No. 124690

In the Supreme Court of Illinois

WEST BEND MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v.

GARY BERNARDINO,

Defendant-Appellee,

TRRS CORPORATION and COMMERCIAL TIRE SERVICES, INC.,

Defendants.

On Appeal from the Second District Appellate Court of Illinois
Nos. 2-18-0934 & 2-18-1009 (cons.)

There on appeal from the 22nd Judicial Circuit, McHenry County, Illinois
No. 2018 MR 798, Honorable **Thomas A. Meyer**, Judge Presiding.

BRIEF OF *AMICUS CURIAE* ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE

Kurt A. Niermann (ARDC 6207461)
Porro Niermann Law Group LLC
821 W. Galena Blvd
Aurora, Illinois 60506
Telephone No. 630-264-7300
kurt@pnlawoffice.com

POINTS AND AUTHORITIES

INTRODUCTION

The Illinois Trial Lawyers Association (ITLA) submits this brief a*micus curiae*, in support of injured workers like Gary Bernardino. ITLA is an organization focused on protecting the rights of all injured persons, including injuries sustained in the workplace. ITLA offers the Court some historical and public policy perspectives about the consequences of courts staying the vital operations of the Illinois Workers' Compensation Commission (IWCC). A review of the history and purposes of the IWCC tell us two important things:

1) Circuit courts probably lack the authority to stay claims at the IWCC;
2) Insurance carriers should never be given the power to use equitable devices to interfere with an injured worker's claim at the IWCC.

ARGUMENT

The nation's transition to an industrial economy brought workers face to face with dangerous machinery and injurious processes they had not encountered in the preindustrial world. Injuries followed and a lack of meaningful measures to address the carnage meant that the fallout landed squarely on workers and their families. The common law tort system had not evolved to address this fallout and structural barriers in the tort system thwarted easy adaptation of torts to workplace injuries. See *Grand T.W.R. Co. v. Indust. Com'n*, 291 Ill. 167, 173 (1919), citing to *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). Assuming a worker could find a lawyer and survive while the claim aged in the courts, workers faced proof barriers which defeated most claims. Torts ("wrongs") were premised on the worker being able to prove the employer was at fault for his injury. Robust affirmative defenses shielded employers from liability. Moreover, the tort system always provided an after-the-fact means for redressing losses, not a means for obtaining timely treatment and financial support for the worker.

States enacted no-fault compensation systems to address these unmet needs of injured workers. Illinois' system was designed to provide "prompt, sure, and definite compensation, together with a quick and efficient remedy, for injuries... suffered by such workers in the course of their employment. See *O'Brien v Rautenbush* 10 Ill.2d 167, 174 (1956). This Court understood that the expense and delay required for common law claims amounted to a denial of justice for these workers. *See Grand T.W.R.*, 291 Ill. at 173. Industry was to bear the costs of

injuries rather than injured workers and their families. See *Id.*, 291 Ill. at 174-175. Moreover, the Act was to be liberally construed, and the Act's provisions read in harmony to achieve the goal of providing financial protection for injured workers. See *Peoria Bellwood Nursing Home v. Indust. Com'n*, 115 Ill.2d 524, 529 (1987).

The State considered treatment and survival needs of injured workers so compelling that it effectively restructured branches of government in furtherance of the goal. The judicial branch historically carried out the State's constitutional obligation to provide a mechanism for substantive redress of wrongs between parties. The new compensation system displaced the judiciary's role in resolving accident claims between employers and workers, and the judiciary accepted a role as a reviewing court.[1] See *Gunnels v. Indust. Com'n*, 30 Ill.2d 181, 185 (1964) (courts have no original jurisdiction over workers compensation proceedings); 820 ILCS 305/19(f). This Court accepted the surrender of its authority over injury claims between employers and workers by upholding the Act against constitutional attacks. *See* e.g., *Grand T.W.R.*, 291 Ill. 167 (1919). The United States Supreme

[1] Early comments by this Court suggest that the compensation board performed no judicial function. See *Savoy Hotel Co. v. Indust. Bd. of Illinois*, 279 Ill. 329, 334 (1917) (board exercises no judicial function); *Grand T.W.R. Co. v. Indust. Com'n*, (the Act is almost automatic in practical working); and the dissent in *People ex rel Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 360 (1937) (preparation and filing of claims before the commission does not involve or require an particular skill or knowledge, legal or otherwise, comparing it to the ease of filing claims against estates and pension claims). However, this Court retreated from that view by 1937, recognizing obvious parallels to judicial functions. See *Goodman*, 366 Ill. at 354 (the burden of proof and competency of the evidence are the same as in actions at law for recovery for damages for personal injuries). Our modern compensation system is far from the automatic system the Court was commenting on a century ago. IWCC practice has evolved into a complex practice involving hearings conducted by lawyers serving as arbitrators and commissioners, applying rules of evidence and controlling legal principles, also possessing the authority to issue subpoenas to compel production of documents and witnesses. The IWCC can also penalize parties and their carriers for mishandling of claims, and reviewing courts accord deference to factual findings by the IWCC.

Court contemporaneously upheld similar compensation systems against federal constitutional attacks. *See New York C.R. Co.*, 243 U.S. at 205 (substitution of compensation system for tort remedies survives 14th Amendment due process challenge as long as states provide meaningful substitutions).

As detailed below, Illinois has a constitutional obligation to provide citizens with fair mechanisms to redress their losses. This *right to substantive redress* is the function which the IWCC carries out for injury claims between employers and workers. Moreover, the IWCC assists people in protecting the most fundamental of rights they possess- *the right to preserve bodily integrity*. Following an injury, workers often need immediate relief in the form of treatment and subsistence benefits. The IWCC claims process was streamlined to permit quick decisions on benefits when the judicial system proved itself inadequate to provide the relief.[2] Given the purposes of the Act and this Court's surrender of authority over injury claims between employers and workers, courts presumably lack the authority to interfere with IWCC operations. Yet even if courts retain jurisdiction over the

[2] The first version of Illinois workers compensation system was administered by the judiciary, but the volume overwhelmed the courts. *See* p.5 of *FY 2018 Annual Report from the Illinois Workers Compensation Commission,* www2.illinois.gov/sites/iwcc/about/ Documents/ FY2018AnnualReportFinal.pdf. Compensation claims were then transferred away from the courts to a three-member industrial board in 1913, a five-member industrial commission in 1917 within the Department of Labor, and the commission ultimately became a self-standing agency in 1957. *See* Act of June 28, 1913, sec. 1, §13. 1913 Ill. Laws 346-147; Act of May 31, 1917, sec. 1, §13(a) and (b). 1917 Ill. Laws 498-499; Act of July 11, 1957, sec. 1, §13(a). 1957 Ill. Laws 2633.

IWCC, insurance carriers should never be permitted to use a court's equitable powers to grind IWCC operations to a halt.

I. COURTS DO NOT SHARE CONCURRENT JURISDICTION OVER WORKER'S COMPENSATION CLAIMS PENDING AT THE IWCC

The role of the circuit court in compensation proceedings is appellate only, and is limited by section 19(f) of the Workers' Compensation Act. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142, 158 (1992). Circuit courts have no original jurisdiction over workers compensation proceedings. *See Id.* The *Hartlein* decision approvingly cited to *Gunnels v. Indust. Com'n* for the idea that courts lack jurisdiction to restrain a claimant from proceeding with petitions before the commission. As in our case, *Gunnels* involved an employer seeking to use the equitable powers of the circuit court to halt commission operations. This Court reversed the injunction, noting that there is no need for such an exercise of judicial power in the case, further noting that the role of the courts in compensation cases was appellate only. *See Gunnels*, 30 Ill.2d 181, 185 (1964).

