Iowa/Illinois Workers' Compensation Update

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Illinois – Leadership

- Governor Pritzker
  - 3/15/19 announced appointment of Michael Brennan as Chairman of the Illinois Workers' Compensation Commission
- Chairman Michael Brennan replaced Joann Fratianni-Atsaves

Michael Brennan

- 40+ years professional experience
- Several years as a Commissioner on the Illinois Workers' Compensation Commission
- Prior Assistant Attorney General and prosecuted tax matters and Medicaid fraud
- Acted as Special Assistant Attorney General, serving Illinois Self-insurers Advisory Board

Governor Pritzker has appointed New Commissioners

- Douglas McCarthy and Barbara Flores
  - Previously Arbitrators
- Maria Portela
  - Previously in-house counsel at AIG
- Mark Parker
  - Plaintiff/Petitioner practice in Madison County
- Governor may appoint additional new Commissioners

Appeal Process

- Arbitrator – statewide venues
- Illinois Workers' Compensation Commission
  - 10 Commissioners appointment by governor with consent of Senate
    - 3 represent employers
    - 3 represent employees
    - 4 not identified with either
      - One of these 4 is designated Chairman by the Governor
    - No more than 6 from same political party
  - Oral argument before 3 member panel, one from each class
  - Commission hears case de novo
    - Not bound by Arbitrator's findings
    - Findings of Fact based upon transcript plus findings of Arbitrator plus Conclusions of Law
  - Conclusions of Law by Commission are considered precedents for Arbitrators

Appeal Process Cont.

- Circuit Court
  - Manifest weight of the evidence standard
  - If a rational basis can be discerned for Commission's decision, it must be affirmed.
- Illinois Appellate Court – WC Commission Division
  - Panel of 5 appellate judges, one from each district
  - If a rational basis can be discerned for Commission's decision, it must be affirmed.
- Illinois Supreme Court
  - Few cases each year are granted Leave to Appeal to the Supreme Court
  - 2 or more judges of Appellate panel must make a statement that substantial question warrants Supreme Court consideration

Legislative Update
SB 904
Amends The Workers' Compensation Act Section 8.2 and 8.2(a)
House and Senate overrode Governor Veto

8.2 Fee Schedule

- When patient says treatment is work related
  - Provider bills employer or its designee directly
  - Employer or designee shall pay provider directly
- All payments due within 30 days of receipt
  - Denial: employer/carrier shall provide written notification via EOB within 30 days of receipt
    - Basis for denial
    - Describing additional data necessary to review

Nonpayment to Provider within 30 days

- 1. Nonpayment to provider if substantially all required data elements present
- 2. Nonpayment of a portion of the bill or
- 3. provider has not been issued an EOB for a bill

The bill (or portion) up to lesser of actual charge or payment level set by Commission: 1% per month in interest payable by employer to provider

If Employer or carrier fails to pay interest

- Provider may bring an action in Circuit Court
- Interest is only payable to the provider
- Employee is not responsible for interest
- Right to interest shall not delay, diminish, restrict or alter the benefits the employee or dependents are entitled to
- Applies to medical services on or after the date of amendatory Act of 100th General Assembly

8.2(a) Electronic Claims

- Electronic bills also subject to these provisions
- Dept. of Insurance: Administrative fine if employer/carrier fails to comply with electronic claims acceptance and response process
  - No greater than $1000 per violation, $10,000 max for identical violations during calendar year

Illinois SB 1596

- Awaiting Governor's signature
- Amends the IL Workers' Compensation Act and Workers' Occupational Disease Act
  - Victims of exposure to toxic substances (such as asbestos) in the workplace
  - Diagnosis of latent disease
  - After 25 year bar imposed by WCA and ODA
  - Civil action available

SB 1596

- Victim has burden of proving negligence in court
- Defendants have every defense of common law available
- Employers have unlimited liability in tort for employees' latent injury claims
  - Examples":
    - Asbestos
    - Pesticides
    - Skin cancer
    - Musculoskeletal
    - Long term hearing loss
    - Repetitive trauma claims

SB 1596

- Eliminates exclusive remedy provision
- Allows cause of action outside of IL WC System
- Potentially uninsured claims
- Employer risk costs increase due to uncertainty

SB 1596

- Should only apply if diagnosed after 25 year statute of Repose in Occupational Disease Act per legislative history
  - General rule is prove disablement for OD within 2 years of date of last exposure
  - Statute of Repose for Occupational disease caused by exposure to radiological materials or equipment extends the period to 25 years from the date of last exposure

