WCLA NEWS

THOUGHTS FROM THE PRESIDENT

Dear WCLA Members:

I am truly humbled and honored to be the 64th President of the Illinois Workers' Compensation Lawyers Association (WCLA). I look forward to carrying on in the footsteps of so many of our great past presidents and to continue to shepherd our great organization. I again want to congratulate Immediate Past President Michael F. Doerries on a job well done for his 2012 year as president of the organization and for making such an easy transition for me!

I want to thank all who attended the Installation Dinner on January 19 at the Trump International Hotel & Tower in Chicago. It was a wonderful night for me personally, as well as the other WCLA Officers and Board of Directors who were sworn in by the Honorable Thomas L. Kilbride, Chief Justice of the Illinois Supreme Court. I want to specially thank Joseph Garofalo for donating the wine from his new vineyard that was at all of our tables that night, as well as our program sponsors: Preferred Capital Funding, Injured Workers' Pharmacy, Hinsdale Orthopedics, and ATI Physical Therapy for making that a wonderful night to remember!

As a bar association, the WCLA promotes fellowship among members of the Illinois bar engaged in the trial of workers' compensation matters. This is an area of law that is highly specialized and thus those of us who practice in this field tend to deal with each other daily. We appear before the same arbitrators and commissioners. It is a close knit group. After a petitioner's attorney zealously fights for the rights of his injured client with a respondent's attorney, who is zealously defending the rights of the employer, both attorneys can leave the courthouse being friends even though they are on different sides of the law. We maintain respect for each other, for the profession, and for the tribunal.

As you are all aware, no president works alone. So I am confident that my fellow officers and board of directors are up to the task to make this an exciting year. I want to thank all of them for past hard work and look forward to the work to be done this year.

On behalf of the WCLA Officers and Directors, I invite you to renew your membership for 2013. A 2013 WCLA dues statement can be found on our website: www.wcla.info. Please return the completed form to Workers' Compensation Lawyers Association, P.O. Box 3217, Oak Brook, IL 60522 with your check for $185.00. Once again, there is no increase in our annual dues. By being a member, we will enhance your legal knowledge through our CLE seminars, protect our mutual interests by way of our PAC, and promote respect and collegiality within our profession.

Spring 2013

Inside this issue:

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

President's chair, continued from 2

While our dues remain unchanged, our Association shall continue to offer monthly accredited CLE programs. We again held a three-hour CLE ethics program on February 12 at no extra cost. Also, for a nominal cost, CLE credits are available at our annual medical seminar scheduled for September 13 as well as at our Appellate Court Luncheon on October 16. This year, we will also again offer three-hour downstate CLE programs on a quarterly basis.

Though the Association is committed to providing its members with current legal updates and education on medical/legal issues, we have not forgotten to offer social functions that promote and foster camaraderie among Association members. This year, we shall host our Golf Outing on August 2 (back at Oak Brook Hills Marriott Resort) and our Holiday Party on December 6. Further, we shall continue to maintain a "Young Lawyers' Section" that offers additional social functions including happy hours, a sports game, as well as charity events. Of course, all members, both young and old, are welcome at these events.

Membership in the Association not only provides the opportunity to enhance your legal knowledge, but also recognizes the commonality of interests with fellow practitioners and members. Consequently, you are not only encouraged to join, but also seek out fellow practitioners to do so.

Next, in completing your WCLA membership, consider participation in the PAC. The year 2013 will be another challenging year. The PAC fund enables the Association to be apprised of legislative activity in Springfield and communicate the concerns of all practitioners to legislators.

In closing, we always strive to complete our WCLA directory in a timely manner. Thus, if your dues were not forwarded in conjunction with the ethics program, please return your completed form with dues no later than April 15 to insure your inclusion in our 2013 Membership Directory.

Should you have any questions or suggestions, do not hesitate to contact me or any of the other Officers or Directors.