Gunnels simply followed an older line of precedent where this Court recognized that courts cannot exercise their inherent judicial powers to obtain jurisdiction over compensation claims. *See Levy v. Indust. Com'n*, 346 Ill. 49 (1931) (court cannot cure defective writ by amending the writ); *Nierman v. Indust. Com'n*, 329 Ill. 623, 627 (1928) (court cannot use common law writ to obtain jurisdiction, only the form of writ of certiorari allowed by the statute). As it related to the new

form of writ created by the Act, "the powers which the court may exercise by virtue of that writ are merely the powers which the Workers' Compensation Act confers." *Nierman*, 329 Ill. at 627. Thus, *Gunnels*, *Levy* and *Nierman* suggest two important principles: 1) courts do not have jurisdiction over workers compensation claims until appeals are perfected in accord with the Act; and 2) courts cannot interfere with commission operations.

The *Ardt* case cited by West Bend does not lead us to a contrary conclusion. The court in *Ardt* did not issue a stay until it had already gained jurisdiction over the agency's decision through a perfected review. *See Ardt v. Illinois Dept. of Professional Regulation,* 154 Ill.2d 138, 143-144. The court had jurisdiction over the case and the parties when it issued the stay. Therefore, *Ardt* has nothing to teach us about whether a court can issue stays against cases it does not have jurisdiction over. *Ardt* specifically distinguished itself from cases where courts had not yet gained jurisdiction over the matter, including a defective appeal from a worker's compensation decision in the *Levy v. Indust. Com'n* case. *Ardt* also involved a separation of powers dispute which has nothing to do with our present case. This Court determined in *Ardt* that the inherent power of courts to issue stays on cases before them overrode language in the statute which attempted to restrict that authority. *Ardt* does not support West Bend's position in this appeal.

The Concurrent Jurisdiction Ruling in *Employer's Mutual* Was Drawn Too Broadly

Employer's Mutual v. Skilling told us that courts share jurisdiction with the IWCC to resolve coverage disputes. *See Employer's Mutual Co. v. Skilling,* 163 Ill.2d 284, 287 (1994). This Court reached the concurrent jurisdiction ruling through a three-step analysis. First, our state constitution vests courts with original jurisdiction over all justiciable matters. *See* Ill. Const. 1970, art. VI, §9. Second, court jurisdiction persists unless a new legislative scheme explicitly divests the courts of jurisdiction. Third, because the Workers' Compensation Act did not explicitly divest courts of jurisdiction, the courts still shared jurisdiction with the commission. However, this concurrent jurisdiction conclusion appears to have been drawn too broadly.

If a lack of explicit language is the key to concurrent jurisdiction, then courts must also enjoy concurrent jurisdiction over every aspect of IWCC operations. That would fly in the face of a century of practice and it would trigger due process violations. Unacceptable barriers in the court system led to the creation of the compensation system in the first place, and the inability of courts to handle the cases led to a transfer of the claims away from the courts (see footnote 2). We also have 90 years of precedent telling the lower courts they only play an appellate role in the system. Further, this Court ultimately recognized that *Employer's Mutual* failed to consider the overall purpose and structure of the statutory scheme under scrutiny, contrary to the way the Court had historically assessed whether an agency had exclusive jurisdiction. See *J&J Ventures Gaming LLC v. Wild, Inc.*, 2016 IL

119870 *P24. Therefore, the concurrent jurisdiction ruling in *Employer's Mutual* rests upon a shaky foundation.

Moreover, we trigger profound constitutional issues if we read *Employer's Mutual* broadly enough to give courts concurrent jurisdiction over claims at the IWCC. Workers' compensation schemes survived early due process challenges because they swapped a quick mechanism for obtaining guaranteed, albeit limited, benefits, for a tort system which offered no guarantees (outlined in next section). However, if we remove the "quick process" feature of the IWCC system by allowing courts to creep back into the process, we resurrect the debate over whether the original trade was fair. This issue naturally leads to the more profound question of whether the State possesses an ownership interest in the bodily integrity of individuals who are injured in the state. As also detailed in the next section, bodily integrity is the most fundamental interest that any person possesses. The right is so overwhelmingly important that the constitution places restrictions on a state's ability to intrude upon it, at the same time the constitution imposes affirmative obligations on the state to provide a means for redressing injuries to bodily integrity. There is no suggestion in our federal or state constitutional scheme that states enjoy an ownership interest in a citizen's bodily integrity. This issue then leads to the question of whether the legislature had the power to strip citizens of their common law remedies in the first instance.

This Court could (and should) sidestep each of these problems by clarifying that its concurrent jurisdiction holding in *Employer's Mutual* only applies to

coverage disputes. Even though the commission is to decide "all questions arising under this Act" (820 ILCS 305/18), *Employer's Mutual* may logically have concluded that insurance coverage disputes did not involve questions arising out of the Act. That narrower interpretation would avoid the constitutional problems, it would preserve the ruling in *Employer's Mutual* and it would preserve the IWCC's exclusive jurisdiction to process claims before it. Under this narrower view of *Employer's Mutual*, courts would not have a role in individual compensation claims until the claims were appealed per the terms of the Act. Courts would also not have the authority to impose stays on cases being processed through the IWCC, and there would be no occasion to engage in a primary jurisdiction analysis. Primary jurisdiction is a doctrine without a purpose in the compensation system. The circuit court should never have stayed Bernardino's IWCC proceedings as the court lacked jurisdiction over the claim.

II. EQUITY COULD NEVER FAVOR AN INSURANCE COMPANY'S FORUM PREFERENCES OVER THE VITAL FUNCTION SERVED BY THE IWCC

Even if the court had jurisdiction over Bernardino's claim at the IWCC, West Bend should never have been granted a stay to stop IWCC operations. Stays are equitable devices. See *Ardt v. Illinois Dept. of Professional Regulation*, 154 Ill.2d 138, 146 (1992). No party is entitled to equitable relief. Rather, a party must ask a court to exercise its equitable powers for the party's benefit, typically to address injustices which will result from the normal operation of law. A proper equitable

analysis must consider how the stay will affect the parties on either side of the stay. As explained below, the stay deprives Bernardino of constitutional rights.

West Bend's Stay Denies Bernardino's Fundamental Right To Substantive Redress

The IWCC fulfils the State's constitutional obligation to provide workers with a fair mechanism for redressing their injuries. It is the duty of every state "to provide for the redress of private wrongs." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885). The right "lies at the foundation of all well-ordered systems of jurisprudence" and is "founded in the first principles of natural justice." *Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876). The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). One of the first duties of government is to afford that protection. *Id.*

This duty arises out of Lockean social compact obligations of democratic governments. Individuals possess a natural privilege to respond to mistreatment by others. Insofar as the state denies individuals the privilege of self-help and self-assertion in the name of civil peace and justice, the state becomes obligated to provide alternative mechanisms for redress. *See* John C.P. Goldberg, Benjamin C. Zipursky, *Civil Recourse Theory Defended: A Reply To Posner, Calabresi, Rustad, Chamallas and Robinette*, 88 Ind. L. J. 572-573 (2013). William Blackstone and John Locke both recognized the right to fair redress and the right traces back many centuries earlier through the natural law of England. *See* John C.P. Goldberg, *The*

Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs, 115 Yale L. J. 532-559 (2005).

Art.1 §12 of the Illinois Constitution protects each citizen's access to justice. The guarantee is not simply an aspiration or policy goal of the State, it is a core constitutional obligation of the State.[3] For injury claims between employers and workers, Illinois satisfies its obligation by providing a fair and functioning workers compensation system for its workers to use. The State is not obligated to ensure that workers win their cases. However, the State is obligated to empower its citizens by providing a mechanism which they can use to obtain recourse. *See* John C.P. Goldberg, Benjamin C. Zipursky, *From* Riggs v. Palmer *to* Shelley v. Kraemer*: The Continuing Significance of the Law-Equity Distinction, in* Philosophical Foundations of the Law of Equity (Dennis Klimchuk, Irit Samet & Henry Smith eds., Oxford Univ. Press 2019); also p.4 of https://dx.doi.org/10.2139/ssrn.3182593.

