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### Recommended Citation

Richard Sawislak, *Workmen's Compensation*, 22 DePaul L. Rev. 122 (1972)  
Available at: <https://via.library.depaul.edu/law-review/vol22/iss1/9>

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## WORKMEN'S COMPENSATION

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AS IN nearly every field of practice workmen's compensation changes are affected by both statutory amendment and case decision. In the past year the legislature has amended the Illinois Workmen's Compensation Act by raising the benefit rates and changing the employer's accident reporting requirements. The twenty percent increase in benefit rates was part of a major revision of the Act which was first passed in June of 1971.<sup>1</sup> That bill was partially vetoed by the governor pursuant to his new constitutional power<sup>2</sup> and his recommended bill was returned to the legislature, passed and finally approved on October 28, 1971.<sup>3</sup> Questions concerning the effective date of that bill were raised after the supreme court ruled that the parochaid bills,<sup>4</sup> passed under similar circumstances and with the same effective date, could not become effective until July 1, 1972. In any case, the legislature reenacted as Public Act 77-1871 the same rate increases. The amendments were approved and became effective June 26, 1972. It expressly repealed the previous amendment to the Act, certified October 28, 1971, and provided that the repeal shall not affect any rights, obligations or actions arising pursuant to the 1971 amendatory act.<sup>5</sup>

There has been no expression from the court as to what rate should apply between October 28, 1971 and June 26, 1972; and except for the confusion brought on by this situation, the application of the new rate schedule holds no mystery to the practitioner who

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1. H.B. 844, 77th Ill. G.A. (1971).
2. Ill. Const. art. 4, § 9(e) (1970).
3. Pub. Act No. 77-1659 (1971).
4. *People ex rel. Klinger v. Howlett, Auditor of Public Accounts*, 50 Ill. 2d 242, 278 N.E.2d 84 (1972).
5. Ill. Rev. Stat. ch. 48, § 138.5 *et seq.* (Supp. 1972).

has computed employee benefits in the past. Arbitrators generally are applying the new rates as of October 28, 1971.

Most practitioners are generally aware of the Federal Occupational Safety and Health Act of 1970.<sup>6</sup> In part, that Act establishes standards for occupational health and safety and procedures for enforcing them. The law also provides that states may preempt by setting up their own requirements for reporting of accidents, inspections, enforcement, *etc.*, as long as the local requirements are not inconsistent and are as strict as or stricter than those prescribed by the federal act.

The Illinois Health and Safety Act,<sup>7</sup> as amended and effective on July 1, 1972, provides that the federal safety and health standards promulgated in accordance with the Federal Occupational Safety and Health Act of 1970 are made rules of the Illinois Industrial Commission. In order to bring the Illinois practice into compliance with these standards, the legislature has amended, effective July 1, 1972, Section 6 of the Workmen's Compensation Act,<sup>8</sup> relating to the employer's requirements to maintain accurate records and make necessary reports.

Until this section was amended the Workmen's Compensation Act required the employer to submit a written report between the 15th and 25th of each month listing all injuries where compensation had been paid and where the employee had lost more than one week from work. A second report was required when it was determined that permanent disability had or would result. No penal provisions for failure to report were provided.

The Illinois employer is now required to maintain accurate records of work-related deaths, injuries and illnesses, except those which only require first aid and do not involve medical treatment, lost consciousness or restriction of work, motion or a transfer to another job. In case of death, as a result of a work-related injury or illness, a report must be filed with the Industrial Commission within two working days of the death. Where the injury or illness results in the loss of more than one scheduled working day or an inability to perform the duties of the employee's regular job, a report must be filed between

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6. 29 U.S.C. § 651 *et seq.*

7. Ill. Rev. Stat. ch. 48, § 137.3, 4, 6, 8, 17 (1971).

8. Ill. Rev. Stat. ch. 48, § 138.6 (Supp. 1972).

the 15th and 25th of each month. Further reports are to be made when it is determined that a permanent disability has or will result from the injury. The failure to file any of the prescribed reports with the Industrial Commission is now a misdemeanor, punishable by a fine of up to \$200.

