WCLA MCLE 3-28-19

- Legislative Update
- March 28, 2019
- 12:00 noon to 1 pm
- James R. Thompson Center Auditorium, Chicago, IL
- 1 hour general MCLE credit

In Re Elena Hernandez, No. 18-1789 (3-18-19) US Court of Appeals, 7th Circuit

- Bankruptcy Judge denies exemption for WC medical bills, District Court affirms denial of exemption
- Without guidance from the Illinois Supreme Court, we decline to hold, as the district court did, that section 21 no longer blocks this class of creditors. That's one reasonable interpretation of the amended Act, but it's also possible that the General Assembly's silence on the matter means the workers' compensation exemption remains intact.
- In her appellate brief, Hernandez moves to certify this question to the Illinois Supreme Court.The healthcare providers join her motion. We may certify a question if "the rules of the highest court of a state provide for certification to that court." 7TH CIR. R. 52(a). The Illinois Supreme Court permits certification provided the question is one of state law, "determinative of the said cause," and unanswered by "controlling precedents." ILL. S. CT. R. 20(a).
- There is an added layer of uncertainty here because the Illinois Supreme Court hasn't answered a key preliminary question: whether section 21 creates an exemption in the first place. To be sure, a federal bankruptcy court has construed section 21 to do so, see In re McClure, 175 B.R. at 24, and other bankruptcy courts have followed suit. But that's not dispositive.
- After the 2005 amendments does section 21 of the Illinois Workers' Compensation Act exempt the proceeds of a workers' compensation settlement from the claims of medical-care providers who treated the illness or injury associated with that settlement?

Section 6(c) Workers' Occupational Diseases Act 820 ILCS 310/6

- In any case, other than injury or death caused by exposure to radiological materials or equipment or asbestos, unless application for compensation is filed with the Commission ***within 3 years after the date of the disablement***, where no compensation has been paid, or within 2 years after the date of the last payment of compensation, where any has been paid, whichever shall be later, the right to file such application shall be barred. If the occupational disease results in death, application for compensation for death may be filed with the Commission ***within 3 years after the date of death where no compensation has been paid***, or within 3 years after the last payment of compensation, where any has been paid, whichever is later, but not thereafter.
- In cases of disability caused by exposure to radiological materials or equipment or ***asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed***, the right to file such application shall be barred.
- In cases of ***death occurring within 25 years from the last exposure*** to radiological material or equipment or ***asbestos***, application for compensation must be filed ***within 3 years of death*** where no compensation has been paid, or within 3 years, after the date of the last payment where any has been paid, but not thereafter.

Statute of Limitations for Civil Action

- In Illinois, the statute of limitations is set as two years from the date the cause of action accrued. 735 ILCS 5/13-202 (2010). Illinois follows the ***"discovery rule" in asbestos cases, so the cause of action does not accrue until the plaintiff knew or should have known that he or she had an asbestos-related disease and knew or should have known that the disease was caused by exposure to asbestos or asbestos-containing products***. Nolan v. Johns-Manville Asbestos (1981) 85 Ill. 2d 161, 171. Even if the individual diagnosed with the asbestos-related disease passes away due to that asbestos-related disease, the statute of limitations is still two years from when the plaintiff knew or should have known that he or she had an asbestos-related disease and knew or should have known that the disease was caused by exposure to asbestos or asbestos-containing products. Lambert v. Summit (1982) 104 Ill. App. 3d 1034. In other words, if the statute of limitations has expired for the individual exposed to asbestos or asbestos-containing products and diagnosed with an asbestos-related disease, then even when that person passes away, the heirs cannot maintain a wrongful death lawsuit.

Folta v. Ferro Engineering
2015 IL 118070

- This court has held that despite limitations on the amount and type of recovery under the Act, the Act is the employee's exclusive remedy for workplace injuries.
- Section 6(c) of the Workers' Occupational Diseases Act does bar Folta's right to file an application for compensation. That section provides that,"[i]n cases of disability caused by exposure to asbestos, unless application for compensation is filed with the Commission within 25 years after the employee was so exposed, the right to file such application shall be barred."
- Based on the plain language of this section, this provision acts as a statute of repose, and creates an absolute bar on the right to bring a claim.
- Fact that through no fault of the employee's own, the right to seek recovery under the acts was extinguished before the claim accrued because of the statute of repose does not mean that the acts have no application or that Folta was then free to bring a wrongful death action in circuit court