It is further true that the State must provide a "meaningful" means for redress to pass constitutional muster. See *New York Central Ry Co. v. White*, 243

[3] The Court occasionally minimizes the import of this clause when faced with a party demanding entitlement to a particular remedy. Respectfully, diminishing the clause in this way works a disservice to the purpose of the clause. Similar clauses were included in most state constitutions, reflecting the fundamental nature of one's opportunity to seek redress for an injury. See Judith Resnick, *Constitutional Entitlements To And In Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 St. Louis U.L.J. 917, 921-922 (2012). 80% of the state constitutions contain textual references to one's right to a remedy. See Appendix I to Resnick's article (pages 1002-1023). And the nine states without express "right to remedy" provisions guaranteed one's right to use the courts to redress wrongs through due process or open courts provisions. See Appendix 2 (pages 1024-1037). The "right to access" is intrinsic to democracy and deeply embedded in constitutional texts and doctrines. *Id.* at 921-922.

U.S. 188, 205 (1917) (due process will not tolerate the substitution of an insignificant compensation system for common law rights); and *Arizona Liability Cases*, 250 U.S. 400, 419 (1919) (arbitrary and unreasonable changes are not permissible substitutions for common law rights). Consistent with these principles, this Court has long protected an injured person's rights against arbitrary and unreasonable legislative encroachment. *See Grace v. Howlett*, 51 Ill.2d 478, 485 (1972) (legislature is not permitted to adopt an arbitrary or unrelated means of addressing a problem); *Grasse v. Dealer's Transport Co.*, 412 Ill. 179 (1952) (legislative transfer of worker's tort rights against a third party is not a valid exercise of police power); *Best v. Taylor Machine Works,* 179 Ill.2d 367, 406 (1997) (caps are categorically unconstitutional when they operate without regard to the facts or circumstances of the actual case); and *Begich v. Indust. Com'n*, 42 Ill.2d 32, 36-37 (1969) (permanency classifications are irrational, unrealistic and artificial when they provide different values for what is essentially the same physical loss from an injury). These cases involve decisions under a variety of different constitutional provisions, yet the decisions all drive toward the idea that injured individuals have rights hanging in the balance which the State is obligated to protect. This Court has magnificently performed its work.

Adoption of our workers' compensation system undoubtedly shifted the goals somewhat, but the shift was aimed at enhancing protections for injured workers over what common law remedies could provide. This Court highlighted features of the new compensation system which made it a reasonable trade for common law

rights: 1) a quick and certain remedy which common law practice could not provide; 2) immediate treatment for injuries; 3) immediate financial support for workers while they were disabled from work; and 4) permanency awards. See *Grand Trunk R.Co.*, 291 Ill. at 173-174. The common law system had provided after-the-fact recovery for a few successful tort claimants. But the new system offered prompt interim benefits to help workers survive after an injury.

West Bend's Stay Interferes With Bernardino's Fundamental Right To Protect His Bodily Integrity

The importance of IWCC operations is further underscored by the fact that the IWCC helps workers protect their most fundamental of interests, preservation of bodily integrity. Bodily integrity enjoyed special protection under common law, it was enshrined in federal and state constitutions and courts bend over backwards to protect the right against a variety of potential threats, as they should.

Common law protections for bodily integrity long predate our country's founding. *See* Robert J. Kaczorowski, *The Common Law Background Of Nineteenth-Century Tort Law*, 51 Ohio St. L. J. 1127, 1131 (1990) (referencing a 1374 claim for negligent treatment by a surgeon). The ancient torts of assault and battery provided individuals with a mechanism for redressing injury to bodily integrity. See *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 518 (1997), citing to 3 W. Blackstone, Commentaries * 119-120, 127-128. Most civilizations provided mechanisms to redress injuries to bodily integrity. The English called their protections torts, Romans called them delicts, Babylonians redressed some personal injuries in the

Law Code of Hammurabi, and hunter-gatherer bands and tribal groups have their own mechanisms for redressing injuries.[4] Groups of clearly different structure and resources have all felt compelled to provide protections for bodily integrity. That is a powerful indication that bodily integrity is a fundamental interest.

The concern for bodily integrity was also prominently enshrined in the federal and state constitutions, in clauses protecting both life and liberty. States shall not deprive any person of life, liberty or property without due process of law. *See* Ill. Const. art.1 §2; U.S. Const. amend. XIV, §1. The Illinois constitution declares life and liberty as inherent and inalienable. *See* Ill. Const. art.1 §1. Our bill of rights are fundamental charter reservations of liberty and rights to the people as against possible encroachments from the executive, judicial or legislative branches of government, which every court is bound to enforce. *See People v. Humphreys*, 353 Ill. 340, 342 (1933).

The "life" and "liberty" terms both offer protections for bodily integrity, although the liberty term has attracted all the litigation. In an 1877 case from Illinois, Justice Steven Fields explained that *life* under the 14th Amendment means more than mere animal existence. See *Munn v. Illinois*, 94 U.S. 113, 142 (1877) J. Fields dissent. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. *Id.* The provision equally prohibits the

[4] A chapter titled "A Genealogical View of Law" provides a wonderful overview of some of the of the protective mechanisms offered by human groupings through the ages. Brian Z. Tamanaha, *A Realistic Theory of Law*, 82-117 (2017). Cites to anthropological and archeological works can be found there. The author observes in the final section of the chapter that law, even in its most rudimentary form, established protections and restrictions relating to property, people, family unions and sacred matters. These are the same interests we deem fundamental in our system.

mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. *Id.* Although he was in the dissent in *Munn*, Justice Field's views of 14th Amendment protections greatly influenced our present understanding of the scope of the clause. By 1891, a majority of the court agreed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law". *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).[5] Furthermore, given that bodily integrity and survival are literal manifestations of one's life, the "life" term would be the logical seat of protection for our most paramount of interests.

Even so, the *liberty* term has typically been applied to disputes over bodily integrity. These include rights a person has against infringement of bodily integrity [*Cruzan v. Missouri Dept. of Health,* 497 U.S. 261 (1990) (right to refuse medical care/life-saving hydration and nutrition); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (liberty interest in avoiding unwanted administration of antipsychotic medication); *Winston v. Lee*, 470 U.S. 753, 764-765 (1985) (liberty interest against compelled surgery); *Rochin v. California*, 342 U.S. 165, 172 (1952)

[5] *Botsford* involved the denial of a defendant's demand for a medical examination of the plaintiff. The court ultimately allowed reasonable physical examinations under the court's supervisory authority, yet *Botsford* remains relevant for two related points. First, the court recognized that bodily integrity is the most fundamental of interests protected in the law. Second, the case shows that deprivations of bodily integrity are permitted only in only the most extraordinary of circumstances.

(liberty interest against forcible extraction of stomach content); *Youngberg v Romeo*, 457 U.S. 307, 315 (1982) (right to personal security is a historic liberty interest)], as well as the right to compel the state to provide services when the state takes custody over the person. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (right to medical treatment at government's expense while restrained). It is not that important whether the life or liberty terms better capture a persons' right in bodily integrity. The important point is that bodily integrity is undoubtedly our most fundamental interest.

