

ILLINOIS COUNTY GOVERNING CONFERENCE



Monday, April 20, 2015

Double Tree by Hilton – Bloomington, IL



Workers' Compensation and the Government Employer: Where We Are, How We Got Here And What We Can Do About It

Bruce L. Bonds – Urbana Office

Craig S. Young – Peoria Office

Heyl, Royster, Voelker & Allen

Today's Speakers



Bruce L. Bonds

**Heyl, Royster, Voelker & Allen
Urbana, IL**

Lawyer – Teacher – Author – Consultant

Today's Speakers



Craig S. Young

**Heyl, Royster, Voelker & Allen
Peoria, IL**

Chair, Workers' Compensation Group – Heyl Royster



- Most topics warrant their own presentation
- Upcoming seminars
 - Bloomington Seminar
 - Governmental Seminars In Fall 2015
- For Newsletters and Seminar Invitations, give us a business card or sign-up



ILLINOIS PRACTICE SERIES™

Vol. 27

ILLINOIS WORKERS' COMPENSATION LAW



BONDS & LUTHER



Today's Presentation

- Overview of the 2011 Amendments
- Cost Savings to Date
- What Does the Future Hold: Proposed Workers' Compensation Legislation
- Issues of Particular Importance to County Government



Workers' Compensation in Illinois: How Did We Get In This Mess?



2005 Amendments: How Did They Come About?

- The Agreed Bill Process

2005 Amendments

- Employer concerns: medical expenses which constitute 50% to 60% of total workers' compensation outlays
- Employee concerns: access to care, increased benefit rates
- Result: employers got a medical fee schedule with limited utilization review in exchange for increased benefits rates
- Practical result: employees received significant benefit increases (7.5% off the schedule plus increased minimums and maximums) but the medical fee schedule did not significantly reduce medical expenses
 - Studies show that subsequent to the effect of the 2005 medical fee schedule Illinois went from 6th highest in medical payments to either 2nd or 3rd



Other Problems with the 2005 Amendments

- Medical fee schedule did not cover all services
- The 29 “geo zips” resulted in “zip gaming”
- Increased medical fee schedule results in increased “up coding” of services in increased frequency
- Utilization review – not dispositive of the reasonableness and necessity of bills – it can go over admissibility
- Fraud – no provision for the designated prosecutor – statute is flawed

2011 Amendments



How/Why Do They Come About?

- News articles from the Belleville News Democrat with respect to repetitive trauma settlement at Menard State Prison with guards (and the Warden)
- Increased demands by business leaders for workers' compensation reform
- Threat by Caterpillar to leave the State
- Possibly political embarrassment by the Democrats over the significant increase in the personal and corporate income tax
- Testimony in December and January by self-insureds and other business leaders with specific examples of cost comparisons between Illinois and other States
- Workers' compensation settlements/claims by Arbitrators
- Unreasonable and self-serving defense of existing system by labor or trial lawyer
- Claim by State Trooper who killed 2 people while driving 106 mph, using dashboard computer and talking on cell phone



2011 Amendments: Business Wish List

- Work activity must be the “primary cause” of the injury
- Employer control over choice of treating doctors
- PPD awards based solely on AMA guidelines
- Stronger utilization review of treatment

Result



- Political environment ripe for change
- Passage of House Bill 1698 (Senate Amendment 3)
- How the political players line up?
 - Doctors and Hospitals opposed
 - Illinois Chamber of Commerce Trial Lawyers and Labor Neutral
 - Some business groups (IRMA, Chicagoland Chamber of Commerce among others) in favor
- House Bill 1698 is a compromise, but it is probably not worthy of being characterized as bringing significant reform to Illinois workers' compensation law

2011 Amendments:

- Changes to medical fee schedule
- Changes to utilization review
- Changes in determining the amount of permanent partial disability
- Changes in determining benefits available for repetitive trauma carpal tunnel syndrome
- Changes to wage differential awards
- Changes to calculation of temporary partial disability
- Changes to the defense of intoxication
- Unlawful acts/penalties/fraud

