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The Injured Public Employee: Accidential Injuries in the Public Sector Workplace

by Arnold G. Rubin

I. Introduction

Police officers and firefighters are, perhaps, the most obvious examples of public employees who may sustain accidental injuries in the performance of their work-related duties. Benefits are available for these public employees under the Illinois Workers' Compensation Act, provided that the city for whom the employee works has a population of less than 200,000.[1] City of Chicago police officers and firefighters are excluded from this analysis.[2]

The Illinois Workers' Compensation Act generally provides benefits for an injured worker in three specific areas:

1. Medical treatment, including all aspects of physical rehabilitation, and vocational rehabilitation;[3]
2. Payment of temporary total disability benefits;[4]
3. Payment for the permanent disability sustained by the worker. (Recent amendments to the Act have expanded these benefits).[5]

An injured public employee may also be entitled to benefits available under the applicable Pension Code,[6] the Public Employee Disability Act,[7] or the Public Safety Employee Benefits Act.[8] A determination as to whether these "other" benefits may be available should be considered by the public employee, his or her attorney, and the employer in connection with the workers' compensation claim. The failure to take into consideration these potentially valuable benefits made specifically available to public employees could have a detrimental economic effect upon the worker.

This article will contrast the benefits available to private sector employees and public sector employees who sustain work-related injuries, using the three general categories of benefits described above (medical, temporary total disability, and permanency). Under each category, the additional, or alternative, benefits that may be available to the public employee will be analyzed. The public employee's economic security will not be safeguarded unless due consideration is given to *all* available benefits following a work-related injury, not just those available under the Illinois Workers' Compensation Act.

II. Medical Benefits

When public employees sustain work-related injuries, they are entitled, generally, to payment for medical care under the provisions of the Illinois Workers' Compensation Act, just as an employee working in the private sector. There is no distinction between the public sector and private sector in this analysis. The benefits afforded to injured workers under the Illinois Workers' Compensation Act are covered under Sections 8(a)[9] and 8.2.[10] Section 8.2 represents significant changes to the Workers' Compensation Act, which took effect on February 1, 2006.

Section 8(a) of the Illinois Workers' Compensation Act provides that the employer must pay for all "necessary medical expenses."[11] The medical expenses include necessary first aid, medical, surgical and hospital services that are reasonably required to cure or relieve the injured employee from the effects of the accidental injury. Payment for medical expenses under the Illinois Workers' Compensation Act also includes payment for physical, mental and vocational rehabilitation.[12]

There are certain limitations with respect to the medical care covered under Section 8(a). Unquestionably, all first aid and emergency treatment must be paid for by the employer. In addition to first aid and emergency treatment, the employer must pay for all medical services provided by the physician, surgeon or hospital initially chosen by the employee, or by any other physician, consultant, expert or other provider of services recommended by the initial service provider, or any subsequent provider of medical services in the chain of referrals from the initial provider. In

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addition, the employer is responsible for payment for all medical services for any treatment provided by a second provider of medical services in a chain of referrals from the second service provider.[13]

Significant changes were recently made to the Workers' Compensation Act. Specifically, Section 8.2 now provides for a medical fee schedule as it relates to payment for medical services. Under this change to the Act, for treatment rendered on and after February 1, 2006, the maximum allowable payment shall be 90 percent of the 80th percentile of charges and fees as determined by the Workers' Compensation Commission, utilizing various sources of information provided by employers' and insurers' national databases. This change also applies, implicitly, to accidents occurring before February 1, 2006.[14]

Further, section 8.2(e) now prohibits balance billing. Balance billing is the well-known practice of medical providers sending bills and threatening collection actions against employees for unpaid balances for medical treatment in connection with work-related injuries. Section 8.2(e) now prohibits a provider from billing or otherwise attempting to recover from the employee the difference between the provider's charge and the amount paid by the employer or the insurer on a compensable injury.[15]

Generally speaking, the employee working in either the public or private sector must closely safeguard his or her medical rights, in connection with a pending workers' compensation claim. Unless provisions are made in the settlement contract for future medical rights, or unless the case has proceeded to hearing in order to keep open the employee's medical rights under Section 8(a) of the Act, the employee may not be entitled to payment for medical services for treatment for the work-related injuries upon settlement of the case.[16] Therefore, an employee must take into consideration the necessity of future medical rights, when making a final decision relating to settlement of a workers' compensation claim. If the case is settled, and the worker still requires treatment, the group medical insurance policy will not necessarily provide coverage.