Very truly yours,

Frank A. Sommario

Frank A. Sommario
President
Workers' Compensation Lawyers Association

WCLA Upcoming Events

MCLE Lunch Programs
Noon on dates below:
March 28; April 16
May 15; June 20
July 9; August 14
September 12; October 1
November 6 ; December 5
JRTC Assembly Hall
James R. Thompson Center
100 W. Randolph, Chicago

Blackhawks v. Predators
Monday, April 1
6:30 p.m.
United Center Super-Suite
Must register by 3-27-13

YLS Happy Hours
Dates listed below:
May 15; June 20; Aug. 14
5:30-7:30 pm
Locations TBA

Annual Golf Outing
Friday, August 2
Oakbrook Hills Marriott
Oak Brook

Race Judicata
Thursday, Sept. 12
6:30 p.m.

Annual Medical Seminar
Friday, Sept. 13
8 a.m. - noon

Appellate Court Luncheon
Wednesday, Oct. 16
Noon

Annual Holiday Party
Friday, December 6

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Rule 23: A History

By: Laura D. Hrubec,
Rosario Cibella, Ltd. &

Peter Stavropoulos,
Brady Connolly & Masuda

Of the cases that make it to the Appellate Court, very few result in a published opinion. This is due to Illinois Supreme Court Rule 23. Rule 23 describes the ways in which the Appellate court can express its ruling. The Court can prepare a full opinion, a concise written order, or a summary order.

The rule was initially prompted by the crisis of volume. The cost of publishing and storing opinions was burdensome. There was also concern that it was unfair to allow citation to unpublished opinions given their relative unavailability. Attorneys who work for an institution were thought to have an advantage as they had greater access to these unpublished opinions. There were other factors that gave impetus toward unpublished opinions as well such as "the demands upon the judiciary of a burgeoning caseload, the burden on the bar of wading through a flood tide of opinions and concerns for the integrity of the body of case law occasioned by the opinion glut." Michael T. Regan, Supreme Court Rule 23: The Terrain of the Debate and a Proposed Revision, Illinois Bar Journal 2002.

Unlike the Appellate Court, the Illinois Supreme Court had a way of reducing its docket through the use of Rule 315, under which a petition for leave to appeal from the appellate court is granted only as "a matter of sound judicial discretion." Ill S Ct Rule 315 (a) (1999). Under this rule, a small percentage of petitions are granted. The Illinois Appellate court, on the other hand, had no such control over its caseload. Recognizing the problem, the Supreme Court created Rule 23 in 1972. Ill S Ct Rule 23 (a) and (e) (1999).

Rule 23, in its initial form, authorized the Appellate Court to dispose of a case by issuing a full opinion, a written order, or a summary order. Only an opinion of the court was published and considered precedential; orders, which were unpublished, were not permitted to be cited by any party as precedent except in unusual circumstances to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case. SCR 23(e). No party or decision maker may cite to unpublished decisions.

A decision warranted opinion status if it either "establishes a new rule of law or modifies, explains or criticizes an existing rule of law,'' or "resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.'' Richard Neumeier, Why No-Citation Rules are Unworkable, Unwise, and Unconstitutional, and How They Should be Changed, App Practice J, ABA Litigation Section, Vol 19, No 3, p 13 (Summer 2001).

The criterion to be met for each of these forms is as follows:

(a) Opinions. These are the published decisions we use as precedent and cite to from the Appellate Court. A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied:

(1) The decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or

(2) The decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

(b) Written Order. Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state:

(1) in a separate introductory paragraph, a concise syllabus of the court's holding(s) in the case;
(2) the germane facts;
(3) the issues and contentions of the parties when appropriate;
(4) the reasons for the decision; and
(5) the judgment of the court.

(c) Summary Order. Pursuant to Rule 23 Summary Orders are not published pursuant to the public domain rules. The Summary Orders typically appear as a paragraph only citing the holding and have zero precedential authority.