Medical Fee Schedule

- Key elements:
 - Reimburses medical procedures, treatments, services and supplies covered under the Act at 70% of the current medical fee schedule
 - Adjust the reimbursement yearly based on the CPIU (in 2014 this was a 1.52% increase)

Annual Adjustments to Medical Fee Schedule

Annual Adjustments			
Effective date	CPI-Medical	CPI-U/IL FS	Annual Difference
February 1, 2006	4.37%	4.90%	0.53%
January 1, 2007	4.26%	3.80%	-0.46%
January 1, 2008	4.52%	1.97%	-2.55%
January 1, 2009	3.26%	5.37%	2.11%
January 1, 2010	3.31%	-1.48%	-4.79%
January 1, 2011	1.03%	1.01%	-0.02%
September 1, 2011*		-30.00%*	-30.00%
January 1, 2012	3.19%	3.77%	0.58%
January 1, 2013	4.05%	1.69%	-2.36%
January 1, 2014	2.34%	1.52%	-0.82%
Cumulative	30.33%	-7.45%	-37.78%



Medical Fee Schedule

- Out of state treatment:
 - Shall be reimbursed the lesser of the State's fee schedule or the fee amount for the region in which the employee resides
- Implants:
 - Limited to 25% above the net manufacturer's invoice price less rebates plus actual reasonable and necessary shipping charges

Medical Fee Schedule



- Non-pharmacy dispensed prescriptions:
 - Shall not exceed the average wholesale price (AWP) plus dispensing fee of \$4.18 (AWP based on Medispan)
 - Applies to prescriptions filled at the doctor's office which represents 19.3% of the total prescription market in Illinois
- Significance?
 - The cost of prescriptions filled other than at a licensed pharmacy on average are 200% to 800% higher than the manufacturer's recommended price
 - The cost of Vicodin (for example) is 85% higher per pill on average than at a pharmacy



Medical Fee Schedule

- Non-pharmacy dispensed prescriptions:
 - Opposed by:
 - Doctors: lost profits
 - Labor: alleged reduced access to care
- Estimated savings: 6-7 million/year



Medical Fee Schedule

- Services not covered by the fee schedule will be reimbursed at 53.2% of charges
- Why 53.2%?
 - 30% of 76% = 53.2%



Medical Fee Schedule

- Fun Facts:
 - Before the 2011 Amendments the Illinois workers' compensation medical costs were the 6th highest in the Nation
- After the 2011 Amendments:
 - Illinois is now the 2nd highest workers' compensation medical costs State in the Nation

Utilization Review



- Key elements:
 - Allows employers to disallow care based on utilization review by an accredited UR program and thereafter shifts the burden of proof to the employee to demonstrate a variance from the standard of care will cure or relieve the effects of the injury
- Potential pitfall of new UR provisions:
 - Section 8.7(i)(3) "An employer may only deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section."
 - Can the reasonableness and necessity of treatment still be attacked by a Section 12 IME?

Utilization Review Pitfalls





Utilization Review Pitfalls

- Which guidelines must be used to evaluate treatment?



GUIDELINES



Utilization Review Pitfalls

"Cooperation"



Utilization Review Pitfalls

- Depositions





Utilization Review Pitfalls

- Utilization review appeals



"I'll work on the appeal. You try to escape."



- Is the utilization review determination dispositive?