III. Temporary Total Disability

A worker who sustains an injury at work and becomes unable to perform his or her job duties may be determined to be temporarily totally disabled from work. Normally, the worker is under active medical treatment for the injuries suffered at work and has not been released to return to work activities. The injured employee is entitled to payment of weekly compensation benefits. There is a difference between benefits available to the private sector employee and the public sector employee during the first year that the employee is disabled.

A. Temporary Total Disability Benefits for the Injured Private Sector Worker

Compensation for temporary total disability is one type of interim benefit available to injured workers under the provisions of the Workers' Compensation Act.[17] "Temporary total disability" has been defined as "[t]he period immediately after the accident during which the injured employee is totally incapacitated for work by reason of the illness attending the injury. It might be described as the period of the healing process."[18] Another definition of temporary total disability, or incapacity, is the period of time that a worker is not able to work. A worker is "physically able to work when he can do so without endangering his life or health."[19] In a recent decision, the Illinois Appellate Court focused the analysis of temporary total disability, stating that "the dispositive question is whether the employee's condition had stabilized."[20] The court further stated that, "the duration of temporary total disability is not defined by whether an employee can find a job somewhere else."[21]

An injured worker who is determined to be temporarily totally disabled is entitled to be paid temporary total disability benefits pursuant to Section 8(b) of the Illinois Workers' Compensation Act.[22] Section 8(b) was recently amended to increase the minimum amount of temporary total disability benefits provided to an injured worker. Section 8(b) also provides that the compensation rate

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for temporary total incapacity shall be equal to 66 2/3 percent of the employee's average weekly wage computed in accordance with Section 10 of the Act.[23]

The minimum benefit now available is not less than 66 2/3 percent of the federal minimum wage under the Fair Labor Standards Act or the Illinois minimum wage under the minimum wage law, whichever is more, multiplied by 40 hours.[24] There are certain maximum benefits available to injured workers.[25] The current maximum benefits for injuries occurring between July 15, 2006, and January 14, 2007 is $1,120.87.[26]

B. Temporary Total Disability Benefits for Public Employees (PEDA)

For the public sector employee, there is a special statutory scheme that provides for payment of benefits for up to one year following a work-related injury. The Public Employee Disability Act (PEDA)[27] provides for disability benefits for "an eligible employee," which includes full-time law enforcement officers or full-time firefighters. PEDA provides that, if the eligible employee suffers an injury in the line of duty causing that employee to be unable to perform his or her duties, the employing public entity shall continue to pay the employee on the same basis as before the injury, with no deduction from sick leave, vacation, or other service credits. Payment is limited to "one year" for the same injury.[28] Thus, the public employee is, essentially, entitled to salary continuation for up to one year after the injury. If the worker remains disabled from returning to work after one year, it is quite clear that the injured worker would then be entitled to receive temporary total disability benefits.[29]

In the recent case of *Albee v. City of Bloomington*,[30] the Illinois Appellate Court interpreted Section 1(b) of the PEDA as not requiring that the one-year period of incapacity be continuous. The court explained that "it is certainly possible that a person can be incapacitated for a period of time, return to work, and then be incapacitated for a subsequent period."[31] The court reasoned that it would be contrary to the purposes of the Public Employees Disability Act if an officer were penalized for making a good faith effort to return to work.

IV. Permanency Benefits

This section of the article will analyze the permanency benefits available to public sector and private sector employees. Employees must carefully analyze the type of applicable permanency benefits when it becomes likely that they will not be able to return to their previous employment, or in other words, when the injury becomes "career-ending."

