital tunnel claims similar to the one it placed on carpal tunnel claims.

An additional issue relating to permanency findings arises when an employee has a subsequent injury to a body part for which the employee had a previous workers' compensation claim. In these instances in recent years, the arbitrators and the IWCC have focused on ensuring that the employee receives additional money for the subsequent injury, regardless of whether the medical evidence and resulting work restrictions, if any, justify an additional permanency award. For example, consider an employee who had a claim for carpal tunnel syndrome for the right hand and received an award of 15% loss of use of that hand and subsequently injures that same hand

6 The repetitive trauma cases arising out of Menard Correctional Center have illustrated the problem with the IWCC's approach to PPD benefits prior to the recent amendments to the Act. These cases primarily involve carpal or cubital tunnel syndrome or both. For example, a correctional officer who is diagnosed with bi-lateral carpal tunnel syndrome has a minimally invasive, very brief surgery on each hand. The correctional officer's physician allows him to return to work without any restrictions on his ability to perform his job. Despite the fact that the surgery has alleviated the condition and his physician has not placed any restrictions on his ability to do his job, the correctional officer seeks PPD benefits. Then, the IWCC Arbitrator determines, without any medical evidence, that the correctional officer's ability to use his hands has permanently diminished by as much as 22.5%. As a result, the correctional officer receives over $50,000 for bi-lateral carpal tunnel syndrome (and in the many cases where the employee has both bi-lateral carpal and bi-lateral cubital tunnel syndrome, he receives over $100,000).

(either through repeat carpal tunnel syndrome or other injury) and seeks another permanency award. In considering the permanency award for the subsequent injury, the arbitrators and IWCC should focus on the resulting level of disability that the employee has experienced and then make an award accordingly, off-setting the portion of the disability payment that the employee has already received from any new payment. Instead, the arbitrators and IWCC too often focus on awarding additional money to the employee for the subsequent injury. As a result, the employee in this example would often receive a second award for 15% loss of use of the hand, with the employer having paid for a total of 30% loss of use of the hand despite the fact that the employee's actual physical disability has not changed due to the second hand injury.

A recent Appellate Court decision raises another issue relating to permanency awards. The Third District Appellate Court, Workers' Compensation Commission Division, recently held that a shoulder injury should be treated as an injury to the "person as a whole" rather than as an arm injury. *Will County Forest Preserve District v. IWCC*, No. 10-MR-673 (Ill. App. 3rd, Feb. 17, 2012). This decision, which is contrary to well-established precedent, is likely to result in a significant increase in costs for employers for two reasons. First, PPD benefits are calculated based on a number of benefit weeks, and the number of weeks awarded varies by the body part affected. The Act provides a schedule of benefits for the loss of use of certain body parts. Under the Act, "[a]n 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." *Will County Forest Preserve District*, at para. 13 (citing 820 ILCS 305/8(e)(10) (West 2008)). If the employee's injury results in a partial loss of use, then the number of weeks awarded is based on the percentage loss of use of the arm. So, a 25% loss of use of an arm would result in an award of 63.25 benefit weeks. If an injury is treated as an injury to the person as a whole, the benefits are awarded based on a percentage of 500 weeks, in contrast to the 253 weeks used in arm injury cases. As a result, the petitioner in the *Will County Forest Preserve District* case, who experienced a 25% loss of use of his shoulder, was awarded 125 benefit weeks – **nearly double** what he would have received under the longstanding precedent that treated shoulders as part of the arm. The State currently has a number of cases involving shoulder injuries similar to the injury in this recent decision.

Second, in cases where an employee experiences a subsequent injury to a body part, such as an arm, the employer can set-off any previous permanency award in paying a permanency award for the subsequent injury. The *Will County Forest Preserve District* case provides an example of this issue. Several years before the petitioner's shoulder injury, he sustained an injury that required surgery to his right elbow and a right carpal tunnel release. He settled with his employer for 15% loss of use of his right hand and 15% loss of his right arm. If the court had treated his shoulder injury as an arm injury, the employer could have set-off the previous arm award against this new award. Under the current law, however, an employer cannot set-off a previous award for a body part against a "person as a whole" permanency award in any subsequent case.

RECOMMENDATIONS:

- Given that the petitioners usually return to work with no restrictions after carpal tunnel treatment or surgery, the legislature should consider specifying a lower level of permanent partial disability to be awarded in carpal tunnel claims.