The Illinois general practitioner would be well-advised to familiarize himself with these requirements so that he may counsel his business clients, who fall under the provisions of the Workmen's Compensation Act, of their new obligations under this law. In the past a lawyer might meet his legal responsibilities by determining whether or not his client's business falls within the coverage of the Act, and if not, advise the client that he could elect to come under the Act voluntarily. These obligations of accident recordation and reporting fall squarely on the employer and that fact should certainly be brought to his attention.

The Illinois employee who is rendered incapable of work as a result of a compensable injury or illness is entitled to benefits under one of two distinct classifications. The specific loss or loss of use of two major members suffered in one accident qualifies the employee as being permanently, totally and completely disabled and, therefore, entitled to weekly benefits equal to the existing death benefit and thereafter fifteen percent of the death benefit annually, regardless of whether or not the employee returns to any type of employment. This is generally called a "specific" permanent total disability pursuant to Section 8(e)<sup>9</sup>. The employee who suffered a "non-specific" permanent total disability, that is an injury or illness not involving loss or loss of use of two specific members which renders the employee incapable of work pursuant to Section 8(f),<sup>10</sup> is awarded the same weekly benefit as the specific permanent total disability equaling the death benefit and thereafter twelve percent of that benefit annually for life, but subject to change if the employee should return to work.

It has been generally felt that if an employee suffered an injury limited to one specific major member, compensation would be limited to scheduled benefits for that member, notwithstanding the fact that the employee may not have returned to work. The rationale for

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9. Ill. Rev. Stat. ch. 48, § 138.8(e) 18 (Supp. 1972).

10. Ill. Rev. Stat. ch. 48, § 138.8(f) (Supp. 1972).

this position was based on the language included in Section 8(e) of the Act which allowed the employee compensation for temporary total incapacity for work:

[The employee] . . . [s]hall receive in addition thereto such compensation for a further period subject to limitations as to amounts provided in this Section for the specific loss therein mentioned, but shall not receive any compensation under any other provisions of this Act. Unless otherwise specified, the following listed amounts shall apply to either the loss of or the permanent and complete loss of use of the member specified, such compensation for the length of time as follows. . .<sup>11</sup>

In considering this language in *Springfield Park District v. Industrial Commission*,<sup>12</sup> the court ruled that it did not limit the Industrial Commission to an award for the loss of use of an arm where the employee was otherwise wholly and permanently incapable of work, even though the injury was confined to the arm. The employee, by virtue of his age and prior work experience which was limited to the use of both hands and arms, his complaint of constant pain, a right arm which in spite of three operations was not restored to use, and who was described by the treating physician as suffering from post-traumatic neuritis and neuralgia (frozen elbow), and was unable to pursue any of his previous occupations, was permanently and totally disabled under Section 8(f).

The employer argued that the language of Section 8(e) cited above, should limit recovery to the loss of use of the arm. The court pointed out that "other expressions in this Act reinforce the view that Section 8(e) was not intended to be the sole source of compensation" as in this case.<sup>13</sup> Section 8(e)18, after describing the specific permanent total disability case, states that "these specific cases of total permanent disability do not exclude other cases." Section 8(c) which provides compensation for disfigurement and Section 8(d) providing compensation for permanent partial incapacity contain language specifically prohibiting compensation under other sections where compensation is payable under Section 8(e). Section 8(f), which provides compensation for complete disability, contains no similar limiting language as do Sections 8(c) and 8(d). Therefore, the court concluded:

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11. Ill. Rev. Stat. ch. 48, § 138.8(e) (Supp. 1972).

12. *Springfield Park Dist. v. Industrial Comm.*, 49 Ill. 2d, 273 N.E.2d 376 (1971).

13. *Id.* at 71, 273 N.E.2d at 378.

