WCLA NEWS

PRESIDENT'S MESSAGE

Spring 2016

Dear WCLA Members,

I want to thank everyone who attended the Installation Dinner on January 16, 2016 at the Fairmont Hotel. We were honored to have State Senator, Tom Cullerton swear in the new officers and Board of Directors of the WCLA.

I would also like to thank outgoing Board members, Jack Gilhooly, Guy Maras, and Past President, Andrew Rane, for their hard work, and dedication to making the WCLA, the best Bar Association in the State of Illinois.

This year, we have a lot of work to do in making the WCLA an even better Illinois State Bar Association. So far this year, we have had three WCLA seminars for a total of five CLE credit hours that have been approved by the MCLE Board. We had two case law update seminars on January 26th and February 24, 2016. We had a three-hour ethics seminar on February 12, 2016. We have plans for at least two medical seminars representing six hours of CLE credit hours. We have plans for at least 10 more legal seminars, and one Appellate Court luncheon. This will bring a total of 22 free CLE credit hours for 2016. We have plans to add additional legal seminars downstate Illinois, as well as additional credit hours for future medical seminars. The WCLA is committed to provide its members with current legal updates and education on medical/legal issues.

The WCLA has plans for a number of other activities including those sponsored by the Young Lawyers Section (YLS), currently chaired by Attorney Michael Powalisz. The WCLA YLS has a number of scheduled events for 2016 including charity events such as Letters to Santa and Back to School Backpack. The YLS also has a number of social functions such as a Blackhawks game, a Chicago Cubs game, bowling, Race Judicata, and a few happy hours to promote and foster comradery among the association members.

We are always looking for new ideas to make the WCLA a better, and stronger organization, therefore, we welcome your comments, criticism, and ideas for future WCLA seminars, activities, or YLS events.

Every year, the WCLA sponsors a golf outing at the Oak Brook Marriott on the first Friday of August. Golf is followed by dinner, and a raffle. Last year,

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Inside this issue:

Interested in submitting an article? Contact John Castaneda at jcastaneda.cac@gmail.com

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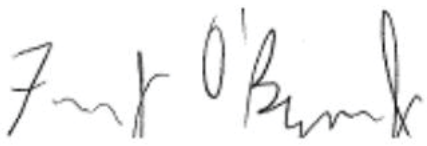
President, continued

100% of the proceeds from the raffle were donated to the Ronald McDonald House charities, located at 211 East Grand Avenue, Chicago, Illinois, www.rmhc.org. As of today's date, the WCLA has donated a total of $20,000.00 to the Ronald McDonald House. This year, we will again donate all proceeds from the golf outing raffle to the Ronald McDonald House with a goal of $10,000.00.

Another goal for 2016, is to raise our membership to 1,000 members. Last year, our membership was approximately 700 members. In order to reach the goal of 1,000 members, I would ask all existing members to recommend the WCLA to other attorneys in your office, and attorneys that you practice with. The benefits of being a WCLA member are numerous and referenced on our website, http://www.wcla.info. In closing, I would like to thank all of WCLA members as well as thank our current Board members that volunteer their time in keeping the WCLA the best Bar Association in the State of Illinois.

Sincerely,



Francis J. O'Byrne, Jr.
2016 President of the WCLA

IMPAIRMENT RATING – 8.1(b) or not to be?

On November 6, 2015, the Fifth District Appellate Court filed the decision of Continental Tire of the Americas, LLC. v. Illinois Workers' Compensation Commission and Curtis Oltmann, 43 N.E. 3d 556 (5th D. 2015). In Continental, the Appellate Court affirmed the Circuit Court's decision confirming the decision of the Illinois Workers' Compensation Commission (hereinafter IWCC). The only issue on appeal centered on whether the IWCC's decision was against the manifest weight of the evidence in awarding the petitioner 5% loss of use of the left hand.