A. Benefits Available to Injured Workers in the Private Sector under the Illinois Workers' Compensation Act

An injured worker is entitled to permanent disability payments for either permanent partial disability or permanent total disability under the Illinois Workers' Compensation Act. These benefits are described below:

1. *Specific Losses*

Section 8(e) of the Workers' Compensation Act provides what may be referred to as scheduled or specific losses.[32] For example, an employee who sustains an injury to a hand, after February 1, 2006, is entitled to 205 weeks of compensation at the appropriate permanent partial disability rate.[33] The total value of the hand or any other body part listed under the schedule assumes 100 percent disability. If the resulting injury causes a 50 percent loss of the body part, then 50 percent of the total amount of weeks would be awarded at the appropriate permanent partial disability rate.[34]

2. *Disfigurement*

In addition to specific loss recoveries, injured workers are entitled to compensation for serious disfigurement under Section 8(c) of the Act. To be entitled to compensation under this section of the Act, there must be serious and permanent disfigurement to the hand, head, face, neck, arm, leg below the knee, or chest above the axillary line. Prior to July 20, 2005, the maximum amount of disfigurement benefit available to an injured worker was 150 weeks. As a result of the amendments, for the periods from July 20, 2005 through November 15, 2005, or after February 1, 2006, disfigurement may be awarded up to 162 weeks.[35]

3. *"Person as a Whole" and Wage Loss Claims*

Another form of recovery is provided for in paragraph 8(d) of the Workers' Compensation Act.[36] Section 8(d)(1)[37] is normally referred to as the "wage loss" section of the Act. If an employee has established that he or she is permanently impaired from returning to the employee's usual and customary occupation, and has sustained a reduced earning capacity as a result of the work-related injuries, then compensation may be awarded based on 66 2/3 percent of the difference between the average amount the employee earned or would be able to currently earn in his or her usual and customary occupation before the accident and the average amount the employee is earning or is able to earn in some suitable employment after the accident. Amendments to the Workers' Compensation Act have increased the maximum amount awarded under Section 8(d)(1).[38] The award under Section 8(d)(1) results in payment of

weekly benefits for the "duration of the disability."[39] However, the amendment of Section 8(d)(1) has also been modified so as to provide employers more rights to review awards.[40]

Section 8(d) of the Act also provides compensation under Section 8(d)(2) which has been referred to as loss of use to the person as a whole.[41] Normally, injuries involving the head, neck or back are covered under Section 8(d)(2). Fractured vertebrae, skull fractures, facial fractures, injuries to kidneys, spleen or lung, are also provided specific coverage under Section 8(d)(2). The "person" is valued at 500 weeks. Percentages of disability are computed based on the value of 500 weeks. Thus 10 percent loss under Section 8(d)(2) amounts to fifty weeks at the applicable permanency rate.[42] This section of the Act also covers injuries that may disable the employee from pursuing other suitable occupations, or which have otherwise resulted in physical impairment. In addition, this section covers injuries which partially incapacitate the worker from pursuing the duties of his or her usual and customary line of employment, but do not result in an impairment of earning capacity.[43] Even if the employee has sustained a wage loss, the employee may elect coverage under 8(d)(2) if the employee waives recovery under Section 8(d)(1).[44] This is a particularly important consideration for public employees.[45]

4. *Permanent Total Disability*

Finally, the Workers' Compensation Act provides for permanent total disability benefits. A specific permanent total disability award is provided under Section 8(e)(18)[46] of the Act, which specifically sets forth that, in the case of the complete loss of use of both hands, arms, feet, legs, or any two of them, the injured worker is considered totally disabled from work. The worker is entitled to payment of benefits equivalent to 66 2/3 percent of the employee's average weekly wage.[47] Section 8(f)[48] also provides for payment of permanent total disability benefits when it is determined that a person is wholly and permanently incapable of work.[49]

If a worker is awarded permanent total disability, the benefits are to continue for as long as the employee remains permanently totally disabled from work.[50] In addition, once it is determined by the Workers' Compensation Commission that the employee is entitled to permanent total disability benefits, the employee also becomes entitled to receive an increase in benefits pursuant to the Rate Adjustment Fund provided for under the Act. The Rate Adjustment Fund provides for payments to be made on July 15th of the second year next following the date of entry of the award. The Rate Adjustment Fund does not apply where there has been a lump sum settlement of the workers' compensation claim.[51]