. . . that had the legislature intended that Section 8(e) schedule benefits were to be exclusive for the loss of a single member, it (the legislature) would have inserted the limiting language in Section 8(f). We consider that the expression "but shall not receive any compensation under any other provisions of this Act" does not confine a claimant, who has suffered the loss of a single member, to recovery under Section 8(e). An injury to one of the specified members not resulting in complete disability in fact is compensable only under Section 8(e). But where that injury causes a permanent and total disability, compensation is available to the employee under Section 8(f) of the Act.<sup>14</sup>

In an earlier decision the court clarified yet another limitation included in Section 8. Paragraph (h) limits, except in cases of complete disability, compensation payments to a period of no more than 8 years or 416 weeks. Although specific losses are generally described in terms of percentage of disability, the Act provides for specific weekly amounts for each of the scheduled members. One hundred percent loss of use of a leg is more correctly described as 200 weeks of compensation for the complete loss of use of a leg. It was argued, therefore, by the employee in *American Bakeries v. Industrial Commission*<sup>15</sup> that an award under Section 8(e) for specific losses and temporary total incapacity totaling 487- 2/3 weeks of compensation was violative of the limitations contained in Section 8(h).

The court pointed out that prior to a 1931 amendment Section 8(e) allowed for compensation subject to the limitations as to time and amount fixed by paragraphs 8(b) and 8(h). In 1931 the amendments to Section 8(e) deleted the reference to limitation of time. Since Section 8(d), which provides for partial incapacity, refers to the time and amount limitations of Sections 8(b) and 8(h) but such time limitation was deleted from Section 8(e), the legislative intent not to limit the weeks of compensation payable under Section 8(e) to 416 weeks was clear. Equally clear was that the Industrial Commission's award totaling more than 416 weeks for specific losses under Section 8(e) was proper.

Finally, in considering limitations on Section 8 benefits, the court has considered an award for disfigurement and for a specific loss of use of each arm in *Corn Products Company v. Industrial Commission*.<sup>16</sup> The employee had cut his forehead and fell to the floor

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14. *Id.* at 71-72, 273 N.E.2d at 379.

15. 50 Ill. 2d 146, 277 N.E.2d 864 (1971).

16. 51 Ill. 2d 338, 282 N.E.2d 445 (1972).

striking his neck. As a result, according to a medical report, he had a permanent scar and a cervical spine injury causing an aggravation of pain in his shoulder and arms that further resulted in a permanent partial loss of use of both arms. There was no photograph contained in the record so the court could not determine whether the scar was inconspicuous or a disfigurement "which impairs or injures the beauty, symmetry or appearance . . .; that which renders unsightly, mis-shapen or imperfect, or deforms in some manner" as defined in *Superior Mining Company v. Industrial Commission*.<sup>17</sup> Under these circumstances the commission's award for disfigurement was not against the manifest weight of the evidence.<sup>18</sup>

Further, the court held that disfigurement to the face and disability to the arms could be awarded even when resulting from the same accident since the injuries were to different members of the body and such award was not prohibited by the language of Section 8(c).

No compensation is payable under this paragraph where compensation is payable under paragraphs (d), (e) or (f) of this Section.

When the disfigurement is to the portions of the body designated in this paragraph, as a result of any accident, for which accident compensation is not payable under paragraphs (d), (e) or (f) of this Section, compensation for such disfigurement may be had under this paragraph.<sup>19</sup>

Here, in a single accident the employee suffered a disfigurement to the face and disability of two arms and the award was proper under the two different paragraphs of Section 8.

Whether the claimant is an employee or an independent contractor is a "threshold inquiry" to be made in any claims arising under the Act. In *Bauer v. Industrial Commission*,<sup>20</sup> the claimant answered an advertisement for part-time delivery men and signed a "Delivery Contract" which provided that he, as an independent contractor, was to receive fifty cents for each delivery. He was to insure his own automobile for business usage and hold the company harmless in any claims arising out of his delivery agreement. By specific terms of the contract he was to be deemed an independent contractor and be free from control or direction over the performance of the delivery

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17. 309 Ill. 339, 141 N.E. 165 (1923).

