

# Evidence and Work Comp: A Primer

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# Illinois Rules of Evidence

- Section 7030.70 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission
- a) The Illinois common law rules of evidence and the Illinois Evidence Act [820 ILCS 305] shall apply in all proceedings had before the Industrial Commission, either upon arbitration or review, except to the extent they conflict with the Workers' Compensation Act, the Workers' Occupational Diseases Act [820 ILCS 310], or the Rules Governing Practice Before the Industrial Commission.
- b) b) Exhibits offered in evidence, whether admitted or rejected, shall be retained by the assigned Arbitrator or Commissioner until a decision is issued in the matter. Exhibits may not be removed by the parties. Once a final decision is rendered exhibits shall be retained by the Industrial Commission pursuant to the requirements of Section 17 of the Workers' Compensation Act [820 ILCS 305/17].

# Abuse of Discretion standard applies

Failure to object **before arbitrator** waives any challenge to evidence on appeal. See Docksteiner v. Industrial Comm'n, 346 Ill. App. 3d 851, 855, 806 N.E.2d 230, 282 Ill. Dec. 255 (2004)

- Evidentiary rulings made during a workers' compensation proceeding will not be disturbed on review absent an abuse of discretion. National Wrecking Company v. Industrial Commission, 352 Ill. App 3rd 561, 566 (1st D. 2004).
- An abuse of discretion occurs when the Commission's ruling is arbitrary, fanciful or unreasonable where no reasonable person would take the view adopted by the Commission. Oliver v. Illinois Workers' Compensation Commission, 46 N.E. 3rd 914 (1st D. 2015).

# What do you need to prove your case and how do you enter it into evidence?

- Wage records
- Accident reports and witness statements
- Surveillance Video
- Expert Witness (IME, UR, Narrative, etc.)
- Social Media
- Medical Records
- Medical Bills
- Prior Bad Acts
- Immigration Status
- Intoxication

# Basic concerns

## Is it relevant?

- Illinois Rules of Evidence 401-403
- "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## Can you authenticate it?

- Illinois Rules of Evidence 901
- Is the evidence sufficient to support a finding that the matter in question is what its proponent claims?
- Best: Testimony of a witness that a matter is what it is claimed to be.
- Other: Comparison with other authenticated evidence, distinctive characteristics, public records, official publications, certified records, etc.

# Hearsay Exceptions for Records

## Business Records

- **Ill. R. Evid. 803 (6) Records of Regularly Conducted Activity.** Except for medical records in criminal cases, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, **made at or near the time** by, or from information transmitted by, a person with knowledge, if **kept in the course of a regularly conducted business activity**, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), unless the opposing party shows that the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- Pursuant to [Rule 805](#) of the Illinois Rules of Evidence, when a business record contains hearsay statements within the record, the hearsay statements within the record must also be admissible under an exception to the hearsay rule.
- A statement by an employee is admissible against the employer as a party admission if it is made during the existence of the employment relationship and concerns matters within the scope of the employment.
- Statements made by a party's agent about a matter within the scope of his or her agency and made by virtue of the agent's authority are party-opponent admissions.
- The person laying the foundation for a business record need not be the preparer of that record so long as such person is familiar with the entity's business methods and procedures in relation to record keeping practices.

## Public Records and Reports

- **(8) Public Records and Reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and in criminal cases medical records and matters observed by police officers and other law enforcement personnel, or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions, unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.
- **(17) Market Reports, Commercial Publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