It is easy to understand the vital role the IWCC serves for injured workers. The integrity of one's body impacts their survival as well as their ability to function in the world. Internal drives and reflexes attempt to protect us from injury while basic cellular mechanisms repair damaged tissue. These mechanisms only go so far in restoring the body after an injury. That is why professional treatment is often required for injuries suffered in the workplace. Fractured bones must be set, squeezed nerves released, tendons reattached to bone, infectious tissues debrided and tissues sutured. More serious injuries require more urgent treatment. When the worker finds himself disabled from the injuries, prompt financial support is needed. The IWCC provides the mechanism for workers to satisfy those needs. Prompt handling of claims is central to the mechanism. Thus, stays on IWCC proceedings do not *preserve the status quo* as West Bend claims. Rather, delays defeat the core design of the Act, threatening constitutional rights in the process.

The design of the system also warrants protective handling of claims by the State. The Act contains mandatory coverage and exclusive remedy provisions which force injured workers into a ward-like state of dependence on the IWCC process when they are injured. *See* 820 ILCS 305/3; 820 ILCS 305/5. Health insurance policies and disability plans exclude treatment and benefits for work injuries and few workers have savings to fall back on after an injury. When a carrier or employer disputes a claim, we have an overriding need to speed up the processing of claims, rather than grinding the process to a halt so the carrier can exercise a forum preference. The state must ensure that its own powers are not misapplied to defeat fundamental needs of vulnerable citizens. *See DeShaney*, 489 U.S. 189 (duty to provide services where person is in government custody or government creates the danger). Even if courts retained their inherent power to stay IWCC proceedings, the powers should only be exercised in the most compelling of circumstances.

We know that Bernardino's constitutional rights, health and survival all hang in the balance if IWCC proceedings are stayed. If Bernardino cannot access treatment or survival benefits, he may suffer irreversible harm or even perish. Yet West Bend is the party demanding the right to use equitable tools to deprive Bernardino from his own rights. What apocalyptic consequences will West Bend face if it does not get the power to stay cases at the IWCC?

Threats To West Bend If It Cannot Get A Stay

West Bend mentions a few consequences it might face if it cannot stop IWCC operations. However, West Bend severely handicaps its own position by offering

zero evidence that it will actually face any of the problems. West Bend complains about a cost differential between the agency and circuit court, but it provides no proof of what the differential might be, the likelihood of the differential materializing or differences in attorney billing rates between the IWCC and circuit courts. It complains about extra time being required if it litigates out coverage at the IWCC, but West Bend again presents the Court with no actual proof there is a material difference between the forums. West Bend's arguments should be summarily rejected due to its failure to build its record for a meaningful analysis of its arguments. This Court should not be granting an insurance company the power to halt agency operations over arguments conjured from thin air.

Even if we speculate about how West Bend's fears might play themselves out, none of West Bend's concerns are remotely compelling and each is easily solved by existing doctrines and principles. The following is a list of West Bend's concerns and solutions to those concerns.

Possible Conflicting Decisions (West Bend Brief p.15)

Principles of estoppel will solve this problem. If a final decision has been rendered in one competent forum, the other forum will follow. Thus, conflicting decisions are highly unlikely to materialize, which probably explains why West Bend offers no examples.

The IWCC May Rule On Coverage Before The Court Can (West Bend Brief p.7)

West Bend never provides the punchline for this imagined horror. If the goal is to get a quick decision on coverage, the forum for that ruling would seem immaterial. Thus, West Bend must actually be complaining that some aspect of the IWCC process will lead to incompetent decisions on coverage issues. West Bend again offers no evidence for this concern and the concern is unfounded. Arbitrators, commissioners and litigants at the IWCC are all trained lawyers, and they all receive additional routine training on current legal decisions, procedural issues and medical topics. Reviewing courts can correct errant factual conclusions through a manifest weight review standard. Legal errors are more readily reversible under a *de novo* review standard. West Bend informs us that coverage issues are often easily resolved through dispositive motion practice before the courts. Assuming that unverified detail is true, then coverage issues would seem to be pretty easy work for the IWCC to perform.

Dual Track Litigation Will Defeat A Circuit Court's Jurisdiction To Decide Coverage (West Bend Brief 17)

This argument does not even make sense. A circuit court's jurisdiction over a coverage dispute does not depend on whether the IWCC proceeds to hearing on the injured worker's claim.

The IWCC Is Not A Suitable Option For Insurance Carriers (West Bend Brief p.19)

West Bend may legitimately incur some extra time, effort and expense by litigating coverage through the IWCC. (Brief p.20) Unfortunately, West Bend

leaves us to speculate on the issue as it failed to provide any evidence about any of these issues. This Court may have access to relevant statistics to compare the aging of cases in the IWCC versus the courts. However, annual IWCC reports verify the extraordinary efficiency of the IWCC process. According to the 2017 annual report, arbitrators move 40,000 claims per year with a total of 1,000 trials, 35,000 settlements and 4,000 dismissals. 50% of the decisions were appealed to the review panel staffed by commissioners, resulting in 750 review decisions, 400 settlements and 100 case dismissals. *See* p.5 of *FY 2017 Annual Report from the Illinois Workers Compensation Commission,* www2.illinois.gov/sites/iwcc/about/Documents/FY2017AnnualReportFinal.pdf. This enormous production was handled by 13 arbitrators in Chicago, 18 downstate arbitrators and 9 commissioners.

Unfortunately, there are no publicly available sources of information about how long it takes coverage disputes to run through the court system. West Bend does not even offer the Court statistics from its own declaratory judgment efforts or the data from its peers. West Bend fails to support its *unnecessary delay* argument with any proof. West Bend's failure to build its record should not be a factor which weighs in its favor, particularly given the extraordinary relief that West Bend is demanding from this Court.

Perhaps West Bend and its peers need the power to stay claims because the industry is on the brink of collapse. According to the 2018 *Workers' Compensation Insurance Oversight Report* from the Department of Insurance,

https://insurance.illinois.gov/wcfu/WorkersComp2018.html (attached), Illinois maintained its long-held position as the most popular destination for workers' compensation carriers (App.3- chart titled "Top 10 States by Company"). Carrier profits in Illinois increased by 8.4% from 2016 to 2017 while the national average was 3.4% (App.4- chart titled "Profitability"). 2017 carrier profits were 37.5% higher in Illinois than nationwide [(23.1 - 16.8) ÷16.8]. This represented a 153% increase in profits over 2013, 113% increase over 2014 profits, 34% increase over 2015 and 57% increase over 2016 profits [(profit year – 23.1) ÷ profit year]. The most revealing statistic about the industry's operational profitability is the loss ratio number, which divides losses by direct earned premiums (App.4- chart titled "Loss Ratio"). This number correlates with profitability per the report. The national loss ratio for workers compensation carriers was 49.9% in 2017, but Illinois carriers only paid out 44% of each dollar collected. In other words, Illinois carriers on average pocketed 56% of every dollar they collected from premiums. This does not even account for additional savings the carriers are able to squeeze out of investments and other operations. The 2017 loss ratio was a 30% improvement over the profit margin they enjoyed four years earlier. Illinois compensation carriers are thriving off the misfortune of injured workers.

West Bend prospers more than most. West Bend's 2018 Annual Report crows about the latest in a string of outstanding years for the company, delivering results in the top quartile of the insurance industry with profits comfortably exceeding its peer group and the industry. *See* https://www/thesilverlining.com/about-us/annual-

report West Bend's goal is achieving "success", which it defines as profitability and growth. (p.2 of 2018 Annual Report). This information is offered simply because West Bend failed to offer any evidence of its own for the Court to consider.