18. *Corn Products Co. v. Industrial Comm.*, 51 Ill. 2d 338, 342, 282 N.E.2d 445, 448 (1972).

19. Ill. Rev. Stat. ch. 48, § 138.8(e) (1971).

20. 51 Ill. 2d 169, 282 N.E.2d 448 (1972).

service. The claimant was assigned delivery orders according to a number given to him when he reported to work. There was no penalty if he did not report for assignments and no income tax, unemployment compensation or social security tax was withheld from his wages. He could choose his own delivery routes and had the discretion to refuse to deliver any orders. At the end of the evening he would give the money he collected for the deliveries to the cashier, less his share.

The court held that the claimant was not an employee, reversing the Industrial Commission's award for injuries sustained when the claimant's car was struck by another automobile while he was returning from a delivery.

Citing several of its previous decisions, the court stated the guidelines to be used in determining the employee-employer relationship: the method of payment, the right to discharge, the skill required to do the work, the furnishing of tools, material and equipment, along with the single most important factor of the right to control the manner in which the work was done. The employee is subject to the control and supervision of the employer at all times, while the independent contractor "represents the will of the owner only as to the result and not as to the means by which it was accomplished."<sup>21</sup> By applying these tests the court found that factually there was no control over the claimant; and further, by contract, there was no right to exclusive control.

Respondents required only that their products be delivered as rapidly as possible and the drivers were free to choose any route they desired in order to fulfill this requirement . . . each driver was paid according to the number of deliveries he made. Claimant had to supply his own car with equipment to keep the food warm as well as pay his own expenses which included automobile insurance with extended coverage for business usage.<sup>22</sup>

Although a dissenting judge commented that the contractual language declaring the claimant an independent contractor, upon which the majority based their opinion, was "a sham and subterfuge designed to achieve the exact result here obtained,"<sup>23</sup> it seems quite clear that the court also relied on the other incidents of the relationship to teach its decision.

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21. *Id.* at 172, 282 N.E.2d at 450.

22. *Id.* at 172, 282 N.E.2d at 451.

23. *Id.* at 173, 282 N.E.2d at 451 (Goldenherst, J., dissenting).

Constitutional attacks on the provisions of the Workmen's Compensation Act are rare since the law has been in effect in Illinois over 60 years. Nevertheless, the court is called upon periodically to consider such questions.

The court had previously upheld the constitutionality of Section 7(a) and (b) of the Act as it differentiated between a widow and widower with respect to death benefits for the surviving spouse.<sup>24</sup> Section 7(a) provides death benefits to widows for their husband's compensable death without regard to the degree of dependency, while Section 7(b) allows recovery of such benefits by a surviving husband only if he was totally dependent upon the earnings of the employee-wife.

The constitutionality of these sections has again been considered by the court in the case of *Holiday Inns of America v. Industrial Commission*.<sup>25</sup> An employee was fatally shot during a robbery at the employer's motel; and the Industrial Commission awarded a statutory burial allowance, but denied further benefits because the husband failed to prove that he was totally dependent upon his wife's earnings. The Circuit Court of Logan County, on certiorari, agreed that the husband was not totally dependent, but held the classification of "husband" in Section 7(b) unconstitutional and ordered the Industrial Commission to enter an award as if he were a widow. The award was entered, confirmed and appealed to the supreme court by the employer.

The claimant-husband argued that if no compensation was payable under Sections 7(a) or 7(b), then under Sections 7(c) and 7(d) surviving parents or children, who were partially dependent, and grandparents, grandchildren or collateral heirs, who were dependent upon the employee's earnings to the extent of fifty percent or more, can recover; and this arbitrarily and unreasonably required a husband to show total dependency while allowing others not as closely related to the deceased to recover on a showing of partial dependency and renders the section unconstitutional.