- The legislature also should adopt a statutory cap on permanency benefits for cubital tunnel claims, similar to the cap adopted for carpal tunnel claims.

- In training arbitrators and reviewing cases, the IWCC should ensure there is no significant difference in permanency awards in similar cases based solely on the location of the dockets, eliminating significant differences in the amount of permanency awards between the Chicago and downstate dockets.

- The legislature should require that in cases involving a subsequent injury to a body part for which the employee has already been compensated, the permanency award must be based on evidence of the employee's resulting permanent disability, regardless of whether that will result in the employee receiving more money for the loss of use of that body part.

- The legislature should allow set-offs for "person as a whole" awards if the employee's subsequent injury is to the same body part as the prior injury.

6. Wage Differential and Permanent and Total Disability Awards

If an injury affects the ability to pursue the employee's usual and customary line of employment and a decrease in earning capacity results, the employee is entitled to receive a wage differential. The wage differential is calculated as 2/3 of the difference between what the employee would be earning if returned to work and what the post-accident earning capacity is determined to be. Until recently, a wage differential award was a lifetime benefit. In 2011, the General Assembly made a critical change and amended the Act to limit wage differential awards to a period of five years or until the employee reaches age 67, whichever is greater.

The recent amendments to the Act, however, did not address a separate, significant issue relating to wage differential awards. If an employee receives a wage differential award, but later obtains new employment making more than the employee's previous job, this increase in earnings will not affect the wage differential award. The wage differential award cannot be reduced by showing that the employee's earning capacity has in fact returned to its pre-accident level or even increased. Rather, the employer can only succeed in a request to reduce the wage differential award by demonstrating that the employee's physical disability has decreased, regardless of his actual income.

If an injury prevents an employee from returning to any gainful employment, the employee is entitled to a permanent and total disability award (PTD benefits). This lifetime award continues to be paid while the employee is receiving retirement or Social Security benefits. An employee is determined to be permanently and totally disabled when, due to the injury, the employee cannot perform any services except those so limited in nature that there is no reasonably stable labor market for them. As an expansion of the permanent disability concept, the IWCC and courts have created a separate class of cases referred to as "odd-lot" permanent and total disability cases. In these odd-lot cases, if the employee has significant restrictions and can show that the injuries in conjunction with other personal limitations (such as education or language barriers) have prevented the return to gainful employment, the IWCC will award him permanent

and total disability benefits for life. The odd-lot category is not in the Workers' Compensation Act, yet the IWCC is entering an increasing number of permanent and total disability awards based on this theory.

It also should be noted that State employees who are found by the IWCC to be permanently and totally disabled have the potential to earn more in disability related payments than they would have earned if they remained employed until retirement. These employees receive 66 2/3% of their wages for life, along with annual increases from the Rate Adjustment Fund. Additionally, they can receive 8 1/3% of their wages in disability payments from the state retirement system. When they reach retirement age, the retirement system switches them from disability benefits to pension benefits. Because none of these payments are taxed under Illinois law, once these employees reach retirement age, they may receive more income than they would have received if they had continued to be employed and then retired.

RECOMMENDATIONS:

To save taxpayer dollars, the legislature should make significant changes to the current provisions for these awards:

- If the employer can demonstrate that the employee's earning capacity has returned to its pre-accident level (regardless of whether the level of physical disability has remained constant), the employer should be entitled to a modification of the wage differential award.

- The legislature should specifically define the odd-lot theory of permanent and total disability in the Act to prevent abuse or the expansion of this approach without legislative approval.

- The legislature should provide that workers' compensation benefits paid to State employees must be off-set by the amount the employee is receiving in State pension payments. This would avoid a situation where a State employee who is receiving PTD benefits is earning more in retirement than the employee earned while working for the State.

7. Penalties and Attorneys' Fees

The IWCC may award penalties under Sections 19(k) and (l) of the Act and attorneys' fees under Section 16.