5. *Summary of Permanency Benefits*

When work-related injuries are sustained by the employee working in the private sector, the main concern for the worker is to obtain the best type of recovery available under one of the categories set forth above. For instance, depending on the circumstances, an injury to a specific part of the body might be better compensated for under Section 8(d)(1) of the Act or Section 8(d)(2) of the Act. If, however, an injured worker sustains a loss of earning capacity, but the loss of earnings is minimal, the worker may obtain a better recovery under the specific loss sections of the Act, or under loss of use to the person as a whole.

Special consideration, as to the choice of theory, must be given if the injury is sustained to an employee such as a police officer or firefighter working in the public sector. This consideration is mandated when the injury is "career-ending." Otherwise, the public employee may sustain economic harm.

B. Benefits Available to the Injured Worker in the Public Sector

A police officer or firefighter is entitled to the same type of permanency benefits under the Act as an injured private sector employee.[52] When the work-related injuries do not result in permanent restrictions or total disability preventing the police or firefighters from continuing in their occupations, then the decision as to how to choose the best recovery of benefits is similar to that set forth above relating to recovery for a specific loss, disfigurement, or loss of use under Section 8(d)(2) of the Act.

However, the analysis completely changes when work restrictions or total disability prevents police officers or firefighters from continuing in their occupations. This is where an analysis of benefits available to the public sector employee must include a review of those benefits available under the applicable Pension Code.

1. *Duty Disability Pension*

For the public employee, special consideration must be given to benefits available under the applicable Pension Code. The Illinois Pension Code applicable for police officers injured in the line of duty entitles the officer to a disability retirement pension equal to 65 percent of the salary attached to the rank on the police force held by the officer at the date of suspension of duty or retirement.[53] The police officer is considered to be on duty while on any assignment approved by the chief of the police department of the municipality he or she serves whether the assignment is within or outside of the municipality.[54] The police officer must prove that he or she is physically or mentally disabled from service in the

police department.[55]

Similarly, firefighters are entitled to disability pension benefits. If the firefighter is found to be physically or mentally disabled from service in the fire department, the firefighter shall be entitled to a disability pension equal to 65 percent of the monthly salary attached to the rank held by him or her in the fire department at the date he or she is removed from the department payroll.[56] The firefighter will receive this benefit for as long as he or she or his or her survivors live.[57]

a. The Medical Evidence Requirement

The duty disability pension must be applied for once it is determined that the employee will not be able to return to work in his or her occupation as a police officer or firefighter. Section 3-115 of the Pension Code requires the employee to obtain certification of the disability from three practicing physicians selected by the pension board. The pension board may also require other evidence of disability.[58]

The three board-selected physicians certification requirement was recently analyzed by the Illinois Appellate Court in *Turcol v. Pension Board of Trustees Matteson Police Pension Fund*.[59] A police officer had filed an application for line of duty disability pension benefits which was denied. One of the reasons for the denial of the application was that only two of the three physicians elected by the board certified that the officer was disabled. The decision of the pension board was affirmed by the circuit court that had reviewed the pension board's finding.

In *Turcol*, the injury to the employee involved his right shoulder. There was a recommendation for the police officer to undergo surgery for the shoulder. The police officer decided not to proceed with the surgery. The police officer's treating physician and two of the three doctors selected by the pension board opined that he was disabled and unable to return to his job as a police officer. The third board-selected doctor determined that the police officer was neither permanently disabled nor prevented him from returning to police duties.