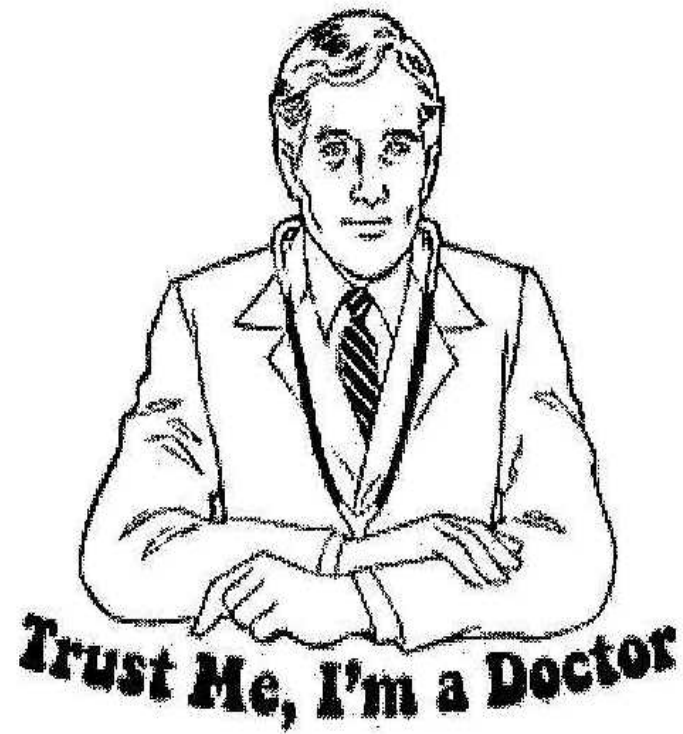
A large, 3D, yellow-to-orange gradient text graphic that reads "NO!". The letters are thick and blocky, with a slight shadow effect, set against a light blue background.



- My observations



- Over treatment





- Utilization review is effective in reducing physical therapy and chiropractic charges



- Chronic pain





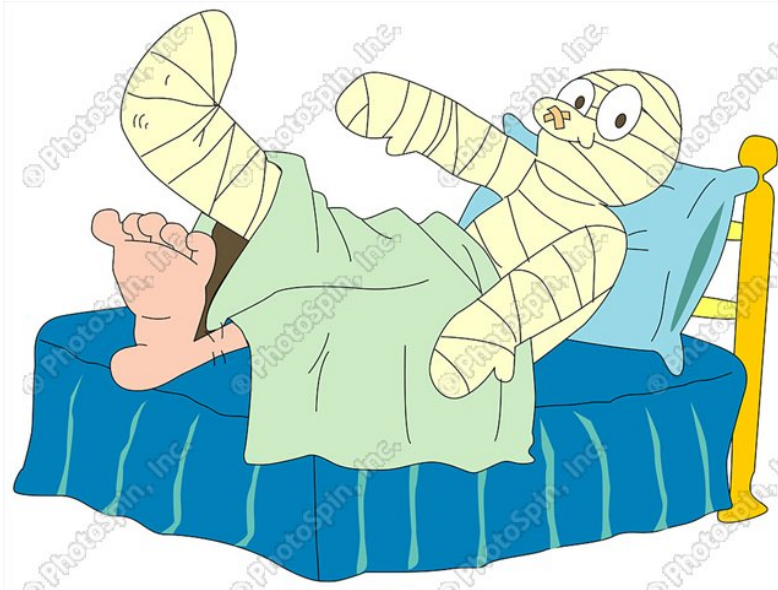
- Treating doctor mystique





2011 Amendments

Determination of Permanent Partial Disability



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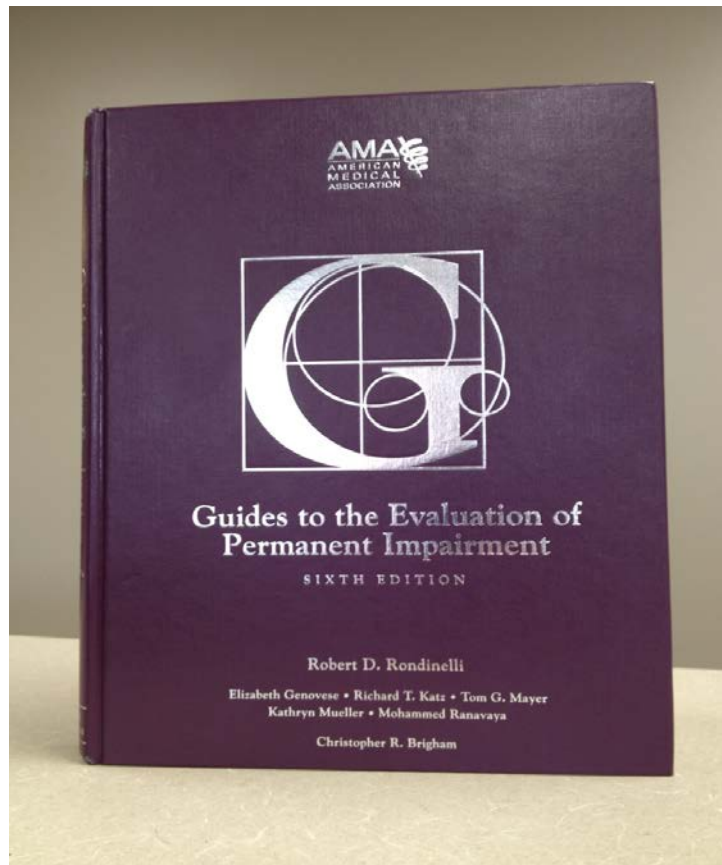
New Section 8.1b (820 ILCS 305/8.1b)