Under Section 19(k), the IWCC has the discretion to award penalties against an employer, including the State, for an unreasonable or vexatious delay in paying compensation, including medical expenses. The amount of the penalty is equal to 50% of the amount payable. For example, if there is $60,000 in unpaid medical expenses, and the IWCC Arbitrator determines that the non-payment was unreasonable or vexatious, another $30,000 is awarded in Section 19(k) penalties. The penalty goes to the employee and the attorney, not to the medical provider whose bill was unpaid. When Section 19(k) penalties are awarded, Section 16 allows the IWCC

to award attorneys' fees to the employee. (The IWCC cannot award attorneys' fees under Section 16 unless it also awards Section 19(k) penalties.) When awarded, attorneys' fees are usually 20% of the 19(k) penalties.

Section 19(l) allows the IWCC to award a per diem penalty against the employer, *including the State*, for an unreasonable delay in paying benefits, including medical expenses and TTD. Section 19(l) provides for a penalty of $30 per day, not to exceed $10,000, if the employer "shall without good and just cause fail, neglect, refuse or unreasonably delay the payment of benefits." Under this Section, a "delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay." Section 19(l) penalties are interpreted as essentially a late fee and are considered mandatory if the employer cannot show an adequate justification for its delay.

Due to chronic underfunding of the CMS budget for workers' compensation and the State's fiscal crisis, CMS is routinely nearly two years behind in paying medical expenses. Currently, CMS has a 22 to 24 month delay in paying medical bills. The IWCC Arbitrators in the downstate dockets have awarded Section 19(l) penalties against the State for failure to pay medical expenses in a timely manner, although in an April 2011 decision, the IWCC denied a State employee's petition for penalties and attorneys' fees, finding that the State's inability to pay was adequate justification for the delay. *Spiller v. Menard Correctional Center*, 08 WC 31092.

RECOMMENDATION:

- The Act currently provides for 1% per month interest payable to the provider for any medical bills that are unpaid after 30 days (820 ILCS 305/8.2(d)(3)). With this provision in place to provide for interest to medical providers, the legislature should amend the Act to expressly prohibit the IWCC from awarding any additional penalties or attorneys' fees against the State when the cause for the delay is the underfunding of the workers' compensation budget.

8. Medical Expenses

The unpaid medical expenses are most often awarded to the employee. Often, the employee's attorney will negotiate with the medical providers to reduce their bills, resulting in the employee keeping the difference between the amount awarded for medical expenses by the IWCC and the amount paid to medical providers.

RECOMMENDATION:

- The legislature should amend the Act to provide that the award of medical expenses is limited to the State satisfying the bills of the medical providers, prohibiting the payment of any portion of the medical award to the employee or the employee's attorney.

V. Settlement of Workers' Compensation Cases

In defending a State employee's workers' compensation case, it may be financially advantageous to the State to consider settlement if there is a chance the State might be required to pay for future medical care related to the work injury. If a workers' compensation case goes to trial and the IWCC enters an award for the State employee, the State remains liable for any and all medical care related to the work injury that the employee may need in the future (this is commonly referred to as "open medical"). The vast majority of settlement agreements, however, specifically end the employee's right to future medical benefits, relieving the State of any further liability for medical expenses.

In cases where a State employee has reached maximum medical improvement and the claim is otherwise uncontested (when, based on the facts and the law, there are no viable legal defenses to the claim), the parties may explore settlement of the employee's claim for PPD benefits. In negotiating any settlement of a claim, the OAG must first receive a specific amount of funds in settlement authority from the CMS Risk Management Supervisor assigned to the case and must operate within the limits provided by CMS. The OAG considers many factors in determining an appropriate settlement amount, including but not limited to:

(1) the diagnosis based upon objective medical evidence;
(2) the amount and level of treatment rendered to address the employee's condition;
(3) the employee's age and occupation;
(4) any resulting inability to perform certain types of employment or physical activities;
(5) ongoing residual physical problems (pain, stiffness, weakness, limitation of motion etc.);
(6) the level of any interference with or absence of normal bodily functions;
(7) the costs involved to secure evidence to support defense(s) (i.e., IME's, FCE's, JSA's) and the likelihood that any such defense(s) would be successful;
(8) the potential liability should the matter go to trial;
(9) the effects a particular settlement would have on the defense of other State workers' compensation claims;
(10) the potential costs of future medical expenses; and
(11) the potential for future workers' compensation claims by the same employee.