In any case in which the panel unanimously determines that any one or more of the following dispositive circumstances exist, the decision of the court may be made by summary order. A summary order may be utilized when:

Continued on page 7

IN MEMORIAM

Harold A. Katz: 1921-2012

Mr. Katz was a labor attorney, state legislator for 18 years and joined Irving M. Friedman to create Katz & Friedman (n/k/a Katz, Friedman, Eagle, Eisenstein, Johnson & Bareck). Mr. Katz authored an article for the Harvard Law Review regarding manufacturing defects and design which later prompted Mr. Ralph Nader to state in a Chicago Sun-Times article: "If anybody is responsible for Ralph Nader, Harold Katz must take a major share of the responsibility."

Justice John T. McCullough: 1931-2012

Justice McCullough was an army veteran who started his judicial career when elected to be a county judge in 1962. Justice McCullough served 22 years on the Worker's Compensation Commission Panel of the Illinois Appellate Court as the Presiding Justice via election by his peers. Justice McCullough frequently attended the Appellate Court luncheons provided by the WCLA and always provided insight, wisdom and wit when at the podium.

Kim E. Presbrey: 1951-2012

Mr. Presbrey practiced worker's compensation law since 1976 when he joined his father in the practice as Presbrey and Presbrey. Mr. Presbrey later formed his own form of Presbrey & Associates; was President of the Illinois Trial Lawyers Association, author of many articles and spoke at many conferences on the subject of workers' compensation and since 2008 co-authored the Lexis-Nexis Illinois Worker's Compensation Book. For 10 years he was president of Illinois Futures, Inc, which provided scholarships for children of permanently disabled workers or workers deceased from injuries.

Rule 23, continued from page 4

(1) The Appellate Court lacks jurisdiction;
(2) The disposition is clearly controlled by case law precedent, statute, or rules of court;
(3) The appeal is moot;
(4) The issues involve no more than an application of well-settled rules to recurring fact situations;
(5) The opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision;
(6) No error of law appears on the record;
(7) The trial court or agency did not abuse its discretion; or
(8) The record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

When a summary order is issued it shall contain:

(i) A statement describing the nature of the case and the dispositive issues without a discussion of the facts;
(ii) A citation to controlling precedent, if any; and
(iii) The judgment of the court and a citation to one or more of the criteria under this rule which supports the judgment, e.g., "Affirmed in accordance with Supreme Court Rule 23(c)(1)."

Effect of Orders

(1) An order entered under subpart (b) or (c) of this rule is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.
(2) An order entered under subpart (b) of this rule must contain on its first page a notice in substantially the following form:

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

Ultimately, the reasoning behind this Rule 23 is to allow judges to devote time for the careful crafting of opinions that they expect to be precedential in nature and not have that time diluted by spending an inordinate amount of time on cases that raise only settled issues. Attorneys, though, object that the courts do not adequately determine which opinions are appropriate for publication and that unpublished opinions are not given the same care and judicial, rather than staff, attention. Attorneys argue that they may approach their arguments differently depending on whether the issue is one the court deals with frequently versus rarely and how that issue is analyzed in various fact patterns.

MOTIONS TO PUBLISH

Until recently, written orders under Rule 23(b) were not published. A recent amendment to Rule 23, which became effective on January 1, 2011 changed the publishing criteria. The amendment eliminates the prohibition against publication of orders entered under subpart (b) written order and directs that they are now to be made publicly available on the Court's website. This amendment was adopted at the urging of Chief Justice Thomas Kilbride, an advocate for transparency in the courts. After discussing the issue with a representative of the Peoria Journal-Star who argued that Appellate opinions should be publically available in a more timely fashion, Justice Kilbride reviewed the matter. He believes there is a legitimate interest on the part of the press and public. He and the other Justices of the Appellate Court decided that since the opinions were produced electronically, it would not entail any additional expense. The Court amended Rule 23 to allow for the publication of non-precedential orders. Helen W. Gunnarsson, Lifting the Veil on Rule 23 Orders, Vol 98, No 100 (November 2010).

If an appeal is disposed of by order, any party may move to have the order published as an opinion. The motion shall set forth the reasons why the order satisfies the criteria for disposition as an opinion and shall be filed within 21 days of the entry of the order.