- For accidental injuries that occur on or after September 1, 2011, permanent partial disability **shall** be established using the following criteria:
 - 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 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.



- In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
 - The reported level of impairment pursuant to subsection (a)
 - The occupation of the injured employee
 - The age of the employee at the time of the injury
 - The employee's future earning capacity
 - 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.

What are the AMA Guides?





What are the AMA Guides?

- Treatise on evaluating “impairment”
- Basic considerations include:
 - Diagnosis
 - Functional difficulties reported by the patient (subjective complaints)
 - Physical examination findings
 - Results of clinical studies
- Assessing impairment:
 - Physician obtains data listed above and applies it to the criteria provided in the AMA Guides in order to reach a corresponding impairment value



Use of AMA Guides:

- “Impairment” \neq “Disability”
- “Impairment Rating” \neq “PPD Award”
- “Impairment is a subset of the disability determination”
- According to the Guides: “The relationship between impairment and disability remains both complex and difficult, if not impossible to predict”
 - Sixth Edition of the Guides, page 5

Example of the Difference Between Impairment and Disability



- Assume both a lawyer and pianist sustain the amputation of their non-dominant little finger
 - Both have the same “impairment” under the AMA Guides:
 - 100% of the digit, which equates to 10% of the hand, 9% of the upper extremity or 5% of the whole person
 - The lawyer has no “disability”
 - The pianist is unable to perform his/her occupation and may therefore be totally disabled from his occupation, although fully capable of other jobs



Why are the AMA Guides Included in the Determination of Permanent Partial Disability in the 2011 Amendments?

- To provide greater uniformity in PPD awards
- To reduce the value of awards as AMA ratings are typically much lower than a PPD award for the same injury



- Carpal Tunnel Syndrome



Carpal Tunnel Syndrome: PPD calculation



- Under 2011 Amendments:
 - Carpal tunnel syndrome based on a **repetitive trauma** is capped at 15% of a hand with the hand being worth 190 weeks or a maximum of 28.5 weeks. Assuming PPD rate of \$400 per week the same case would now be worth \$11,400.
- Savings to the employer:
 - \$5,000 per carpal tunnel claim



Carpal Tunnel Syndrome: Potential System-Wide Savings

- During the five years between 2006 and 2010 approximately 3.6% of all commission decisions were awards for carpal tunnel syndrome
- During that same period the average award for an operative carpal tunnel syndrome was 18.46% loss of use of a hand
- Thus, repetitive trauma carpal tunnel awards under the 2011 Amendments will be reduced by at least 9.34 weeks of permanency and potentially more since the average award should come in significantly less than 15% loss of use of a hand.



Carpal Tunnel Syndrome:

- Are we going to see more “traumatic” carpal tunnel claims?