SB1596

- 2/15/2019 Senate Filed with Secretary by Sen. Elgie R. Sims, Jr.
- 3/5/2019 Senate Do Pass Judiciary; 008-002-000
- 3/5/2019 Senate Second Reading
- 3/6/2019 Senate Third Reading - Passed; 041-016-001
- 3/6/2019 House Arrived in House, House Chief House Sponsor Rep. Jay Hoffman, First Reading
- 3/13/2019 House Recommends Do Pass Subcommittee/ Judiciary - Civil Committee; 005-002-000
- 3/13/2019 House Do Pass / Short Debate Judiciary - Civil Committee; 008-004-001
- 3/13/2019 House Second Reading - Short Debate
- 3/14/2019 House Third Reading - Short Debate - Passed 070-040-001
- 3/14/2019 Senate Passed Both Houses
- 3/20/2019 Senate Sent to the Governor

SB 1596 Enrolled

- (820 ILCS 305/1.2 new)
- Sec. 1.2. Permitted civil actions. Subsection (a) of Section 5 and Section 11 do not apply to any injury or death sustained by an employee as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision. As to any such injury or death, the employee, the employee's heirs, and any person having standing under the law to bring a civil action at law, including an action for wrongful death and an action pursuant to Section 27-6 of the Probate Act of 1975, has the nonwaivable right to bring such an action against any employer or employers.
- (820 ILCS 305/5)
- Sec. 5. Damages; minors; third-party liability. (a) Except as provided in Section 1.2, no ~~No~~ common law or statutory right to recover damages from the employer, ….other than the compensation herein provided is available to any employee who is covered by the provisions of this Act….
- (820 ILCS 305/11)
- Sec. 11. Measure of responsibility. Except as provided in Section 1.2, the ~~The~~ compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer

SB 1596 Enrolled

- (820 ILCS 310/1.1 new)
- Sec. 1.1. Permitted civil actions. Subsection (a) of Section 5 and Section 11 do not apply to any injury or death sustained by an employee as to which the recovery of compensation benefits under this Act would be precluded due to the operation of any period of repose or repose provision. As to any such injury or death, the employee, the employee's heirs, and any person having standing under the law to bring a civil action at law, including an action for wrongful death and an action pursuant to Section 27-6 of the Probate Act of 1975, has the nonwaivable right to bring such an action against any employer or employers.
- (820 ILCS 310/5) (from Ch. 48, par. 172.40) (Text of Section WITHOUT the changes made by P.A. 89-7, which has been held unconstitutional)
- Sec. 5. Liability inclusive; third-party liability. (a) Except as provided in Section 1.1, there ~~There~~ is no common law or statutory right to recover compensation or damages from the employer…….
- (820 ILCS 310/11)
- Sec. 11. Measure of liability. Except as provided in Section 1.1, the ~~The~~ compensation herein provided for shall be the full, complete and only measure of the liability of the employer…
- Section 99. Effective date. This Act takes effect upon becoming law.

Aside from SB1596
Unconstitutional Part of Section 5

- 820 ILCS 305/5 (P.A. 89-7). Workers' Compensation Act. Changes made to this Section by P.A. 89-7 were held unconstitutional by Best v. Taylor Machine Works, 179 Ill.2d 367 (1997), due to inseverability of the unconstitutional provisions of that Act.
- *Limitation on contribution recoveries from employers*. In a contribution action by a tortfeasor against an employer, the employer's liability would be limited to its Workers' Compensation obligation, but the tortfeasor would receive a credit for the full amount of the employer's degree of fault.

HB0269 (Hoffman-D)

- Amends the Workers' Compensation Act. Permits a single commissioner to approve of enforcement actions under provisions of the Act concerning insuring an employer's ability to pay compensation, replacing the current requirement of a panel of 3 commissioners. Permits the Illinois Workers' Compensation Commission to, if an employer's business is declared to be extra hazardous, issue a work-stop order while awaiting a ruling from the Commission or while awaiting proof of insurance by the employer. Provides that investigative actions must be acted upon within 90 days of the issuance of a complaint. Raises the maximum allowable penalty for noncompliance with certain insurance requirements from $2,000 to $10,000. Doubles the maximum allowable penalties, to $1,000 per day, with a minimum penalty of $20,000, for employers found to be in noncompliance more than once. Provides that an employer with 2 or more violations may no longer self-insure or purchase an insurance policy from a private broker for one year or until all penalties are paid, during which time the employer must purchase insurance from the Assigned Risk Pool through the National Council on Compensation Insurance.
- 1/29/2019 Assigned to Labor & Commerce Committee

SB1539 (Barickman-R)