The undisputed facts revealed that petitioner worked as a labor trainer for the respondent, Continental Tire of the Americas, LLC, at a manufacturing plant in Mt. Vernon, Illinois. On January 31, 2012, petitioner suffered an accident arising out of and in the course of his employment. On that date, petitioner tripped and fell over a guardrail landing on his left hand. Petitioner eventually presented to an orthopedic physician, Dr. Brown on two occasions. On February 1, 2012, Dr. Brown concurred that the petitioner had suffered a nondisplaced fracture of the left wrist; opined that the petitioner should work light duty and applied a splint. Petitioner returned to work light duty subsequently. On the second and last consultation of February 29, 2012, Dr. Brown noted petitioner's hand demonstrated good range of motion, and although petitioner had residual symptoms, discharged the petitioner from care and advised he could return to work full duty.

The respondent subsequently requested the treating physician Dr. Brown to prepare an impairment rating (something discouraged by the 6th Edition of the AMA guidelines). Dr. Brown testified via deposition that the petitioner had a 0% impairment rating at the level of his left wrist. Petitioner testified at trial that he continued to work in his pre-injury occupation; that he noted some discomfort in his left wrist; and that he continued to engage in recreational activities including golf.

Since the accidental injury occurred after September 1, 2011, the Arbitrator in deciding the issue of permanent partial disability enunciated the factors listed in Section 305/8.1b(b) and noted that (i) Dr. Brown found a PPI rating of 0% of the left wrist; (ii) Petitioner returned to pre-injury job; (iii) Petitioner was 49 years of age; (iv) Petitioner had no restrictions to work and (v) Petitioner's symptoms were corroborated by Dr. Brown's notes. The Arbitrator found petitioner suffered 5% loss of use of the left hand.

On review the IWCC affirmed and adopted the Arbitrator's decision with no additional findings. The Circuit Court affirmed the decision of the IWCC.

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Impairment, continued from pg Page3

The Appellate Court noted that the "only issue raised in this workers' compensation appeal concerns the nature and extent of the claimant's injury to his left wrist." Continental Tire of Americas, LLC. v. Illinois Workers' Compenation Commission, et. al., 43 N.E. 3rd 556, 557 (5th D. 2015). The Court cited the above undisputed facts. The Court began its analysis by referencing the statutory language of Section 8.1b. The Court noted that "Section 8.1b(a) requires a licensed physician to prepare a permanent partial disability impairment report setting out the level of the claimant's impairment in writing and include an evaluation of medical defined and professionally appropriate measurements of impairment that include, but not limited to loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury and any other measurements that establish the nature and extent of the impairment." Continental Tire of Americas, LLC. v. Illinois Workers' Compensation Commission, et, al., 43 N.E. 3rd 566, 559 (5th D. 2015). The Court noted that "Section 8.1b(b) directs the Commission to consider '(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; (v) evidence of disability corroborated by the treating medical records.'" Continental at p. 559.

The respondent argued that the Commission "misinterpreted" section 8.1b. Respondent proposed that the petitioner's request for permanency should have been denied since petitioner did not submit a physician's report pursuant to Section 8.1b(a). The respondent also argued that the Commission decision awarding 5% loss of the left wrist was against the manifest weight of the evidence.

The Appellate Court agreed that the standard of review for the first argument of the respondent is de novo. The Court noted that although the purpose of statutory construction is to give effect to the intent of the legislature – "the language used in the statute is normally the best indicator of what the legislature intended." Continental Tire of Americas, LLC. v. Illinois Workers' Compensation Commission, et.al., 43 N.E. 3rd 556 (5th D. 2015) citing Gruszeczek v. Illinois Workers' Compensation Commission, (2013). The Court referenced the language in Section 8.1b(b) that "requires the Commission to consider a report prepared by a physician that includes an opinion concerning the level of the claimant's impairment." Continental , at p. 560. On the facts before the Appellate Court, an impairment report was prepared and the Commission did consider the report as noted in the Arbitrator's decision affirmed and adopted. However, the Court went further to state "(t)he statute does not require the claimant to submit a written physician's report. It only requires that the Commission, in determining the level of the claimant's permanent partial disability, consider a report that complies with subsection (a), regardless of which party submitted it." Continental Tire of Americas, LLC. v. Illinois Workers' Compensation Commission, 43 N.E. 3rd 556, 560 (5th D. 2015). So, what happens if neither party submits an impairment rating? Are the Arbitrator and Commission forbidden to award permanent partial disability because there is no report to "consider?" Notice the Court did not say the statute requires the Commission to consider a report in determining the level of impairment, but only in determining the level of the claimant's permanent partial disability.