Wage Differential Awards



Wage Differential Awards

- Section 8(d)(1) provides for a wage differential award at the election of the petitioner where there is proof of loss of earning capacity
- Recovery is $\frac{2}{3}$ the difference between the amount the petitioner would be earning in their pre-accident employment and the amount which they can earn after reaching maximum medical improvement for the duration of their disability
- Duration of disability has been defined to mean “for life”

Topic: Limits on Wage Differential Awards

Statute: 820 ILCS 305/8(d)(1)

Effective Date: Applicable to all injuries occurring on or after September 1, 2011

- The wage differential provisions of Section 8(d)(1) of the Act are amended to indicate that a wage differential award shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later
- Change from existing law which has defined by case law "duration of disability" as meaning "for life"



Wage Differential Awards



- Practical implications
 - Should reduce wage differential awards and settlements
 - Important to close cases promptly: make an offer at MMI and then set the case for trial!
- Practical implications for appeals
 - No change

Wage Differential Awards: What is missing?

- Credit for prior wage differential awards
- Post-award ability to reduce wage differential payments where earnings increase





Temporary Partial Disability Benefits



Calculation of Temporary Partial Disability Benefits or “TPD”



- Applies where petitioner is still treating and not at MMI
- Employee is working “transitional duty” and earning less than in their regular job

Topic: Calculation of Temporary Partial Disability Benefits

Statute: 820 ILCS 305/8(a).

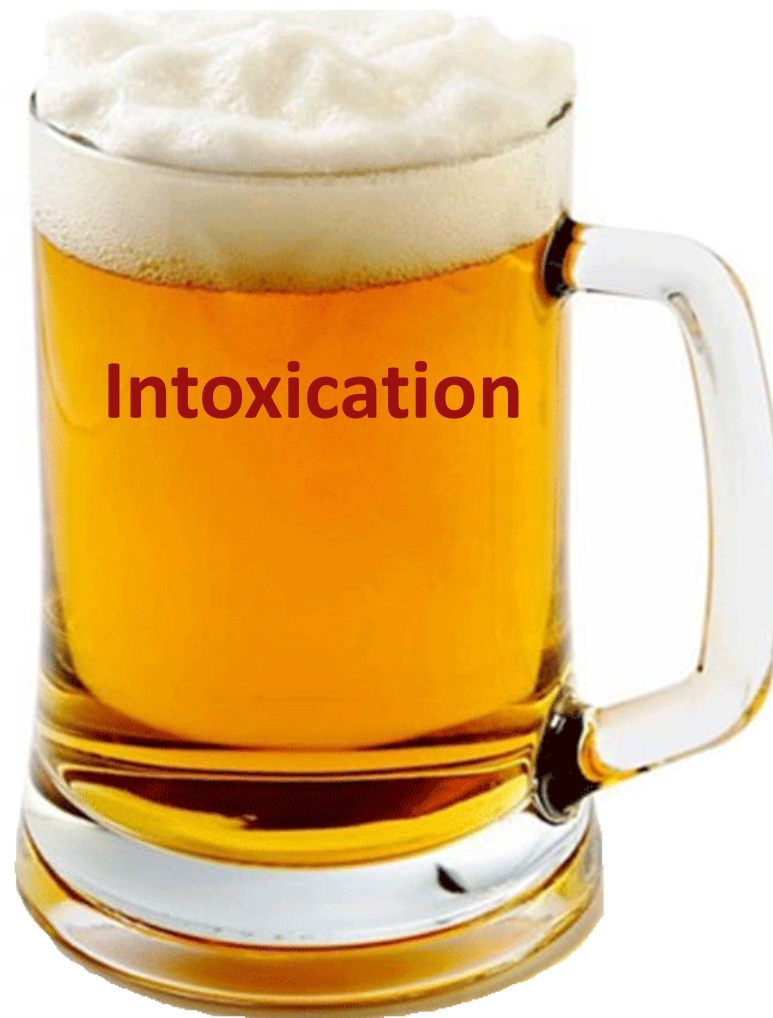
Effective Date: June 28, 2011

- Temporary partial disability benefits will now be calculated by using gross current earnings rather than net current earnings.

Impact:

1. Simplifies calculation;
2. prevents possibility that an employee would earn more while on TPD than in their regular job pre-accident.