Medical Marijuana - Illinois

- Compassionate Use of Medical Cannabis Pilot Program Act – scheduled to be repealed July 1, 2020
- Cannabis has many currently accepted medical uses in the US
- Cannabis use continues to be against federal law

Lawful User and Lawful Products

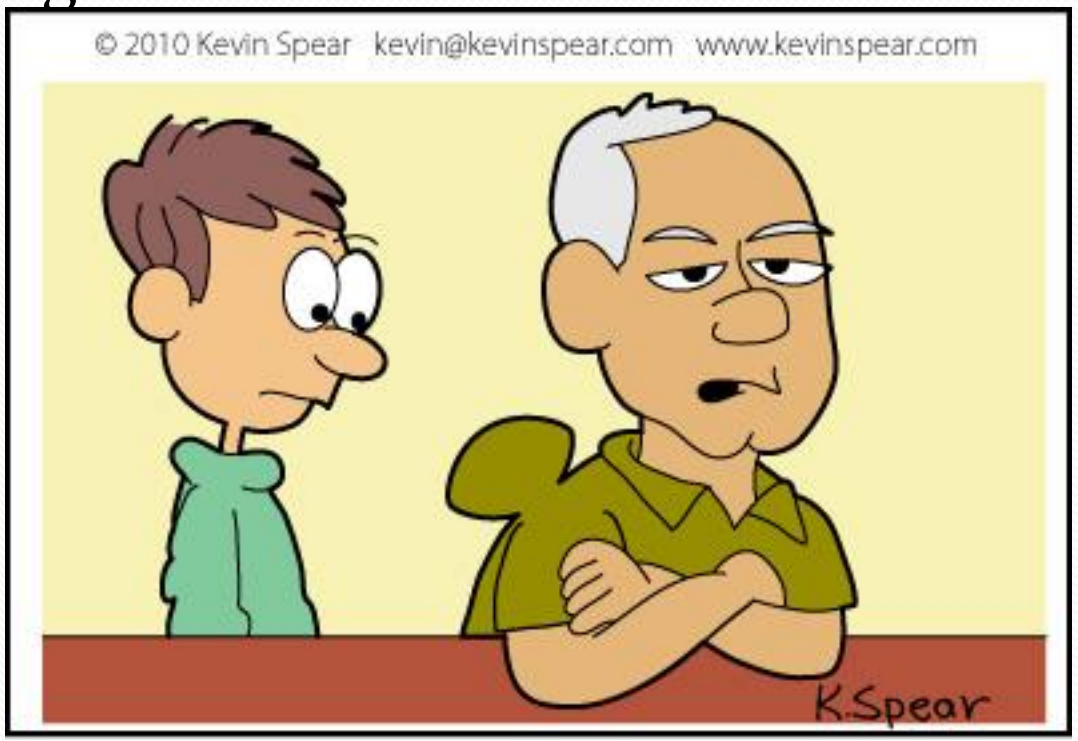
- Lawful User must be a cardholder
  - Qualifying patient or caregiver who possess a valid registry ID from the Department of Public Health
- Lawful products must be purchased from licensed dispensing organization

Debilitating Medical Condition

- Severe fibromyalgia
- Spinal disease or spinal cord injury
- Traumatic brain injury
- Post concussion syndrome
- RSD/CRPS
- Residual limb pain
- PTSD
- Etc.

Qualifying Patient

- Person diagnosed by a physician as having a debilitating medical condition



"That? Oh, it's an old football injury."

Act Does Not Permit

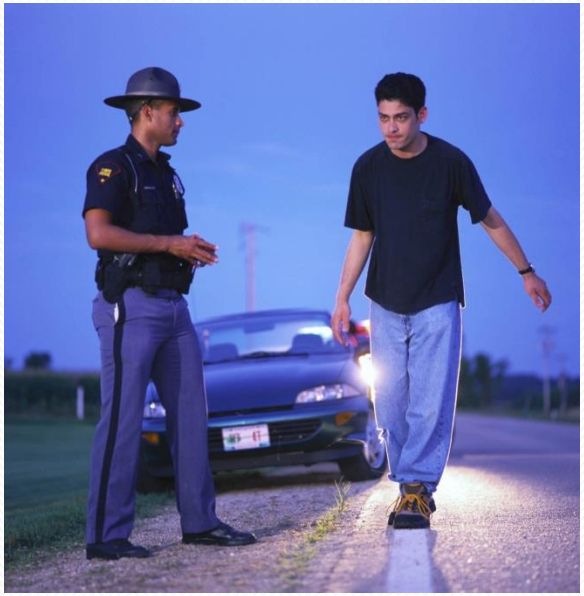
- Undertaking task under influence of cannabis if
  - Doing so would constitute negligence
  - Professional malpractice
  - Professional misconduct
- Possessing cannabis
  - In a school bus
  - On school grounds
  - In a correctional facility
  - Private residence that is a licensed daycare
  - In a vehicle unless secured, sealed and inaccessible