In upholding the constitutionality of the section and remanding for judgment in accordance with the original Industrial Commis-

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24. *Duley v. Caterpillar Tractor Co.*, 44 Ill. 2d 15, 253 N.E.2d 373 (1969).

25. 48 Ill. 2d 528, 271 N.E.2d 884 (1971).

sion decision, the court indicated that although they did not know the reasons why the legislature allowed recovery under Sections 7(c) and (d) on a showing of partial disability in light of the comprehensive social character and purpose of the Act. Further, the court stated that "there is no fair reason for the law that would not require with equal force its extension to others not included."<sup>26</sup> The failure of the Act to allow recovery for husbands on a showing of less than total dependency did not render the legislative schedule unconstitutional, since the legislature was not required to design the Act in order to provide for any or all eligible conditions.<sup>27</sup>

The compensability of injuries sustained by employees injured on or around company parking lots has been the subject of several decisions in the past. Generally, if the parking lot is provided by the employer and is customarily used by its employees, the employer is considered responsible for the maintenance and control of the parking lot, and injuries arising out of its use are compensable.<sup>28</sup> In *Osborn v. Industrial Commission*,<sup>29</sup> the court considered the compensability of injuries sustained by an employee who had parked in a company-owned parking lot, crossed the street to the factory, worked her shift and was injured by an automobile driven by a co-employee as she re-crossed the public street on her way back to the parking lot. The injuries were held not to arise out of and in the course of employment. The employee was not acting for the benefit of or at the direction of the employer, and the street was not under the employer's control. This decision should be considered along with *Torbeck v. Industrial Commission*,<sup>30</sup> where it was held that an employee injured by an automobile while crossing a public street to pick up her lunch at a restaurant did sustain compensable injuries. Here the employee was customarily told, after she began her workday, what her hours would be for that day. They were irregular hours and depended on whether or not the employer would be present in the store. When the employee reported for work on the day of the accident she did not know if she would be required

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26. *Id.* at 553, 282 N.E.2d at 887.

27. *Id.*

28. *DeHoyos v. Industrial Comm.*, 26 Ill. 2d 110, 185 N.E.2d 885 (1962).

29. 50 Ill. 2d 150, 277 N.E.2d 833 (1971).

30. 49 Ill. 2d 515, 276 N.E.2d 344 (1971).

to stay through her mealtime. She was told by the employer that she was to work late and that she should go across the street to a restaurant to pick up her meal and return to the store to eat. Her presence in the street was held to be for the benefit and accommodation of the employer and occasioned by the demands of the employment. Both of the above cases sustained Industrial Commission decisions based on uncontested factual situations.

Workmen's Compensation practitioners are apt to hear again and again that the Civil Practice Act does not apply to Industrial Commission matters. That point has been ruled upon by the First District Appellate Court and the Illinois Supreme Court in two different opinions. In *Sears, Roebuck And Company v. Industrial Commission*,<sup>31</sup> a writ of certiorari was quashed by the circuit court because it was not filed within twenty days of the receipt of an award of the Industrial Commission as provided by Section 19 of the Act. The appellate court indicated that if the writ had been seasonably filed and the circuit court had jurisdiction of the subject matter, an arguable question would accrue as to the applicability of Section 72 of the Civil Practice Act to any subsequent order, judgment, or decree from the circuit court since such a proceeding is a "statutory proceeding" as defined by subsection (1) of Section 72. The appellant in the *Sears* case had filed a Section 72 petition, supported by affidavit, explaining why the writ of certiorari was not filed within the statutory period, in an attempt to confer jurisdiction on the circuit court. The holding infers that as to any proceedings in the circuit court relating to workmen's compensation matters, applicable sections of the Civil Practice Act could apply.