Intoxication

Topic: Injuries Occurring While Intoxicated

Statute: 820 ILCS 305/11

Effective Date: Applicable to all injuries occurring on or after September 1, 2011



- Section 11 of the Act has been amended and for the first time imposes a statutory framework for disputing and denying drug and alcohol cases. No compensation shall be payable if:
 - The employee's intoxication is the proximate cause of the employee's accidental injury
 - At the time of the accidental injury, if the employee was so intoxicated that intoxication constituted a departure from the employment

Intoxication: Rebuttable Presumption



- There is a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the injury if at the time of the accident:
 - The BAC was .08% or more by weight in the blood, urine or breath ... or
 - There is evidence of the presence of cannabis, a controlled substance or an intoxicating compound in the employee's blood, urine or breath and **"any"** evidence of impairment due to the unlawful or unauthorized use of these substances... or
- The employee refuses to submit to testing of blood, urine or breath.

WHAT ABOUT MEDICAL MARIJUANA?





WHAT IS IMPAIRMENT?



Intoxication: Overcoming the Rebuttable Presumption

- The employee may overcome the rebuttable presumption by presenting admissible evidence that the intoxication was not the sole proximate cause or the proximate cause of the accidental injuries



- Unlawful acts/penalties/fraud

2011 Amendments: Changes to Fraud Provisions



- Disclosure of the complaining party to the alleged perpetrator of fraud is now eliminated
- The ability to subpoena medical providers has been added (by the Department of Insurance)
- Violations may now be referred to the Special Prosecutions Bureau of the Criminal Division of the Attorney General or to the State's Attorney in the county where the violation occurred

What did not make it into the 2011 Amendments?



What did not make it into the 2011 Amendments?



- No provision to appeal wage differential awards based on change in economic and circumstances as opposed to physical impairment.
- The interstate scaffolding case was not “overruled” legislatively and thus by case law an employer may still be required to pay temporary total disability to an employee who has been terminated for a cause where they are not at maximum medical improvement.



- No provision for taking credit for prior person as a whole settlements.
- No provision for taking credit for prior wage differential settlements.
- No clarification in the subpoena process in the amount that can be charged for subpoenas for providing medical records pursuant to subpoena.
- No change in the calculation of average weekly wage which provides “windfall” for injured seasonal worker.



Where Are We Now?