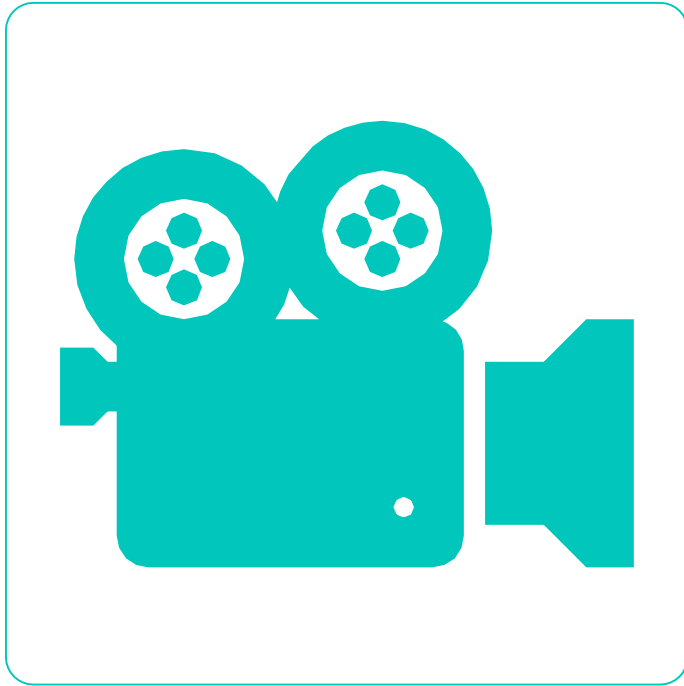


# Video

There's no discovery in WC. Except, can you file a 19(b-1)?

"No document or other evidence not previously identified by either party with the petition or written response, or by any other means before the hearing, may be introduced into evidence without good cause."

- A foundation must be laid, by someone having personal knowledge of the filmed object, that the film is an accurate portrayal of what it purports to show.
  - The testimony of the cameraman is not necessary for the admission of the videotape into evidence.
  - A videotape can be admitted if it is identified by a witness as a portrayal of certain facts relevant to a particular issue and is verified by that witness with personal knowledge as a correct representation of these facts.
  - So if not the cameraman, someone else who was present.
- The danger of unfair prejudice can outweigh the probative value if the videotape was edited. See Carroll v. Preston Trucking Co., 349 Ill. App. 3d 562 (1<sup>st</sup> Dist., 2004).
- Is the investigator's report a business record?



1. evidence establishing the time and date of the photographic evidence;
2. any evidence of editing or tampering;
3. the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product;
4. the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and
5. testimony identifying the relevant participants depicted in the photographic evidence.

## Video of the Accident Itself



# Photographs

- Witness is familiar with the scene portrayed in the photograph;
- Photograph fairly and accurately shows the scene as it appeared on the relevant date;
- The probative value is not outweighed by prejudicial effect;
- The photograph will assist the trier-of-fact in understanding the testimony.

Photographs are admissible if they have a reasonable tendency to prove or disprove a fact at issue but may be excluded when irrelevant or immaterial or if their prejudicial nature outweighs their probative value. As demonstrative evidence, photographs should not be admitted if they are inaccurate or would mislead or confuse the trier of fact. Before a photograph may be admitted, a proper foundation must be offered establishing: (1) the photo is a true and accurate representation of what it purports to portray; and (2) the subject of the photo was in substantially the same condition it was in at the time of the accident. **Piechowicz v. Ill. Workers' Comp. Comm'n, 2018 IL App (1st) 171084WC-U (also includes a good discussion of phone records)**

# Social Media

- Anyone can establish a fictitious profile under any name, a mere printout of a post or message is insufficient to establish that it emanated from a particular person's account.
- The mere fact that the account was password protected does not, in and of itself, establish authenticity. (i.e., spouse had the password)
- If Petitioner won't admit to making the post, how do you get it in?
  - Distinctive characteristics and the like, aka, circumstantial evidence.
  - Metadata shows the date, time and identity of the creator of an electronic record as well as all changes made to it.
- In re Marriage of Miller, 2015 IL App (2d) 140530



# Expert Opinions



The opinions of a party's IME are hearsay and are therefore inadmissible unless some exception to the hearsay rule applies. *Greaney*, 358 Ill. App. 3d at 1011. A party's IME is not per se an agent of the party who hired him or her, and, therefore, the expert's opinions are not admissible as admissions against that party's interest. *Greaney*, 358 Ill. App. 3d at 1011.



The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. *Wilson v. Clark*, 84 Ill. 2d 186 (1981).



Expert opinions must be supported by facts and are only as valid as the facts underlying them. Further, the proponent of expert testimony must lay a foundation sufficient to establish the reliability of the basis for the expert's opinion. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable.



Documents prepared in anticipation of litigation are not admissible as business records because they "do not possess the same trustworthiness of other records prepared in the ordinary course of business." *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 819 (2006). For the same reason, Illinois Rule of Evidence 803(4)(A), does not include "statements made to a health care provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial." Ill. R. Evid. § 803(4)(A) (eff. Jan. 1, 2011).