In a recent Commission decision, Marque M. Smart v. Central Grocers, 14 IWCC 0374, by a 2-1 majority, the Commission affirmed and adopted the Arbitrator's decision wherein the Arbitrator awarded petitioner 25% loss of use man as a whole for an accident occurring on January 11, 2012 without any impairment report. Specifically, the Arbitrator found "that a permanent partial disability can and shall be awarded in the absence of an impairment rating or impairment report being introduced." The Arbitrator based this finding on interpreting the statute to mean that the impairment report is but one "factor" to consider and since no single factor is determinant it follows that the absence of one factor cannot extinguish or be determinant of the permanent partial disability award. The Arbitrator also referenced a Memorandum issued by the IWCC which indicated that "(i)f an impairment rating is not entered into evidence, the Arbitrator is not precluded from entering a finding of

disability." Smart at p. 8.

In the dissenting opinion of the Commission decision, Commissioner White argued that the legislative debates reflected that the "intent" of the legislature indicated that an impairment report was required. Commissioner White cited the following language for her argument - "For the first time ever, the State of Illinois will be embracing the AMA's guidelines with regards to rating impairment. So the Illinois Workers' Compensation Act will have a provision in there that says physicians' impairment shall be rated by physicians that are certified to apply AMA guidelines to rate impairment and that will be the only way that rating of impairment will take place within the Illinois Workers' Compensation System. Thereafter, rating of disability by arbitrators will take into account the rating impairment, the occupation of the injured employee, the age of the injured employee, and the employee's future earning capacity and finally, evidence of disability corroborated by the treating medical records." Smart v. Grocers, 14 IWCC 0374, citing 97th General Assembly Senate Transcript, May 28, 2011, p. 37. No other comments in the aforementioned transcript referenced the impairment ratings.

Certainly impairment ratings are now a factor and a definite influence in the decisions of Arbitrators rendering nature and extent decisions on injuries that occurred after September 1, 2011. However, given the interpretation by the Appellate Court of the applicable statute and its pronouncement that claimants or petitioners are not required by law to submit an impairment rating; given the pronouncements of Senator Kwame Raoul noting that impairment ratings only need be "taken into account"; logic defies the position that if no impairment rating is presented by the respondent that the Arbitrator cannot make a finding on permanent partial disability. Taken to its logical extreme, the respondent's bar and their clients would never invoke the statute to obtain an impairment rating if the respondent knew that without soliciting such an opinion it could defeat the petitioner from seeking a finding on permanent partial disability.

The petitioners' bar will rarely, if ever, request an impairment rating. Nonetheless, the impairment rating becomes a factor when, and only if, either side desires to incur the cost of expense, time and delay in obtaining such a rating. A review of recent decisions rendered by the Arbitrators confirm that the absence of impairment ratings presents no obstacle for parties to proceed to hearing requesting a decision on the nature and extent of injuries for accidents occurring after September 1, 2011.

IN MEMORIAM

HENRY C. SZESNY, JR.

(10/28/48 - 10/14/15)

The family and friends of WCLA member, Hank Szesny, mourn his death. He died of natural causes on October 14, 2015 at the age of 66.