Conclusion to Date

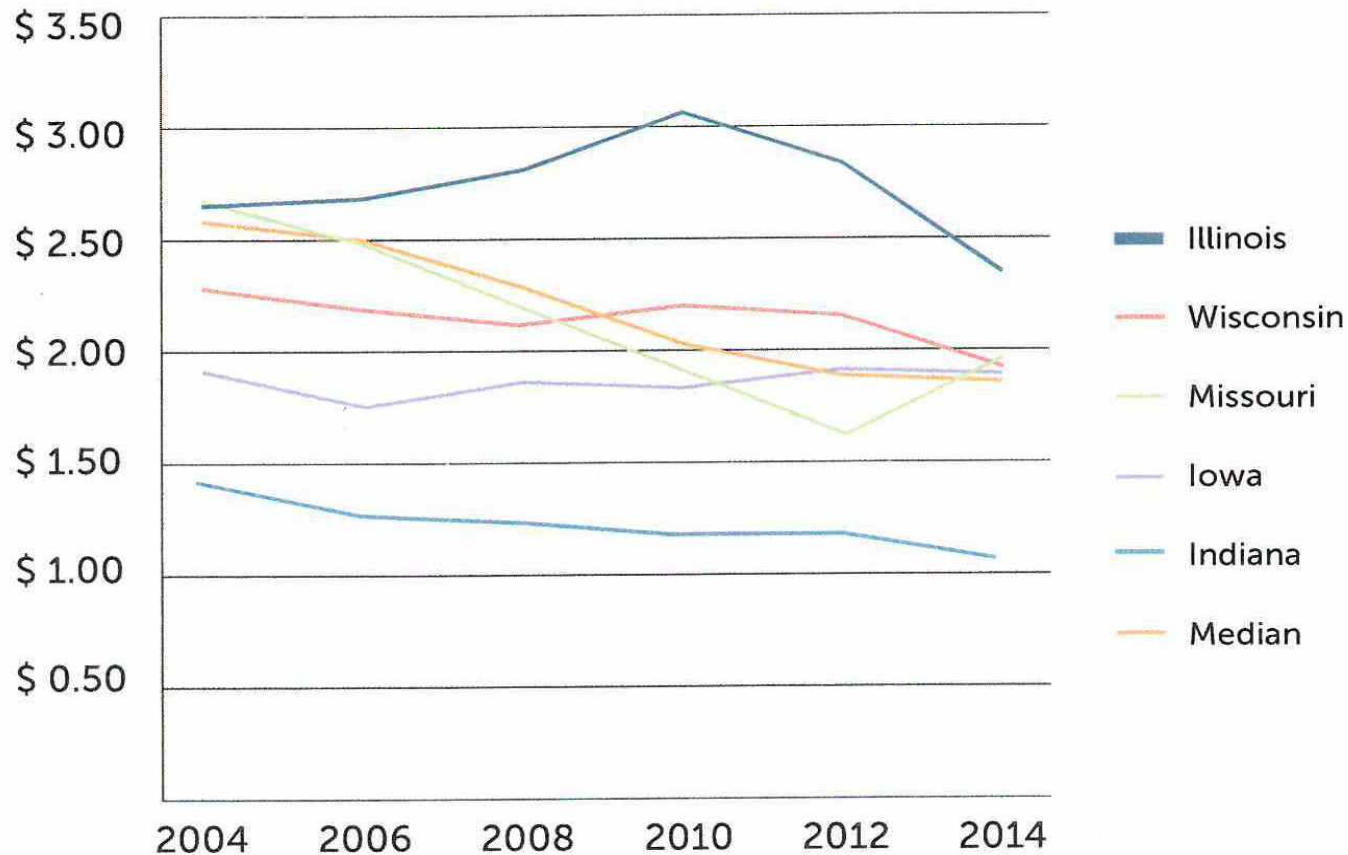
- NCCI Advisory Rates
 - Since enactment of 2011 Amendments the cumulative rate change of workers' compensation advisory premium rates have decreased 19.1%
 - This includes the most recent reduction of 5.5% which took effect on January 1, 2015





How Does Our State Compare?

Workers' Compensation Premium Rates
(Per \$100 of Payroll)