At the recent Appellate Court Lunch of 2012 the Justices of the Appellate Court all stated that they rarely receive motions to publish Rule 23 Decisions. If the argument is convincing even on the facts alone, they may be inclined to publish the decision, especially now with the ease of publication and ease of access for all attorneys, unlike the past where some had greater access giving them a greater advantage. As that is no longer the case, the argument for publishing a case may be more likely accepted.

There is a trend in federal circuits across the country to permit citation of unpublished opinions. Prior to December 1, 2006 Local Circuit Court Rule 53 prohibited the citation of any unpublished order in any court within the federal circuit of appeals unless it supported a claim of res judicata, collateral estoppel, or law of the case. On December 1, 2006

Continued on page 11

Rule 23, continued from page 7

the Court repealed Local Circuit Rule 53 by Federal Rule of Appellate Procedure 32.1, which provides, in part, that a court may not prohibit or restrict the citation of unpublished decisions. This rule does not apply to the district courts; however, there is no law that prohibits the citation of non-precedential orders in the district courts. Chief Judge of the Northern District of Illinois, Judge Holderman, believes that non-precedential orders may occasionally be persuasive and acknowledges that there is no rule in the federal district courts that precludes citation to non-precedential orders. Id.

As indicated above in the Federal 7th Circuit Court of Appeals, one now can cite to non-precedential orders. This is not the case in state court, however. With the changes allowing publication and citation of non-precedential orders in the Federal Appellate courts, there is hope that Illinois Appellate courts will follow the federal courts and allow citation to non-precedential orders for persuasive value.

At the WCLA Appellate Court lunch on October 24, 2012, the Justices of the Appellate Court all agreed that they follow the guidelines of Rule 23 in determining whether or not to publish a decision. Essentially, they stated that if their decision provides no new twist in the law and was only based on fact rather than precedent, they would not publish the decision. Since most of their cases are manifest weight and decided on fact, they do not publish those decisions as they do not create or define any law.

The Justices of the Appellate Court stated that if an attorney wants the decision to be published, he or she can file a motion requesting publication within 21 days of receipt of the decision. Ill S Ct Rule 23(f) (1999). The Justices of the Appellate Court stated they rarely see such motions. If they receive such a motion, they will again review the criteria of Rule 23, and if it is a close call will defer to the attorney.

An informal survey of many arbitrators and commissioners currently serving at the Commission raises some interesting points. For example, when asked if their knowledge of a particular Rule 23 Order has any impact on their decisions, the responses range from one extreme to the other. One Arbitrator indicated that a Rule 23 Order has no bearing on decisions because they do not guide the actions of an Arbitrator. Yet another Arbitrator stated that Rule 23 Orders are taken into account because of the belief that they provide insight into what the Court is thinking. In between these two points, many arbitrators and commissioners admitted that Rule 23 Orders may play some role in the decisions they render because they are reluctant to go against the thinking of the Court, even though the Orders themselves are not precedential.

One Arbitrator raised a significant and interesting situation. Because Commission decisions have precedential value, they are frequently cited at the Commission. What if the Appellate Court contradicts one or several Commission decisions yet does not publish the opinion? In theory, a Rule 23 Order could contradict long standing Commission precedent, creating a situation where Commission decisions are precedential but a Rule 23 Order with no precedential value would question their reasoning.

Given the electronic age and the ease with which Rule 23 Orders can be discovered, there is no longer the crisis of volume, which initially prompted the rule. Perhaps it is time to abolish Rule 23 Orders and publish all opinions. This would satisfy those who are frustrated by their inability to cite to rulings by the Court that deal with a cogent issue. Further it would avoid the potential scenario where a Rule 23 Order contradicts Commission precedent but does not technically overrule it due to the unpublished and non-precedential nature of the Order.

Trying a Permanency Claim Using AMA Guidelines

By: Jacqueline A. Kinnaman

Decisions in cases involving accidents occurring on or after Sept. 1, 2011 where permanent partial disability impairment reports are in evidence are beginning to accumulate. A close reading of these decisions can be a guide to attorneys, providing insight into the way arbitrators are likely to approach these cases and suggesting ways to effectively represent clients.