Any equitable analysis cannot turn a blind eye to the existing power differential between the parties on either side of the stay. West Bend and its peers are extraordinarily profitable and these profits flow directly from injuries to a worker's bodily integrity. These carriers are also legally compelled to increase profits to enhance shareholder value. Thus, the carrier's goals are inversely related to the needs of the worker as well as the protective goals of the Workers' Compensation Act. We must further take stock of the risk West Bend is really facing here. Assuming it prevails on the coverage dispute, West Bend will still escape responsibility for all medical costs, all benefit payments and any permanency award. Thus, West Bend is merely complaining about a potential unknown increase in defense costs if it has to travel through the IWCC. West Bend also has the option of recouping its defense costs from the employer who has improperly claimed coverage, or by spreading the loss among accounts by adjusting premium rates, just like the insurance industry is supposed to do. Equity cannot possibly value a carrier's forum *preferences* over the immediate survival needs of injured workers. Insurance carriers should never be given the power to stop a worker's claim in its tracks at the IWCC.

Other Relevant Considerations For Our Equitable Analysis

Carriers also gain inequitable advantages by forcing workers to defend coverage disputes in circuit court. Workers already face structural disadvantages when presenting their claims at the IWCC. When the carrier receives a claim for benefits, the carrier can deploy an army of employees and agents against the claim backed by a corporate treasury. The Act imposes no limit on how much money the carrier can spend to defend against the claim. However, the Act does limit the amount of fees the worker's lawyer can earn for working on the case. The Act limits the worker's lawyer to a 20% contingency fee. 820 ILCS 305/16. The lawyer can petition for more in fees, but the increase is rarely granted, the standard for obtaining an increase is *ad hoc* at best, and the money comes out of the injured worker's pocket in any event. This cap probably made sense when the cases were easily processed through the commission, but the complexity of the claims now makes the fee cap a practical limitation on the worker's ability to fight against an entirely unrestrained and motivated carrier. This is not an imaginary issue. The average contingency fee for an IWCC case is fleetingly small given the tiny value of the average IWCC case.[6]

[6] Claims had an average value of $2,389 in 2013 and $2,346 in 2012. See *FY 2014 Annual Report from the Illinois Workers Compensation Commission.* (www2.illinois.gov/sites/iwcc/Documents/annualreportFY14.pdf) The IWCC stopped publishing claim value data for several years and then resumed in a different format in 2018. The new format set out average claim values for cases handled by in-house lawyers ($ 1,660) versus lawyers at private firms ($ 2,966). Claim values had not materially changed by 2018. *See FY 2018 Annual Report from the Illinois Workers Compensation Commission* (attached to this brief as A.11) www2.illinois.gov/sites/iwcc/Documents/annualreportFY18.pdf

The injustices simply explode if carriers are permitted to force workers to fight coverage disputes out in circuit courts. There is no practical way for the worker to pay the lawyer to fight these coverage actions. The carrier faces no similar cost restraints. If this Court further grants carriers the right to stay emergency IWCC processes, the carrier has now been given the tools to strangle the worker of available survival and litigation resources. This would result in a complete denial of due process for the injured worker. Carriers should never be granted the power to stay IWCC proceedings.

There are also practical benefits to litigating coverage disputes out at the IWCC. All of the interested parties can be present for the IWCC hearing. Insurance carriers can be named as parties to the claim pursuant to 820 ILCS 305/4(g)(8). The worker, his attorney, the unrepresented employer, the carrier and the Attorney General can all participate in the hearing. The Attorney General becomes involved when a lack of coverage threatens a state fund. One of those funds is the fund which was created to cover some of the responsibilities of uninsured employers, the Injured Workers Benefit Fund. See 820 ILCS 305/4(d). If the IWCC determines that the *employer* violated the mandatory coverage requirement, the IWCC can assess penalties of $500 per day for willful violations and the Attorney General can jump into criminal prosecution. See 820 ILCS 305/4(d). If the IWCC alternatively determines that the *insurance carrier* asserted a groundless coverage dispute, or that the carrier practices a policy of delay or unfairness in adjusting cases, the IWCC can assess penalties and attorney fees

against the carrier and can even order that it stop insuring claims in the state. *See* 820 ILCS 305/19(k); 820 ILCS 305/19(l); 820 ILCS 305/16; 820 ILCS 305/4(c). The Attorney General can also roll right into prosecutions of the carrier or the hearing officer can refer the carrier to the Department of Insurance for action. Thus, the IWCC has been granted a wide set of tools which it can use to punish delays of IWCC proceedings over frivolous disputes about coverage. Those are some of the benefits to handling the disputes in an expedited IWCC forum.

Hasting's Mutual Is A Perfect Example Of What We Need To Avoid

West Bend promotes *Hasting's Mutual Co. v. Ultimate Backyard, LLC* as the path this Court should follow. But *Hasting's* is a concrete example of why courts should not be staying IWCC proceedings. The worker in *Hastings* suffered his work accident in May of 2008. *See Hastings Mutual Ins. Co. v. Ultimate Backyard LLC*, 2016 IL App (1st) 151976-U, *P5. Hastings obtained its stay via the 2012 appellate ruling and the stay was not lifted until the 2016 appellate decision. See *Id.* at *P27 It appears that the carrier paid a total of five months of subsistence benefits to the employee until the carrier took its coverage dispute to the courts. The worker thereafter received no benefits or treatment from the employer or carrier before the case was settled a decade after the accident During the decade which passed from injury to settlement, multiple hearings were required at the IWCC, the Attorney General's office became involved in proceedings to protect the state fund, and the carrier delayed the worker's case with eight years of travel in the "real" courts. The

carrier's final appeal in 2016 involved a challenge to the circuit court's ruling that the carrier improperly denied coverage. The appellate court found that appeal meritless for various reasons, including the carrier's violation of briefing rules and waiver of defenses in the lower court. Not only was the trip through the carrier's preferred forum a disaster for the worker, the appellate decision did not even provide important legal principles for the legal community to use.

West Bend has only delayed Bernardino's treatment and benefits from April 2018 through the present. However, West Bend has achieved this delay by forcing Bernardino to fight out what appears to be a meritless coverage dispute in circuit court.[7] West Bend's dual track option is fertile ground for gamesmanship.

CONCLUSION

Courts do not possess original jurisdiction over the individual compensation claims pending at the IWCC. Courts only have the review powers granted to them by the Act. These powers do not include the authority to use equitable stays to halt emergency IWCC proceedings. Further, no workers compensation insurance carrier

[7] This entire case arises out of some pretty dubious coverage defenses. West Bend is denying coverage over the insured's failure to comply with the "your duties" section of the policy. However, the policy says nothing about the insured forfeiting coverage by violating any of the itemized duties. (C.91-92) West Bend complains about late notice, but the policy does not spell out what the consequence will be for late notices. West Bend further alleges that the insured chose to forego coverage (C.68 par.17) because the insured paid some of the initial treatment and benefits rather than asking West Bend to pay them. (C.67 par.11). The duties section also says nothing about coverage being forfeited over this infraction. Rather, the policy does inform the insured that the insured will eat whatever payments they make without West Bend's approval. (C92 par.6) Contract language is to be construed against the drafter and West Bend failed to include forfeiture language in its policy.

should ever be given the power to use the equitable powers of courts to halt vital IWCC proceedings.

Respectfully Submitted,

ILLINOIS TRIAL LAWYERS ASSOCIATION

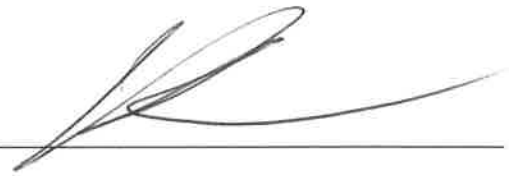
By _____

Kurt Niermann
Porro Niermann Law Group LLC
821 West Galena Blvd
Aurora Illinois 60506
Phone: (630) 264-7300
Fax: (630) 897-8637
kurt@pnlawoffice.com

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 28 pages.