Act does not permit cont.

- Using Cannabis
  - In a school bus
  - On school grounds
  - In a private residence that is a daycare
  - In any correctional facility
  - In any motor vehicle
  - In any public place

Act does not permit, cont.

- Smoking cannabis in any public place
- Operating, navigating or being in control of any motor vehicle, aircraft, watercraft, while using or under the influence of cannabis



Employment/Employer Liability

- Employer may adopt reasonable regulations concerning consumption, storage or timekeeping requirements for qualifying patients related to the use of medical cannabis

Employment/Employer Liability cont.

- Employer may enforce a drug testing policy, zero tolerance, or a drug free workplace
  - Cannot apply in discriminatory manner
- Employer may discipline a registered qualifying patient for violating a workplace drug policy
- Employer may discipline an employee for failing a drug test if failing to do so would put the employer in violation of federal law or cause it to lose a federal contract of funding

Employment/Employer Liability cont.

- Employer may consider RQP to be impaired when s/he manifests symptoms that lesson job performance
  - Speech
  - Physical dexterity
  - Agility
  - Coordination
  - Demeanor
  - Irrational or unusual behavior
  - Negligence operating equipment, etc.

Employment/Employer Liability cont.

- If employer disciplines RQP, must afford opportunity to contest the basis of determination

Act does not create 3rd Party Cause of Action against employer

- Employer's good faith belief that RQP used or possessed cannabis at work
- RQP was impaired while working
- Injury or loss to 3rd party if employer neither knew or should have known the employee was impaired

IL – Cannabis Payable under WC?

- Not specifically addressed in the statute
- Not specifically determined in a case
- Discussed in French v. Ill. WCC(Wal-Mart)
  - Sought payment of medical scooter, personal assistant and medical cannabis
  - Commission denied
- 8(a) an employer must pay all necessary medical services that are reasonably required to cure or relieve the effects of the accidental injury

French, cont.

- Failed to prove need for medical cannabis
- Conflicting doctor opinions on need for medical cannabis, Commission found against ordering it

Iowa Code 124E – Medical Cannabidiol Act

- Iowa Dept of Public Health
- Approves Cannabidiol Registration Card to patient or primary caregiver (doctors only) of patient
- Debilitating medical condition

Debilitating Medical Condition

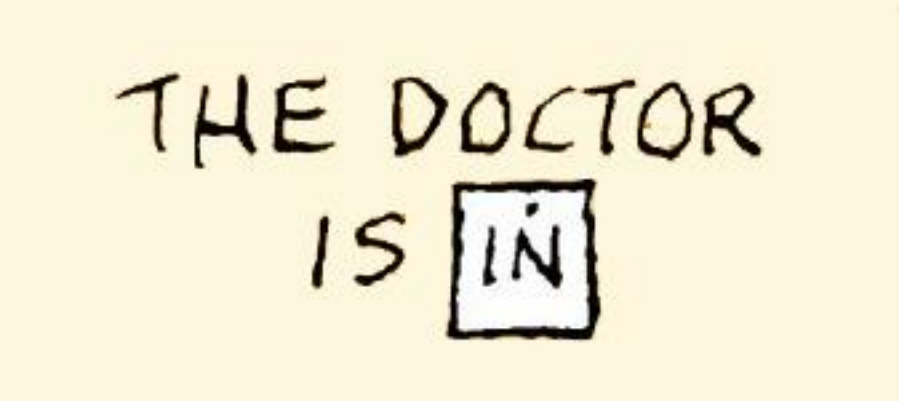
- Cancer
- MS with severe and persistent muscle spasm
- Seizures
- AIDS or HIV
- ALS
- Any terminal illness with probable life expectancy less than 1 year
- Untreatable pain