On June 5, 2012, Arbitrator Thompson-Smith coincidentally presided over two nature-and-extent hearings which involved permanent partial disability impairment reports, apparently the first such trials under Sec. 8.1b of the Act since it became law. Fittingly, she filed decisions in both cases on July 24, 2012- Zachary Johnson v. Central Transport, 11WC041328 (10% loss of use of the right hand for a fracture of the right small finger); Frederick Williams v. Flexible Staffing, Inc., 11WC46390 (30% loss of use of the right arm for right distal biceps tendon rupture). Both decisions became final as no Petition for Review was filed. On Nov. 27, 2012, Arbitrator Zanotti filed his decision in Shawn M. Dorris v. Continental Tire, 11WC46624, (13% loss of use of the left hand for a TCFF tear with surgery). On Jan. 3, 2013, Arbitrator Lindsay filed her decision in Jeffrey N. Garwood v. Lake Land College, 12WC04194 (20% loss of use of the left leg for lateral and medial meniscal tears with surgery). No Petition for Review was filed in the Dorris case; the Garwood claim was appealed to the Commission.

Because Sec. 8.1b is new and decisions regarding its application are few, each arbitrator must reach her or his own understanding of its meaning. It is a basic premise of statutory construction that any analysis should begin with the plain language of the statute and with a new statute there is no alternative starting point. Sec. 8.1b provides:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are 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. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (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; and
>
> (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. (Source: P.A. 97-18, eff. 6-28-11.)

With the statutory language in mind, many arbitrators begin the decision-making process by reviewing their own trial notes and the parties' proposed decisions, often together. The trial notes refresh an arbitrator's memory of the trial testimony and the proposed decisions should, among other things, summarize the medical evidence. Any depositions are reviewed and rulings are made on objections. A more in-depth review of the medical documentation is also undertaken. By this point, an arbitrator likely will have begun forming her or his opinion. He or she is likely to look at the proposed decisions to determine whether one or the other, or parts of each, can be used as the basis for his or her own decision. Ultimately, the arbitrator may decide to write his or her own decision.

Sec. 8.1b begins by stating that permanent partial disability "shall be established" using the specified criteria, immediately raising

Continued on page 17

WCLA Installation Dinner

Trump Towers

Claims, continued from page 12

the question whether an impairment report must be done in each case where permanency is at issue. The Commission first weighed in on the question in a memorandum dated Nov. 28, 2011 and posted on the Commission's web site on Dec. 6, 2011. The memorandum offered the following "guidance:"

1) parties are not required to submit an impairment report with a settlement contract; and

2) arbitrators are not precluded from entering a finding of disability if an impairment rating is not entered into evidence. Then, in a Decision dated Jan. 31, 2013, the Commission affirmed and adopted the Arbitrator's award of PPD benefits in Terry Wadkins v. Pinckneyville Correction Center, 12WC02866, despite the absence of an impairment report for an accident date of Dec. 17, 2011.

A related question is whether, when one party has invested in an impairment report, the other should seek a report of its own. In theory, impairment reports are objective reflections of the petitioner's physical findings documented in the treating medical records and on examination. There should be little or no difference between impairment reports prepared by different examining doctors: however, the AMA Guidelines caution that treating doctors should not prepare impairment reports. See AMA Guides to the Evaluation of Permanent Impairment, 6th Ed. 2007, Chapter 2.3b. At this point, arbitrators (and most attorneys) do not have the practical experience in reviewing reports to know whether the theory is true. In her decision in Zachary Johnson v. Central Transport, Arbitrator Thompson-Smith specifically noted the petitioner did not offer a PPD impairment rating of his own to oppose that offered by respondent.

Attorneys must also answer the related question of who should do an impairment report. Neither the statute nor any decisions to date imposes any restrictions. In Shawn M. Dorris v. Continental Tire, 11WC46624, Respondent's attorney asked Petitioner's treating doctor to prepare a report. Dr. Brown, whose practice is in St. Louis, found Petitioner sustained a 6% upper extremity impairment resulting from a TFCC tear and surgery. Arbitrator Zanotti noted awards for such an injury are made on the basis of the hand, not the arm. After addressing the other factors specified in Sec. 8.1b(b), the Arbitrator awarded a 13% loss of use of the left hand. It is unclear whether the doctor's misunderstanding of Illinois law reduced the usefulness of the impairment report to the arbitrator.