The son of an affluent businessman, he was born, raised and died in Chicago Heights, Illinois. He graduated from the University of Illinois Business School and received his law dipoloma from DePaul University School of Law in 1973. He began his legal career working as an associate for Edward Vrydolyak, Ltd. He was an associate at Keck, Mahin & Cate. He later was a partner at Boodle, Sears, Sugrue, Giambalvo & Crowley. He was also a partner at Query, Harrow, Gulanick & Kennedy, and then a partner at Pope, Ballard, Shepard & Fowle. In 1993 he formed the firm of Presbrey and Szesny. When his friend and WCLA member, Kim Presbrey, tragically died in 2005, he formed Henry C. Szesny & Associates, Ltd. He later became of counsel to Baum, Ruffolo & Marzal, Ltd.

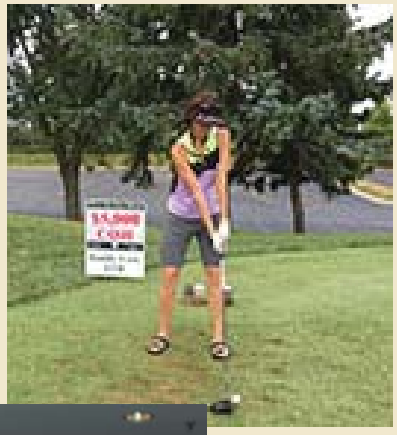
He served in the U.S. Army Reserve from 1973 through 1981 as first lieutenant in the artillery.

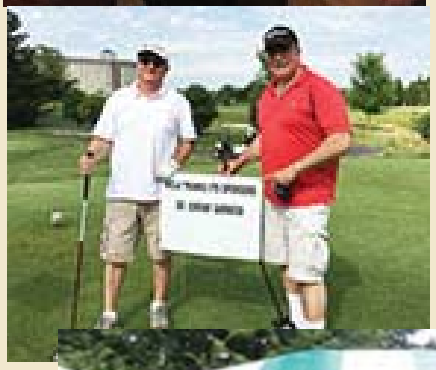
He was married to Yvette LaSalle for 30 years. He later had a loving relationahip with Judy Mosier, a court reporter.

He is survived by two nieces and a nephew. He was predeceased by his father, Henry C. Szesny Jr., his mother Annetta, brothers Bob, Bill, Jim and sister, Jodi Dandino.

He will be missed by many. He was taken suddenly and too soon.

2015 Scrap Book





Holiday Party

In Bell, the Appellate Court held that the estate of an unmarried deceased petitioner who leaves no dependents is entitled to take unpaid PPD benefits that accrued prior to said death. In other words, an estate's claim to unpaid PPD benefits that had accrued prior to a petitioner's death do not abate at the time of death.

Initially, the Arbitrator ordered the respondent to pay medical expenses that had accrued and a small underpayment of TTD benefits. However, the Arbitrator held that the PPD benefits that had accrued prior to the petitioner's death, abated upon her death and denied such compensation to her estate. Despite finding that a permanent disability had been established, the Arbitrator cited Sections 8(d)(19) and 8(h) in denying benefits. Both sections were cited in the Appellate Court's opinion and are cited here as relevant points of reference: In a case of specific loss and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before payment or payment in full for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency. 820 ILCS 305/8(e)(19)

In case death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent (or any grandchild, grandparent or other lineal heir or any collateral heir dependent at the time of the accident upon earnings of the employee to the extent of 50% or more of total dependency) such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7. 820 ILCS/8(h).

The faces of these sections are clear, Inclusive, exhaustive, terminal, and final. They clearly define who can take benefits that have accrued to a deceased petitioner. However, the Appellate Court opined that the list is not limited to those clearly defined as dependents and held that the two sections do not, in fact, limit a petitioner's estate from collecting unpaid PPD benefits that had been accrued prior to death even though such an estate is not a dependent. The court specifically noted that neither section mandates what whether any other entity is entitled to receive benefits when an injured worker dies without leaving any eligible dependents and does not bar an estate from receiving benefits in that instance.