- Amends the Workers' Compensation Act. Provides that an employee who is required to travel in connection with his or her employment and who suffers an injury while in travel status is eligible for benefits only if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment. Adds definitions of "accident" and "injury". Provides that an injury is a condition that arises out of and in the course of employment, and adds provisions concerning establishment of an injury. Establishes the manner of computing compensation for partial disability, with a maximum cumulative compensation of 500 weeks. Provides that injuries to the shoulder and hip are deemed to be injuries to the arm and leg respectively. Provides for the computation of compensation when there are multiple employers and when there is less than full-time work. Provides that no employer shall be required to pay temporary partial disability benefits to an employee who has been discharged for cause. Provides that, following a hearing, the Illinois Workers' Compensation Commission may reinstate the temporary partial benefits and retroactively restore any benefits the employer should have paid if it finds the employer's discharge of the employee was not for cause. Effective immediately.
- 3/5/2019 To Subcommittee on Tort Reform

HB2634 (Skillicorn-R)

- Amends the Workers' Compensation Act. Limits attorney's fees to 15%, rather than 20%, of the sum that would be due under the Act for 364 weeks of permanent total disability based upon the employee's average weekly wage. Effective immediately.
- 3/6/2019 To Business and Industry Regulations Subcommittee

HB 3714 (McSweeney-R)

- Amends the Medical Patient Rights Act. Provides that an attorney may not be present during an independent medical examination unless consent has been obtained from both the patient on whom the examination is being performed and the health care professional performing the examination. Provides that all parties to the legal action for which the independent medical examination is being performed must have an attorney present if any other party's attorney is present. Provides that an attorney present during an independent medical examination may not communicate with the patient or health care professional performing the independent medical examination during the examination.
- 2/19/2019 Referred to Rules Committee

HB 3714 (McSweeney-R)

- Section 5. The Medical Patient Rights Act is amended by adding Section 8 as follows:
- (410 ILCS 50/8 new)
- Sec. 8. Independent medical examination; attorney presence.
- (a) For purposes of this Section: "Patient" means an individual who is having an independent medical examination performed upon him or her.
- (b) An attorney who represents any party in an adversarial legal action may not be present during an independent medical examination conducted for that legal action unless consent has been obtained from:
  - (1) the patient; and (2) the health care professional performing the independent medical examination.
- (c) If an attorney having met the consent requirements of subsection (b) is present for an independent medical examination taking place for a legal action, all other parties who are represented by an attorney in that legal action must also have an attorney present who has met the consent requirements of subsection (b). If any attorney is unable to meet the consent requirements of subsection (b), then no attorney representing any party in the legal action shall be present during the independent medical examination.
- (d) An attorney present during an independent medical examination may not communicate with the patient or health care professional performing the independent medical examination during the examination.

Other Bills of Interest

- SB1422 Repetitive trauma contribution by former employer
- SB2066 Religious beliefs exception
- HB2586 8(d)2 credit for “same part of the spine” (Cervical/thoracic vs. lumbar/sacral)
- HB2792 Medicare based fee schedule (up to 300%)
- HB2793 Traveling employee (definitions & limitations)
- HB2794 Compound drugs (7-day supply & cost limitation/dispensing fee)
- HB2795 Drug Formulary (evidence-based)
- HB2796 Shoulder/hip (arm/leg)
- HB2797 Causation (Legal/medical)
- HB2798 Repeals 7.5% increase (e.g. Arm back to 235 wks.)
- HB2799 Arm conversion for shoulder injury credit

HB2797 Causation

- 1… Accidental injuries shall be considered to be "arising out of and in the course of employment" only if the accident significantly caused or contributed to both the resulting condition and disability.
- Accidental injuries shall not be considered to be "arising out of and in the course of employment" if: (i) the accident resulted from a hazard or risk that was not incidental to the employment or the accident resulted from a hazard or risk to which the general public is also exposed; (ii) the accident did not occur at a time and place and under circumstances reasonably required by the employment; or (iii) the medical condition or disability for which compensation is being sought resulted from a personal risk.
- 2. An injury due to repetitive or cumulative trauma is compensable only if the repetitive or cumulative trauma significantly caused or contributed to both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable. If the duration of the repetitive or cumulative trauma which is found to be the cause of the injury is for a period of fewer than 3 months and the evidence demonstrates that the exposure to the repetitive or cumulative trauma with the immediate prior employer significantly caused or contributed to both the resulting medical condition and the disability, the prior employer shall be liable for the injury.
- 3. An injury, its occupational cause, and any resulting manifestations of disability must be established to a reasonable degree of medical certainty, based on objective relevant medical evidence.