The statute itself distinguishes between "impairment" and "disability." Arbitrator Lindsay made this distinction in Jeffrey N. Garwood v. Lake Land College, 12WC04194. Arbitrator Lindsay noted Dr. Monaco, who prepared an impairment rating at Respondent's request, agreed with the distinction in his deposition, suggesting that such distinction may also be recognized by some physicians.

Arbitrator Lindsay's reference to Dr. Monaco's testimony as support for her own conclusion about the distinction between "impairment" and "disability" is also noteworthy because of another new section in the Workers' Compensation Act. Sec. 1.1(e) requires arbitrators and commissioners to base their decisions "…exclusively on evidence in the record of the proceeding and material that has been officially noticed. It further requires any findings of fact made by the arbitrator to be entered into the record of the proceeding. In fact, Arbitrator Lindsay's decision includes an extensive summary of the doctor's deposition and the evidence in the record.

It is therefore important that testimony and documentary evidence presented at trial address the factors enumerated by Sec. 8.1b. This means that while petitioners may continue to testify generally about what they notice about their condition at trial, more specific testimony also should be elicited. The list of factors in Sec. 8.1b(b) can be used as a checklist at trial to guarantee each is covered by the testimony of petitioner or any corroborating or rebuttal witnesses. Sections 8(d)1 and 8(d)2 of the Act remain relevant to any permanency determination. In fact, future earning capacity is the fourth of the five factors arbitrators are required to consider. At the same time, arbitrators can be expected to refer to Sections 8.1b, 8(e) and 8(d) in ruling on relevancy objections.

Proposed decisions have increased significance given the new requirements of Sec. 1.1(e) and Sec. 8.1b(b)(v) requiring that arbitrators base their findings on evidence in the record and explain the relevance and weight given any factor in their decisions. Proposed decisions at arbitration and statements of exception on review should lay set out each of the factors specified in Sec. 8.1b separately and identify the evidence in the record relevant to each factor. Citing to an exhibit makes the arbitrator's job in reviewing the evidence easier.

Continued on page 18

Claims, continued from page 17

Proposed decisions should also explain why the evidence is relevant. For example, Sec. 8.1b(b)(iii) establishes the employee's age at the time of the injury as a factor to be considered. The petitioner's age at the time of maximum medical improvement or trial is not specified as a factor but may be relevant to assessing a claimant's future earning capacity. Furthermore, the meaning given any factor may change from case to case. A petitioner's youth may indicate he has to live with the consequences of his injury for a long time, as Arbitrator Zanotti found in Shawn M. Dorris v. Continental Tire, 11WC46624. It may also mean his recovery is quicker and with fewer residuals. Conversely, an older worker may have less of a work life before her but may take longer to heal and unable to achieve as complete a recovery. Unless evidence and argument as to the relevance of a factor is presented, the result may be a finding that no evidence was presented as to how Petitioner's age affected his disability, as Arbitrator Lindsay found in Jeffrey N. Garwood v. Lake Land College, 12WC04194.

In drafting proposed decisions, remember Sec. 8.1b(b)(v) requires that no single factor be the sole basis for a permanency award while at the same time requiring arbitrators explain the weight they give any factor relied on in support of their award. This may mean an arbitrator is less likely to choose between competing decisions on either extreme of the range of permanency awards and look for a middle ground reflecting the weight given each specific factor. Ignoring the question of weight risks missing a chance to shape an arbitrator's thinking and reduce the chance the proposed decision becomes the basis for an actual award. None of the arbitration decisions reviewed for this article assigned a numerical or percentage value to each factor, and there is no statutory requirement for that level of precision.