The permanency value of a given case is also driven by the IWCC's decisions in previous cases of a similar nature. As a result, these previous decisions necessarily dictate the settlement value of a case. For example, the OAG is usually unable to settle a cubital tunnel case for much less than what the IWCC will award if the case goes to trial. A petitioner's attorney will not accept a settlement offer of 5 - 7% loss of use of the arm when he knows that the Arbitrator will award 17.5 - 20% loss of use of the arm after a trial.

VI. Conclusion and Summary of Recommendations

Following the critical reforms enacted last year, the legislature and the Illinois Workers' Compensation Commission can take a number of additional steps to improve the system and protect taxpayer dollars while also ensuring that State employees who are injured while working are appropriately compensated. These reform proposals would require changes to the

administration of State employees' workers' compensation claims, changes to the IWCC's procedures in workers' compensation litigation and further amendments to the law.

- Reforms to the Administration of State Employees' Workers' Compensation Claims: The State should undertake reforms to ensure that the workers' compensation claims process is administered effectively and that all state agencies take action to reduce workplace injuries and return employees to work as quickly as possible. The most critical of these reforms include:
    - Adequately fund and staff CMS to effectively administer and pay claims or consider retaining a third-party administrator;
    - Ensure CMS has adequate funding to retain Independent Medical Examinations (IMEs) in all cases in which they might be appropriate and that CMS has an effective procedure in place to obtain IMEs in all appropriate cases;
    - Require initial and periodic CMS supervisory approval for all TTD and maintenance benefits;
    - Increase CMS's use of vocational rehabilitation counselors and ensure that CMS has an effective procedure in place to provide vocational rehabilitation to employees in all appropriate cases;
    - Ensure that CMS establishes a Preferred Provider Program covering all State facilities; and
    - Ensure that State agencies have an incentive to reduce work injuries and workers' compensation claims by employees on their budgets.

- Reforms to the Rules of the IWCC Governing Procedures in Workers' Compensation Litigation:
    - By amending its rules to require that the employer receive at least 20 business days notice prior to a section 19(b) or 19(b-1) hearing or a trial, the IWCC can ensure that employers, including the State, have adequate time to prepare to defend against a claim; and
    - Through training of arbitrators and review of arbitrator decisions, the IWCC should eliminate geographic disparities in awards, ensuring that similar injuries are treated similarly in dockets in the Chicago area and downstate.

- Further Reforms to the Illinois Workers' Compensation Act: Through additional amendments to the Act, the legislature can build on the important reforms enacted last year to provide a fair process for both employees and employers and protect taxpayer dollars. The legislature should consider the following amendments to the Act:
    - To ensure adequate notice of an accident or injury, require that State employees must complete all CMS workers' compensation claim forms prior to receiving benefits and require written, signed and verified notice of an accident;
    - Provide a clear method for determining the date upon which a repetitive-trauma injury manifests itself for purposes of the Act's notice requirements and statute of limitations;
    - Clarify the accidents that are covered by the Act, including by adding a definition of "traveling employee" and detailing the scope of the Act's coverage for such employees;

- Address and change the causation standard that is currently applied by the IWCC and the courts;
- Define repetitive-trauma claims which will be considered compensable under the Act;
- Lower the cap on the level of permanent partial disability to be awarded in carpal tunnel claims;
- Adopt a cap on permanency benefits for cubital tunnel claims;
- Require that in cases involving a subsequent injury to a body part for which the employee has already been compensated, the permanency award must be based on evidence of the employee's resulting permanent disability, regardless of whether that will result in the employee receiving more money for the loss of use of that body part;
- Allow set-offs for "person as a whole" awards if the employee's subsequent injury is to the same body part as the prior injury;
- Provide that if the employer can demonstrate that the employee's earning capacity has returned to its pre-accident level (regardless of whether the level of physical disability has remained constant), the employer should be entitled to a modification of the wage differential award;
- Define the odd-lot theory of permanent and total disability in the Act to prevent abuse or the expansion of this approach without legislative approval;
- Provide that workers' compensation benefits paid to State employees must be off-set by the amount the employee is receiving in State pension payments to avoid a situation where an employee receiving PTD benefits is earning more in retirement than the employee earned while working for the State;
- Prohibit the IWCC from awarding penalties or attorneys' fees against the State when the cause for the delay is the underfunding of the workers' compensation budget; and
- Provide that the award of medical expenses is limited to the State satisfying the bills of medical providers, prohibiting the payment of any portion of the medical award to the employee or the employee's attorney.