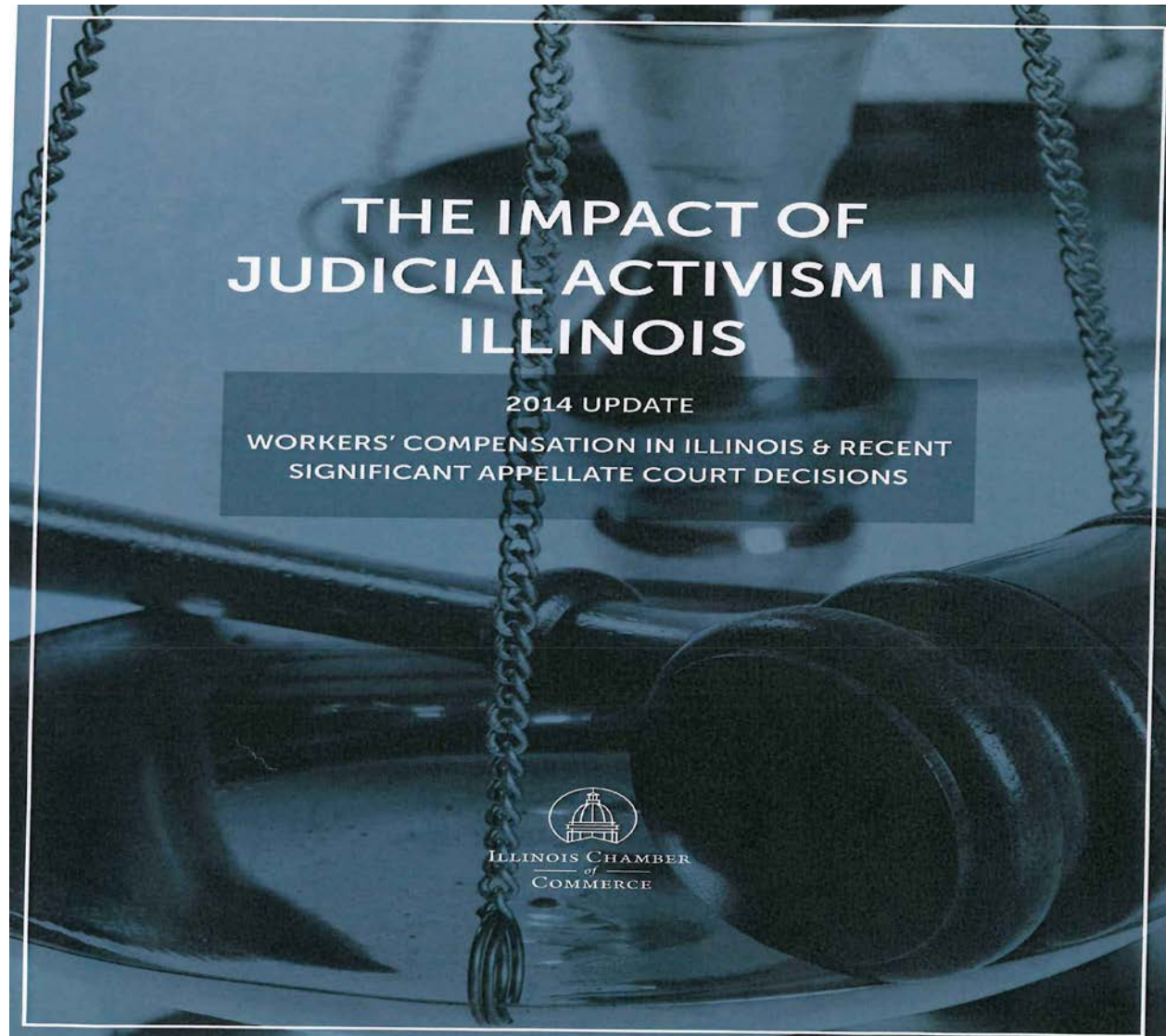
Source: Oregon Department of Consumer & Business Services "Workers' Compensation Rate Ranking"

BUT . . .

Someone Did Not Get The Memo!



“The Impact of Judicial Activism in Illinois”





What does the future hold?

Governor Rauner's Proposals for the “Illinois Turnaround”



- Causation: Standard should be raised from “any costs” to “major contributing costs”
- Traveling Employee: Tightens definition
- AMA Guidelines: Decisions may be based on AMA impairment rating alone
- Fee Schedule Reductions: Reduce fee schedule an additional 30% for all services except evaluation and management (office visits) and physical therapy (physical therapy, chiropractic visits and occupational therapy)

Issues of Specific Importance to Governmental Employers



- Volunteer Firemen and Policemen
- Jurors
- Average Weekly Wage
- Workers' Compensation and Collective Bargaining
 - Drug and alcohol testing
 - Light duty
- Public Employers Disability Act (PEDA)
- Public Safety Employee Benefits Act (PSEBA)
- Long Term Disability and Workers' Compensation

WHAT CAN WE DO ABOUT IT?

Make your voice known



News from the Commission



New Chairman!



- IWCC Statistics

- Number of filings:

- FY95 peak of \$72,000 filings
 - FY13 \$44,624 filings
 - 41% decrease in the number of workers' compensation claims filed since 1995



Arbitrators Whose Terms Expire 7/01/2015

- George Andros
- Maria Bocanegra
- Molly Dearing
- Stephen Friedman
- Gerald Granada
- Jessica Hegarty
- Jeffrey Huebsch
- Nancy Lindsay
- Peter O'Malley
- Maureen Pulia
- Ketki Steffen
- Ilonka Ulrich

A small inset image in the top right corner shows three business professionals in a meeting. One person is standing and pointing at a screen, while two others are seated and looking on.

ANY
QUESTIONS
?



For more information or to discuss your workers' compensation representation:

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ILLINOIS ZONE MAP



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