With respect to the weight of the testimonial evidence, arbitrators will continue to assess credibility, and an effective proposed decision should also address this question. Here Sec. 8.1b(b)(v) again provides guidance by requiring consideration of "…evidence of disability corroborated by the treating medical records." In arguing credibility, attorneys should look beyond hearing-room demeanor to the actual medical records, noting in their proposed decisions whether those records support or contradict witness testimony, including the testimony of any medical examiners as well as the petitioner. Again, the Garwood decision illustrates this point: in reviewing the impairment report, Arbitrator Lindsay noted discrepancies between Petitioner's testimony and the treating medical records, indicating that they gave her "some pause". At the same time, she noted concessions made by Dr. Monaco in his deposition, which she included in her summary of his testimony, in assessing the weight given to his impairment rating. In her analysis of the evidence of disability, Arbitrator Lindsay returned to the treating medical records, concluding the records corroborated Petitioner's trial testimony regarding his residual complaints.

In Williams and Johnson, no depositions were taken. Instead Arbitrator Thompson-Smith considered very different PPD disability impairment reports. Both petitioners were examined by evaluators well-known by workers' compensation practitioners. Petitioner Williams was examined by Dr. Mark Levin. Dr. Levin's report follows the conventions of a Sec. 12 examination report. In his final three paragraphs, Dr. Levin summarized his method of reaching

Continued on page 19

Claims, continued from page 18

an impairment rating, referring to a "Quick Dash" report in support of his evaluation, and concluding Petitioner had "…an AMA disability rating of 4% of a whole person." The arbitrator noted this mistake in terminology, pointing out the difference between impairment and disability. She also noted the Quick Dash report was not in evidence nor were there measurements for loss of range of motion. Further, Dr. Levin did not use a grade modifier for clinical studies. Frederick Williams v. Flexible Staffing, Inc., 11WC 46390 (July 24, 2012). A proposed decision written pursuant to the dictates of Sec. 8.1b should offer a similar analysis to support any argument relating to credibility or weight.

Petitioner Johnson was examined by Dr. Michael Vender who prepared a conventional report pursuant to Sec. 12. Dr. Vender attached his AMA impairment rating report rather than incorporating it into the Sec. 12 report. Dr. Vender also attached the documents he utilized in preparing his impairment report including the AMA Digit Regional Grid for Digit Impairments and the tables for upper extremity and digital impairment as well as the DASH report. Arbitrator Thompson-Smith noted Dr. Vender's findings and expressed none of the criticisms of his impairment rating as she had of Dr. Levin's report in the Williams case. Zachary Johnson v. Central Transport, 11WC 41328 (July 24, 2012).

The Johnson decision illustrates another point: decisions assessing permanency for accidents occurring before Sept. 1, 2011 remain relevant. Arbitrator Thompson-Smith considered both the PPD impairment report of Dr. Vender, who found Mr. Johnson had a 1% impairment of his right hand, as well as a pre-amendment permanency award of 7.5% of the hand in Waggaman v. Freight Car Services, 07 IWCC 41359. This Commission precedent was not simply cited by the arbitrator; she explained its significance to her award in Johnson, writing that it supported a minimal award in the context of the evidence relating to the other enumerated factors. In preparing proposed decisions, practitioners should cite to prior precedent with respect to permanency awards and explain why, or why not, it remains relevant to accidents occurring after Sept. 1, 2011.

It is too early to draw any conclusions as to the range of permanency awards governed by Sec. 8.1b of the Act. Of the four decisions discussed here, two involved hand injuries, one involved the arm and the last involved a leg which represents a narrow sampling of work-related injuries. Only Garwood, the leg case, has been appealed to the Commission, which has not yet issued its Decision on Review. While this makes advising clients more difficult, it makes the attorney's role more important.

A strong evidentiary record is necessary to prevail in any workers' compensation claim. But with the addition of Sec. 1.1(e) and 8.1b, arbitrators will be reviewing the record closely in order to support their decisions. The attorney who offers evidence addressing the factors specified by Sec. 8.1b and submits a proposed decision that addresses the factual issues in the context of its terms helps the arbitrator and may contribute to the development of the body of law interpreting the new statute. Most importantly, the attorney helps his or her clients.