Dated: July 15, 2019

By 

Kurt Niermann
Porro Niermann Law Group LLC
821 West Galena Blvd
Aurora Illinois 60506
Phone: (630) 264-7300
Fax: (630) 897-8637
kurt@pnlawoffice.com

E-FILED
7/24/2019 2:50 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

APPENDIX

State of Illinois
Department of Insurance

Workers' Compensation Insurance Oversight Report

2018

Bruce Rauner — Governor
Karin Zosel — Acting Director

December 20, 2018

Table of Contents

Introduction

The Illinois Workers' Compensation Act [820 ILCS 305/29.2(a)] requires the Department of Insurance (the Department) to annually submit a written report detailing the state of the workers' compensation insurance market in Illinois to: the Governor, the Chairman of the Commission, the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, and the Minority Leader of the House of Representatives.

The data contained in this report from the National Council on Compensation Insurance (NCCI) was provided to the Department in June, 2018.

Market Summary

Countrywide Market Overview

Illinois insurance companies wrote over $2.57 billion in workers' compensation insurance premium during 2017. Illinois and Pennsylvania ranked highest with 339 insurance companies actively engaged in the market. Illinois ranked fifth in premium with 4.4 percent of the countrywide market.

Top 10 States by Company

(with Positive Direct Premium Written)

State	Number of Insurance Companies
Pennsylvania	339
Illinois	339
Georgia	325
Virginia	324
Indiana	322
Tennessee	321
North Carolina	312
South Carolina	303
Texas	296
Iowa	296

Source: NAIC

Top 10 States by Premium

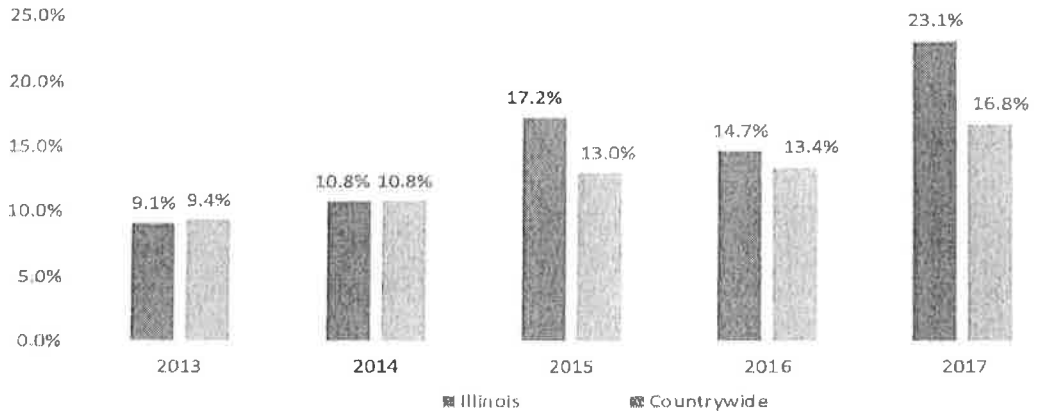
(with Positive Direct Premium Written)

State	Direct Written Premium	Market Share
California	12,770,456,379	21.9%
New York	5,948,934,295	10.2%
Florida	3,187,123,284	5.5%
Pennsylvania	2,616,075,950	4.5%
Illinois	2,570,754,191	4.4%
New Jersey	2,446,334,688	4.2%
Texas	2,345,047,632	4.0%
Wisconsin	1,967,550,602	3.4%
Georgia	1,604,189,255	2.8%
North Carolina	1,448,633,899	2.5%
Countrywide Total	***58,246,653,153***	

Source: NAIC

Profitability

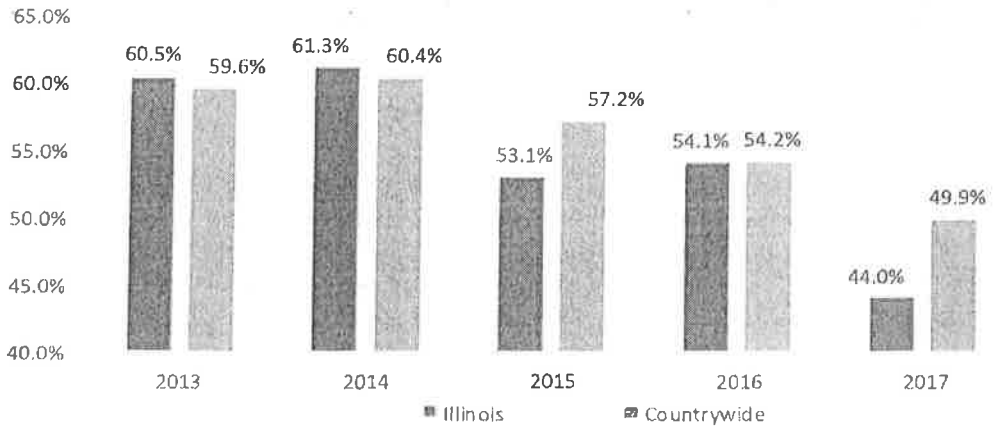
According to the NAIC, the workers' compensation market profits increased nationally by 3.4 percentage points and profits within Illinois increased by 8.4 percentage points from 2016 to 2017. Illinois ranked 17th countrywide based on profitability of workers' compensation insurers.



Source: NAIC Report on Profitability by Line by State in 2017

Loss Ratio

Generally, NAIC data indicates the loss ratio for the workers' compensation market in Illinois and countrywide is trending downward. The loss ratio in Illinois has been below the national loss ratio for the past three years. Illinois ranked 38th countrywide based on loss ratio of workers' compensation insurers. The loss ratios in the below chart reflect incurred losses divided by direct earned premiums, consistent with the loss ratios published in the NAIC Report on Profitability by Line by State. These values cannot be compared with values published in prior years' Oversight Reports, as prior reports excluded those companies without positive direct written premium from this calculation.

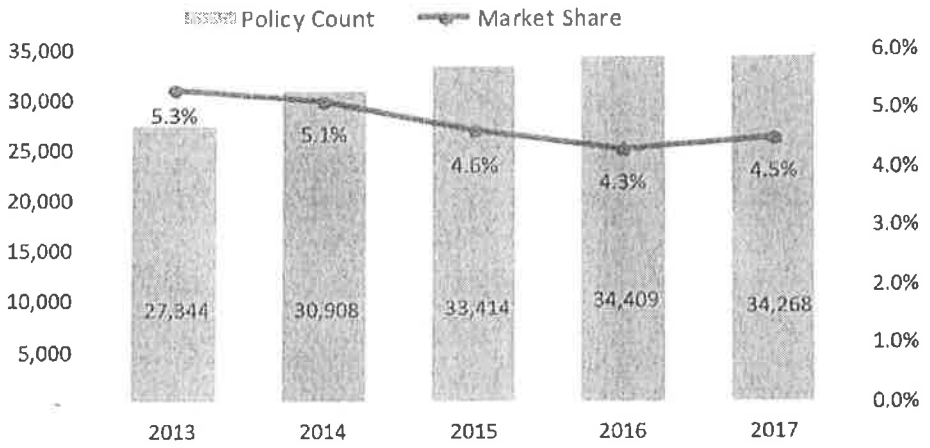


Source: NAIC Report on Profitability by Line by State in 2017

Assigned Risk Market in Illinois

Employers that cannot obtain insurance through the voluntary insurance market may obtain coverage through the assigned risk market. According to NCCI, the total number of assigned risk plan policies effective in 2017 was 34,268. The preliminary assigned risk market share, defined as the percentage of assigned risk premium to total direct written premium, was 4.5 percent in calendar year 2017.