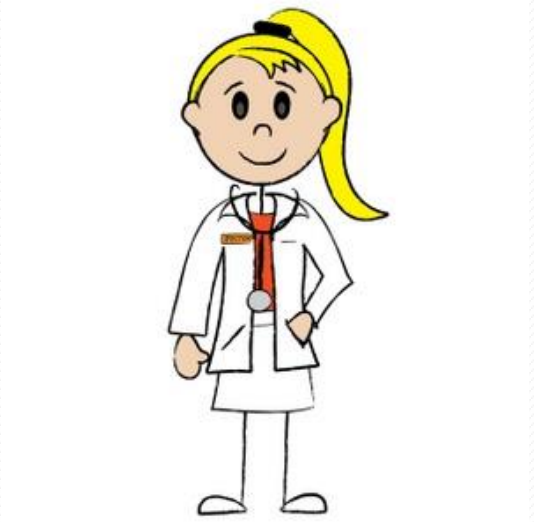
Untreatable pain

- Any pain whose cause cannot be removed and the full range of usual medical pain management treatments have been used without adequate results or with intolerable side effects

To Obtain a Registration Card

- Receive approval from a doctor
- Complete Application Process
- Be approved by Iowa Dept of Public Health
- Pay $100 registration fee





Medical Cannabidiol in Iowa

- Cannot be more than 3% THC
- One Iowa manufacturer (MedPharm)
- Five dispensaries (Council Bluffs, Davenport, Sioux City, Waterloo, Windsor Heights)
- Capsules, tinctures and creams
- Smoking is strictly prohibited

Iowa WC – Require Payment for Medical Marijuana?

- No Iowa cases on point
- McKinney v. Labor Ready, 2002
  - Untreatable pain
  - ATP in Oregon prescribed medical marijuana
  - Oregon Medical Marijuana Program
  - Deputy granted Alt Med Care petition and employer/carrier liable for medical marijuana
  - Later questions of state v federal law
    - Will Commissioner require employer/carrier to pay in violation of federal law?

Laws to Consider

- ADA: requires reasonable accommodation of workers with a disability that can perform the essential functions of the job
- FMLA: allow qualified employees with serious health condition to take time off for medical treatment
- Drug-Free Workplace Act: federal contractors and grantees must guarantee drug free workplaces as a condition of receiving govt contracts or grants

- Medical marijuana is not covered under ADA or FMLA
- All marijuana is illegal under federal law
- Many state courts are considering whether medical marijuana should be accommodated under state law
  - Oregon, Washington and CA – No
  - Massachusetts- Yes Exception to drug policy to permit offsite mj may be a reasonable accommodation

Iowa Idiopathic Falls

Iowa Idiopathic Falls

- Jason Bluml v. Long John Silvers et. al.
  - Seizure at work
  - Struck back of head on ceramic tile floor
  - Serious head injury
- Deputy: not arise out of employment
  - No height, stairs, or hit head on anything on way down
- Commissioner and D.Ct. affirmed, although injuries more serious due to ceramic tile – as a matter of law, idiopathic falls onto level floors not compensable

Iowa Supreme Court

- Idiopathic fall to a level floor could be compensable
  - Fact question
  - Consider hardness of floor
- Burden on EE to prove condition of employment increased the risk of injury

General Rule Post Bluml

- Generally Compensable:
  - Fall from elevated position; ladder or scaffolding
  - Fall on stairs
  - Fall from increased risk related to work such as slippery work surface
- Factual Determination:
  - Level surface due to personal condition
    - EE burden to show increased risk from employment

Iowa Legislative Update
HB 181/SB 507

- Amends 85.61(7) to add
  - Personal injuries due to idiopathic or unexplained falls onto a level surface do not arise out of and in the course of employment and are not compensable under the WC Act
- Governor Reynolds has until 5/9/19 to sign or veto
- Anticipate that she will sign it into law

Post 7/1/17 Statutory Amendments

- Deputy level decision
  - Reiter v. City of Remson and EMC
- Commencement of PPD
  - MMI and IMPAIRMENT can be determined
  - Allows for a gap in benefits
  - Does not appear to change Auxier requirements

Use of AMA Guides, 5th Edition

- Rating must specifically sate AMA Guides, 5th Edition or will be disregarded
- Best to reference specific tables, page numbers, sections, etc.
- Shoulders do not have their own category
- In Reiter, Deputy held rating is applied to the upper extremity X 400 weeks

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THANK YOU