In support of its position, the court relied on an Illinois Supreme Court case that had been decided before the legislature amended section 8(h) in 1975 and then one of their own cases that was decided later. The petitioner in Republic Steele Corp. v. Industrial Comm'n, 26 Ill.2d 32 (1962), died while his case was pending appeal of the Commission's decision. His wife served as administrator of his estate and moved to substitute in his place. However, she moved as administrator of his estate and not as a dependent spouse. The employer argued that the estate had no standing to collect benefits that could only be collected by a dependent. The Supreme Court held that the administrator of the estate was entitled to recover benefits that had accrued prior to the employee's death.

The employer in Bell argued that the enactment of Section 8(h) nullified Republic Steele by defining who may take benefits owed but for an employee's death from unrelated causes and that an estate is not listed as an entitled recipient. In response, the court relied upon Nationwide Bank & Office Management v. Industrial Comm'n, 361 Ill.App.3d 207 (2005) where not only did the injured worker die prior to arbitration, but so too did his widow while the case was on review before the Commission. The widow had no dependents so her estate stood in on her behalf. The Nationwide court looked to Republic Steele which established that an estate does not lack standing to collect accrued benefits. The Bell court specifically noted that Section 8(h) does not address accrued benefits. The court noted that Bell's estate only sought payment of accrued benefits so both Republic Steele and Nationwide Bank applied.

The employer in Bell argued that in both Republic Steele and Nationwide Bank involved situations where at least at one point during the pendency of the proceedings an eligible dependent was

involved. The Bell court acknowledged that distinction but found it irrelevant because the widow in Republic Steele was not acting in her capacity as a dependent but as the administrator of the estate. Likewise, the widow in Nationwide Bank carried on her late husband's claim but did not move to substitute as petitioner. When she died, the claim was carried on by her estate. The Nationwide Bank court relied on Republic Steele and held that the estate did not lack standing to receive accrued benefits.

The Bell employer also made a public policy argument that while payment of TTD and medical to an estate could be used to resolve debts incurred by the injury, payment of PPD did not serve any real purpose. The court rejected this argument and cited a somewhat cynical policy articulated in Republic Steele that the ruling otherwise would encourage employers to delay paying compensation until after an employee passes in order to avoid such obligations.

Despite the employer's best efforts, the Bell court held that neither Section 8(e)19 nor 8(h) limit the estate of a deceased employee from recovering accrued benefits even if there are no eligible dependents.

2016 EVENTS

YLS HAPPY HOUR
March 24 -Bub City, Chicago
BLACKHAWKS GAME
April 7 - 7:30 PM
Chicago vs. St. Louis
MEDICAL SEMINAR
April - DATE TBD
YLS HAPPY HOUR
May 5 @ Sienna Tavern
YLS CUBS GAME
July 7 @ Theory
YLS HAPPY HOUR
May 5 @ Sienna Tavern
GOLF OUTING
August 5 - Oak Brook
MEDICAL SEMINAR
September 16 - University Club
APPELLATE CT LUNCHEON
October - Date TBD
NOMINATION OF OFFICERS
November 10 -Petterino's
ELECTION OF OFFICERS
December 8 - Petterino's
HOLIDAY PARTY
December 9

BROWN BAG LUNCHES PROGRAMS will be held in the JRTC Assembly Hall which is the auditorium on the Concourse (basement) level of the James R. Thompson Center (State of Illinois Building) at 100 W. Randolph in Chicago. All programs begin at 12:00 noon and end at 1:00 pm. Upcoming dates are as follows: March 24, April 14, May 4; June 2, July 12, August 10, September 8, October 20, November 15, and December 15.

Visit our website for up-to-date event information and membership renewal. www.wcla.info

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Jim Henry and Jerry Summers, founders of JJ Capital, identified a need for those people to continue on in their lives while waiting for a workers compensation case to settle, and that is when JJ Capital was born in June 2014.

In order to provide the best service to their clients, JJ Capital partnered with one of the top workers compensation law firms in the Chicagoland Area, where 98% of their cases settle.

The measure of who we are is what we do with what we have..."

"Individual commitment to a group effort – that is what makes a team work, a company work, a society work, a civilization work."

- Vince Lombardi

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