# Medical Records under Section 16

- Pursuant to section 16, the records and reports of a claimant's treating physician, which are certified as true and correct, are admissible "as evidence of the medical and surgical matters" contained within the records or reports.
- There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct.
- Section 16 does not apply to reports prepared by a treating medical provider for use in litigation.
- "Simple inclusion of medical opinions within a treating physician's records is sufficient to exclude it from admission pursuant to section 16." RG Constr. Servs. v. Ill. Workers' Comp. Comm'n, 2014 IL App (1<sup>st</sup>) 132137WC

# Ghere and its progeny

Ghere: The treating physician's causation opinion would have gone beyond the contents of his medical records because there was no mention of causation in the records or that the physician ever treated the employee for the heart condition at issue.



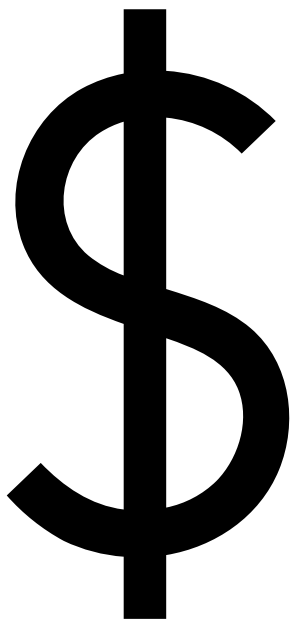
Homebrite: The employer was put on notice that the treating physician may testify as to causal connection because he treated the condition at issue. There is no bright-line rule or presumption that undisclosed opinion testimony constitutes surprise.



Kishwaukee: Employer was on notice because claimant's attorney provided a letter indicating he intended to inquire into causal connection.



Mulligan: A records review falls within the 48-hour rule of Section 12. Once an Arbitration hearing starts, prior undisclosed IME and/or testimony cannot be submitted.



- "To introduce an unpaid bill into evidence, a party must establish that the bill is reasonable for the services of the nature provided."
- "A party seeking admission of an unpaid bill into evidence 'can establish reasonableness by introducing testimony of a person having knowledge of the services rendered and the usual and customary charges for such services.'"
- *Messerly v. Ill. Workers' Comp. Comm'n*, 2012 IL App (4<sup>th</sup>) 110454WC-U (by failing to object, the employer relieved the claimant of his burden to prove the reasonableness of the billing statements for foundation purposes.)
- When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been paid, the bill is prima facie reasonable. *Baker v. Hutson*, 33 Ill. App. 3d 486 (2002)

**What about the medical bills?**



# Evidence of Immigration Status

- **Admissibility of Evidence of Immigration Status, 735 ILCS 5/8-2901**
- **Evidence relating to a person's immigration status is not admissible in any civil proceeding**
- **Immigration status is admissible if:**
  - 1. It is essential to prove an element of the claim or an affirmative defense;**
  - 2. It is offered to prove an interest or bias of a witness; or**
  - 3. The person or his/her attorney voluntarily reveals the immigration status.**
- **A person may not, with the intent to deter any person or witness from testifying at trial in any court or administrative hearing, threaten to disclose or actually disclose a person's immigration status to any entity or any immigration agency.**

# Evidence of Prior Bad Acts

- Under Illinois Rules of Evidence No. 608(a), “The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” The inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally.
- Illinois has not adopted Rule No. 608(b), regarding specific instances of conduct of a witness for the purpose of attacking or supporting the witness’ character for truthfulness. Illinois requires that a question concerning a collateral matter be asked before an inquiry concerning a witness’ prior wrongdoings.
- Inquiry with regard to specific acts of misconduct is barred on the grounds that such examination is overly prejudicial in relation to its probative value. It is improper to attempt to impeach or collaterally attack the character of a witness.
- Is the extrinsic evidence admissible if offered for some purpose other than mere contradiction? Would it affect the outcome of the case?

# Intoxication

820 ILCS 305/11 and Section 9140.30 of the Rules provides a high burden for admissibility.

- Chain of Custody Form
- Collection Procedure
- Verification of Test Results
- Split Testing
- Preservation of Specimens & Records

# What to do if your evidence gets rejected?

Make an offer of proof.

In re Marriage of Miller, 2015 IL App (2d) 140530

This provides the appellate court with a record it can use to determine whether the exclusion of evidence was proper.

Ask permission to make representations regarding the proffered evidence.

- (1) what the offered evidence is or what the expected testimony will be
- (2) by whom it will be presented, and
- (3) its purpose