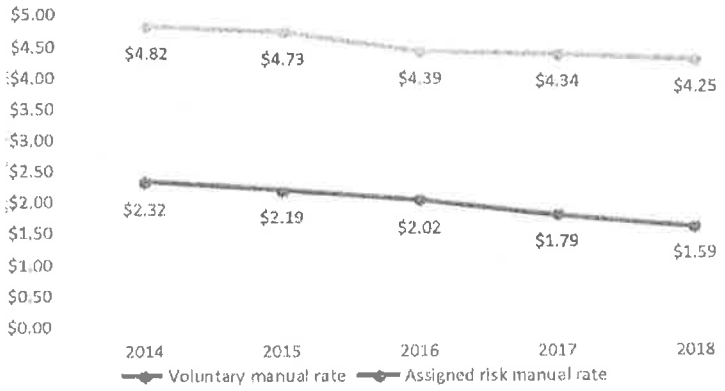
The assigned risk policy count decreased slightly in 2017 while the market share increased for the first time since 2013.



Source: Data provided by NCCI

Premium Rate for Workers' Compensation

The estimated average manual rate for policies effective in 2018 was $1.59 for the voluntary market and $4.25 for the assigned risk market. Both have been decreasing since 2013. These estimates are calculated using a weighted average of NCCI advisory rates effective January 1, 2018, based on Illinois payroll. The latest available payroll weighting was based on policies effective between April 1, 2014 and March 31, 2015.



Source: Data provided by NCCI

Attorney Representation

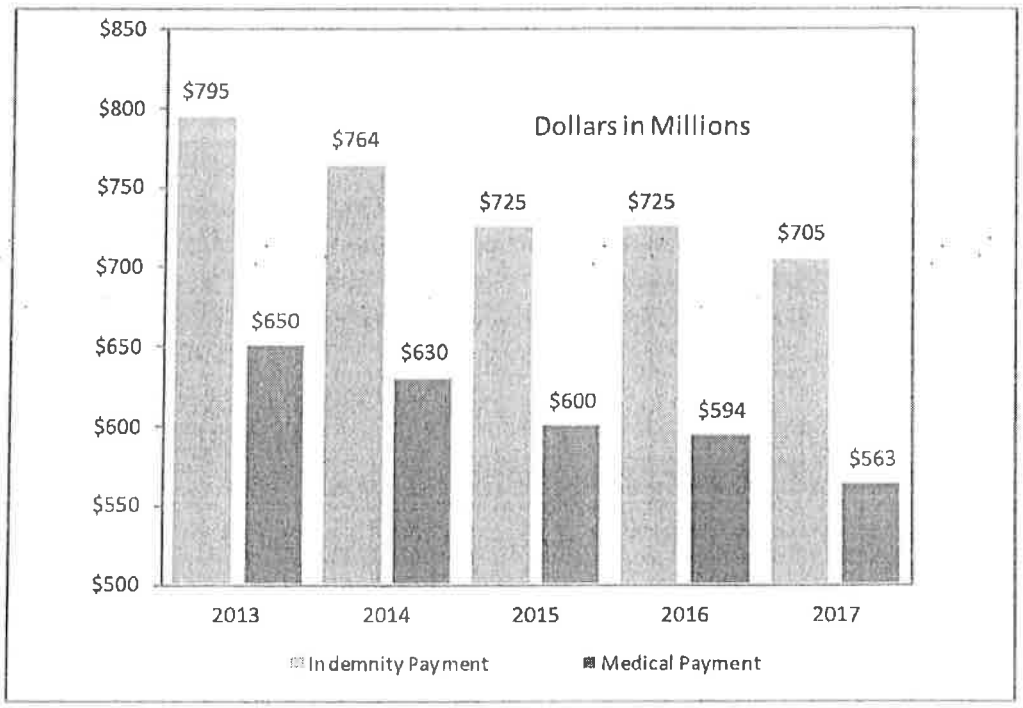
The percentage of injured workers filing claims at the Workers' Compensation Commission that are represented by an attorney and the total amount paid by injured workers for attorney representation is unavailable. This data cannot be collected, accurately calculated and analyzed for the overall market for the 2017 calendar year.

Indemnity & Medical Payments

The total amount of indemnity payments made by workers' compensation insurers affiliated with NCCI was approximately $705 million and the amount of medical payments made was approximately $563 million. The Illinois national rank based on average cost of medical claims per injured worker is unavailable.

The following graph is based on the NCCI Financial Call data as reported by carriers reporting to NCCI on policies effective in 2017 and prior, for transactions occurring through December 31, 2017.

The information excludes data for large deductible policies; self-insured companies; underground coal mine and federal classes; excess policies; maritime and FELA classes for policies effective January 1, 2003, and subsequent; National Defense Projects Rating Plan; and Reinsurance assumed from another carrier.



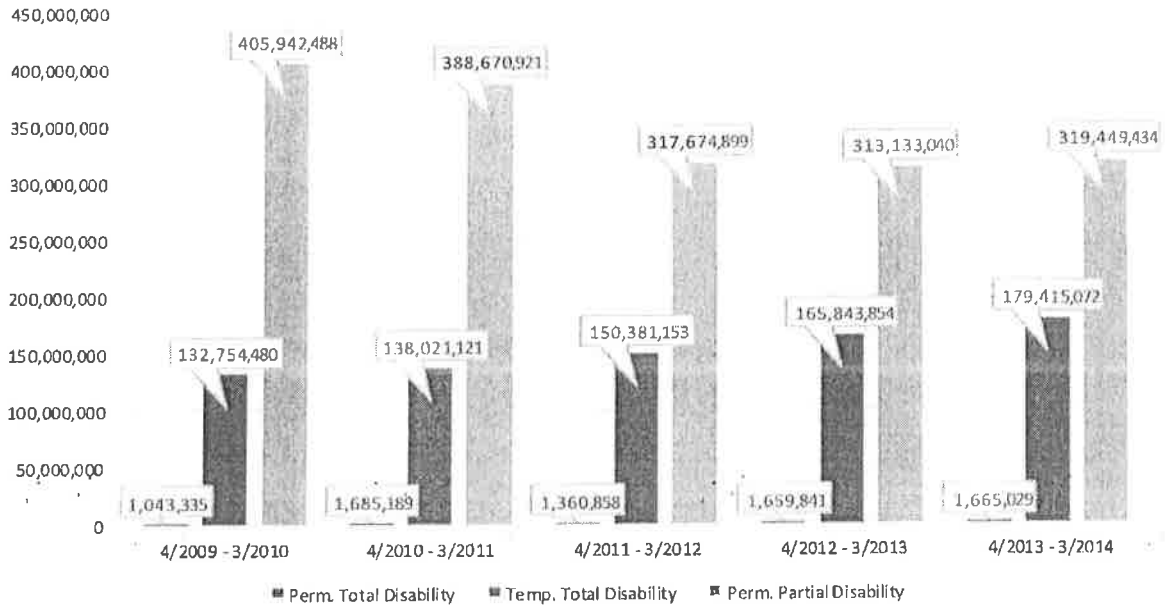
Source: Data provided by NCCI

Indemnity Payments by Type of Disability

The chart and graph below illustrate the amount of indemnity payments by type of disability. Payments are reported on a policy-year basis as of a 30-month maturity. For example, a total of $500,529,535 was paid in indemnity benefits for all policies issued between April 1, 2013 and March 31, 2014, as of September 30, 2016.