In *Zimmerman v. Industrial Commission*,<sup>32</sup> the Industrial Commission had refused to reinstate two cases which were dismissed for want of prosecution by the arbitrator after the case had been set on numerous occasions, the last of which was pursuant to a final notice sent by the Industrial Commission and neither the employee nor his counsel appeared. An unverified motion to reinstate was filed containing allegations as to why the matter should be reinstated. In support of the writ of certiorari affidavits which set out facts relating

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31. — Ill. App. —, 273 N.E.2d 725 (1971).

32. 50 Ill. 2d 346, 278 N.E.2d 784 (1972).

to the practice of the Industrial Commission in setting cases, were filed with the circuit court. The employee argued that the unanswered allegations of the petitions to reinstate constituted admissions of the allegations, and reinstatements should have been allowed based on cases involving Section 72 of the Civil Practice Act. The supreme court stated that the Civil Practice Act does not apply to this type of proceeding and, furthermore, the burden of convincing the Industrial Commission that its prayer for relief was justified was on the petitioner. Granting or denying the petition to reinstate rests in the sound discretion of the Industrial Commission. The court felt that under the facts presented, the Industrial Commission did not abuse its discretion in denying reinstatement.

With regard to the employee filing affidavits in support of the writ of certiorari, the court held that the circuit court must decide the case solely on the Industrial Commission record and has no authority to try the case *de novo* or to hear evidence.<sup>33</sup> In *Brown v. Industrial Commission*,<sup>34</sup> a deposition that was not submitted to the arbitrator or the commission was incorporated into the record and submitted to the circuit court by stipulation. The court held that deposition should not have been considered by the circuit court.

In any case, it seems established that the supreme court recognizes the right of the Industrial Commission to dismiss cases for want of prosecution as long as the dismissal is not arbitrary or an abuse of discretion, even though such procedure is not set out in the statute. Accordingly the practitioner would be well-advised to acquaint himself with the Industrial Commission rules,<sup>35</sup> effective July 1, 1972, relating to continuances, dismissals for want of prosecution and petitions to reinstate.

Finally, in *Proctor Community Hospital v. Industrial Commission*,<sup>36</sup> the court considered the relationship between the Workmen's Compensation Act and the Illinois Interest Act.<sup>37</sup> Section 3 of the latter

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33. *Id.* at 350, 278 N.E.2d at 786.

34. 51 Ill. 2d 291, 281 N.E.2d 673 (1972).

35. Rules Governing Practices Before The Industrial Commission Under The Workmen's Compensation Act and Occupational Disease Act, adopted March 28, 1972, effective July 1, 1972.

36. 50 Ill. 2d 7, 276 N.E.2d 342 (1971).

37. Ill. Rev. Stat. ch. 74, § 3 (1971).

act allows five percent interest per annum from the date of judgment which applies to Workmen's Compensation awards. The interest is to be computed when judgments are entered on any awards running from the time the award is made to the time of rendering judgment on the award.<sup>38</sup> In this case, an award was entered by the Industrial Commission and set aside by the circuit court and later reinstated by the supreme court. The employer paid the award pursuant to the mandate, but refused to pay the interest. A judgment for interest was entered pursuant to Section 19(g) of the Workmen's Compensation Act which provides the procedure for reducing commission awards to judgments.

The employer argued that it was a non-debtor until the supreme court reversed the circuit court; and, therefore, there was no judgment to which the statute could apply since the award was paid pursuant to the mandate. The Illinois Supreme Court, however, ruled that the interest accrued from the date of the award, notwithstanding that the award was subsequently reversed on appeal and on further review reinstated.

The most cursory examination of these cases and the statutory amendments reflects the everforward movement toward expanding employer obligations and extending employee benefits. The trend in both the legislative and judicial areas indicates a continuation of this progressive policy well beyond the period of this survey. It is difficult, at this time, to assess the legal validity and social acceptability of such a policy. However, it surely can be said that the Illinois courts and General Assembly have been quite diligent during the past year in defining the rights and duties of employees and employers under the Illinois Workmen's Compensation Act.

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38. Ill. Rev. Stat. ch. 74, § 3 (1971).