	4/2009—3/2010	4/2010 - 3/2011	4/2011 - 3/2012	4/2012-3/2013	4/2013-3/2014
Perm. Total Disability	1,043,335	1,685,189	1,360,858	1,659,841	1,665,029
Temp. Total Disability	132,754,480	138,021,121	150,381,153	165,843,854	179,415,072
Perm. Partial Disability	405,942,488	388,670,921	317,674,899	313,133,040	319,449,434
Totals:	539,740,303	528,377,231	469,416,910	480,636,735	500,529,535

Source: Data provided by NCCI



Source: Data provided by NCCI

Wage Loss Differential

The number of injured workers receiving wage loss differential awards and the average wage loss differential award payout are unavailable. Additionally, Illinois' rank nationally for maximum and minimum temporary total disability benefit level, maximum and minimum scheduled and non-scheduled permanent partial disability benefit level, maximum and minimum total disability benefit level, and the maximum and minimum death benefit level are unavailable.

Medical Benefit Payout by Hospital and Non-Hospital Providers

The following distribution is based on Service Year (SY) 2012 to 2016 data from the NCCI Medical Data Call:

Distribution of Medical Payments in Illinois					
Type of Service	SY 2012	SY 2013	SY 2014	SY 2015	SY 2016
Physician	46%	46%	47%	45%	47%
Hospital	31%	30%	29%	29%	28%
DME, Supplies, and Implants	7%	7%	7%	8%	7%
Ambulatory Surgical Centers	7%	8%	7%	8%	8%
Drugs	7%	7%	8%	8%	8%
Other	2%	2%	2%	2%	2%

Source: Chart provided by NCCI

Aggregate Growth of Medical Utilization - Hospital and Non-Hospital

Hospital payments are those resulting from Hospital Outpatient, Hospital Inpatient, or Ambulatory Surgical Center Procedures. Non-Hospital payments are those resulting from procedures that are performed by a medical provider other than a hospital.

The charts on the following page are based on an analysis performed by NCCI on data received from the NCCI Medical Data Call for Illinois using claims with accident dates from January 1, 2016 through December 31, 2016, with the same service dates. NCCI aggregates the payments associated with each International Classification of Diseases (ICD) diagnosis codes for each claim. Any individual claim may contain multiple bills from various medical providers. Each of the medical providers may report up to two ICD diagnosis codes for each bill. The ICD code with the highest payments is then selected as the primary diagnosis code.

Top Diagnosis Codes By Amount Paid - Illinois Hospital Accident Year 2016

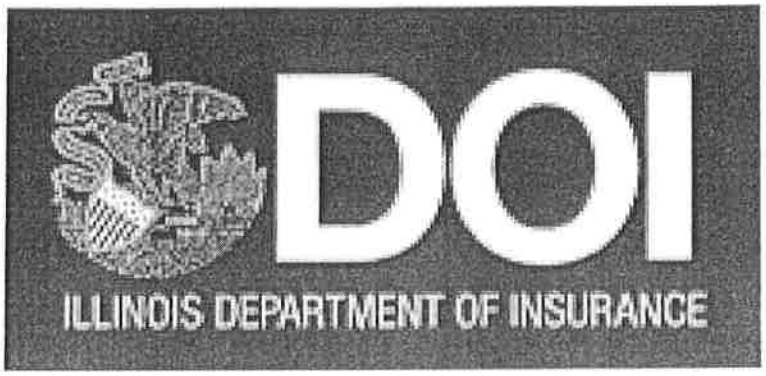
Rank	Primary Diagnosis Code	Share of Hospital Payments	Average Paid Per Claim	Diagnosis Code Description
1	M54.5	1.9%	$2,035	Low back pain
2	K40.90	1.7%	$7,802	Unilateral inguinal hernia, without obstruction or gangrene, not specified as recurrent
3	I10	1.3%	$4,840	Essential (primary) hypertension
4	M25.511	1.2%	$3,104	Pain in right shoulder
5	S27.1XXA	1.0%	$710,221	Traumatic hemothorax, initial encounter
6	M25.512	0.9%	$2,774	Pain in left shoulder
7	M75.121	0.9%	$11,429	Complete rotator cuff tear or rupture of right shoulder, not specified as traumatic
8	M54.2	0.8%	$2,503	Cervicalgia
9	S09.90XA	0.8%	$2,032	Unspecified injury of head, initial encounter
10	T14.90	0.8%	$3,285	Injury, unspecified

Source: Chart provided by NCCI

Top Diagnosis Codes By Amount Paid - Illinois Non-Hospital Accident Year 2016

Rank	Primary Diagnosis Code	Share of Hospital Payments	Average Paid Per Claim	Diagnosis Code Description
1	M54.5	4.2%	$2,445	Lower back pain
2	S25.511	2.7%	$4,407	Pain in right shoulder
3	S25.512	1.9%	$3,674	Pain in left shoulder
4	S25.561	1.7%	$3,340	Pain in right knee
5	M25.562	1.5%	$3,408	Pain in left knee
6	M54.2	1.5%	$2,888	Cervicalgia
7	T14.90	1.2%	$2,111	Injury, unspecified
8	M75.121	1.2%	$15,848	Complete rotator cuff tear or rupture of right shoulder, not specified as traumatic
9	M54.16	1.1%	$5,220	Radiculopathy, lumbar region
10	M75.41	10.%	$10,737	Impingement syndrome of right shoulder

Source: Chart provided by NCCI



http://insurance.illinois.gov/

Springfield Office
Illinois Department of Insurance
320 W. Washington Street
Springfield, IL 62767

866-445-5364 Toll Free Consumer Line
217-782-4515 Phone
217-782-5020 Fax
866-323-5321 TDD

Chicago Office
Illinois Department of Insurance
122 S. Michigan Ave., 19th Floor
Chicago, IL 60603

312-814-2420 Phone
312-814-5416 Fax

Composite of Illinois Workers' Compensation Claims

2018

The Department collects claim specific data from workers' compensation insurers in Illinois on an aggregate basis as outlined in Section 29.2(b) of the Illinois Workers' Compensation Act. The experience period for this summary was January 1, 2017 through December 31, 2017.

- A total of 124,598 workers' compensation claims were opened during 2017. Companies were notified that the employee had attorney representation in 18.5 percent of these opened claims.
- Of the opened claims, a total of 82,782 (66.4 percent of total claims) were medical-only claims. Medical-only claims are defined as any request for recovery that was limited to medical expenses only.
- Of the opened claims, a total of 12,005 (9.6 percent of total claims) were contested claims. Contested claims are defined as any claim in which resolution was delayed due to a dispute regarding policy language or in which litigation was involved.
- There were 32,761 claims that included lost work by the insured claimant. Companies report 32 percent of these claims were not paid within 14 days from the first full day off, regardless of reason. Below is a breakdown of the claims with lost time:
  - 9,913 (30.3 percent) involved a loss of less than 3 working days,
  - 5,504 (16.8 percent) involved a loss of between 3 and 14 working days, and
  - 17,344 (52.9 percent) involved a loss of greater than 14 working days.
- An average of 12.8 hours per claim was spent adjusting workers' compensation claims.
- A total of 287 companies reported paying medical bills 60 days or later from the date of service with an average of 334 days paid on those medical bills paid after 60 days.
- The average cost per claim for claims in which in-house defense counsel participated was $1,660, and the average cost per claim for claims in which outside defense counsel participated was $2,966.
- The amount billed to employers totaled:
  - $27,156,932 for bill review,
  - $33,528,418 for fee schedule savings, and
  - $33,661,585 for any and all managed care fees.
- A total of $4,818,853 was spent on 5,788 claims involving in-house medical nurse case management which is an average of $833 per claim. A total of $34,957,922 was spent on 14,663 claims involving outside medical nurse case management which is an average of $2,384 per claim.
- The amount paid for all Independent Medical exams totaled $33,088,003.
- A total of 55 companies spent $2,710,458 on in-house Utilization Review compared to 184 companies that paid $9,031,508 for outside Utilization Review.