An evidence deposition was taken of the physician who opined that the police officer was not disabled. The deposition revealed that the physician did not have all of the police officer's medical records when he evaluated him. In addition, the physician revealed a bias in that he had evaluated six or seven other police officers as requested by the same law firm for the pension board, but could not remember rendering an opinion in their favor for disability. Further criticism of the physician included that his opinions were "conjectural" and that he "belittled" the opinions of the police officer's treating physician.[60]

The appellate court refused to reverse the decision of the pension board denying the police officer duty disability pension benefits based on the cross-examination in the evidence deposition of the examining doctor. The appellate court would not "re-weigh the credibility determination made by the board."[61] Accordingly, the appellate court affirmed the decision of the pension board denying pension benefits. The appellate court did not address the issue as to whether the certification requirements of Section 3-115 were constitutional.[62]

b. The "Act of Duty" Requirement

The "act of duty" section of the Pension Code[63] requires that the act of a police officer involve special risk not ordinarily assumed by a citizen in the ordinary walks of life. However, the act of duty need not be a high-risk action; an act of duty may include pedaling a bicycle. In *Alm v. Lincolnshire Police Pension Board*,[64] the police officer sustained an injury from riding his bicycle. The appellate court determined that the police officer's pedaling of the bicycle was an act of duty because the officer faced risks not ordinarily encountered by civilians. Specifically, the court pointed out that the police officer was required to ride his bicycle at night over varying terrain, carried a significant amount of additional weight and had to look after his personal safety while performing the patrol duties. The court further explained that the police officer faced the risk of falls, collisions, and "dangerous encounters with the unsavory elements of society."[65]

c. Reduction of Benefits-Impact of the Pension Code on Workers' Compensation Benefits

Assuming that the injured police officer or firefighter establishes, before the pension board, entitlement to duty disability pension benefits, special consideration must be given to the effect of the disability pension upon the workers' compensation claim. This is important because of the sections of the Pension Code that define "reduction of benefits."

For example, assume that the police officer or firefighter sustained a back injury "in the line of duty." Assume further that the work-related injury resulted in herniated discs at two levels, which required the employee to undergo a surgical fusion of the lumbar spine. Thereafter, at the conclusion of the medical treatment, the employee is medically deemed unable to return to work as a police officer or firefighter. At this point, the employee must decide what specific type of recovery to pursue under the Illinois Workers' Compensation Act, when taking into consideration the possibility that the worker may also be entitled to disability pension benefits.

The clear answer to this question is provided for under additional sections of the Pension Code for police officers and firefighters. Under each Pension Code, if the police officer or

firefighter becomes entitled to a disability pension, and is also entitled to benefits under the Workers' Compensation Act for the same injury, the duty disability benefit may be reduced.[66] However, the offset provisions further provide that there will be no reduction for payments made for scheduled losses for the loss or permanent and complete or permanent and partial loss of use of any bodily member or the body taken as a whole. Thus, it is quite clear that if the injured police officer or firefighter decides to first seek recovery for either a permanent total disability, or wage loss recovery under Section 8(d)(1) of the Workers' Compensation Act, those benefits will reduce the amount to be paid to the injured worker under the respective disability pension. The failure to properly coordinate these benefits may have a severe negative economic impact upon the injured worker.

Prior to 1997, the Pension Codes did not provide any exceptions for set-off in connection with recoveries under the Illinois Workers' Compensation Act. In *Village of Winnetka v. Industrial Commission*,[67] the Illinois Appellate Court considered the issue whether a firefighter was barred from proceeding in his workers' compensation claim against the Village which had enacted an ordinance providing for payment of medical care and hospital expenses in the case of an accident resulting in an injury or death. The appellate court found that the village's failure to provide, in the ordinance, for payment of allowances of money did not cause the village to lose the Pension Code bar. The injured fireman was precluded from pursuing a claim under the Illinois Workers' Compensation Act.[68]

The Pension Code was amended in 1997 in response to the *Village of Winnetka* case. The amendment to the Pension Code expressly allowed injured firefighters and police officers to pursue workers' compensation benefits, even though their employers had an active ordinance pursuant to Section 306 of the Pension Code.[69]

The obvious strategy, then, for the police officer or firefighter is to pursue the line of duty disability pension before deciding to choose a theory of recovery for permanency benefits under the Illinois Workers' Compensation Act. If the application for the disability pension is approved, then the workers' compensation claim may be later resolved by settlement or hearing, taking into consideration that benefits should be sought for a scheduled loss for a bodily member or for the body taken as a whole under Section 8(d)(2) of the Workers Compensation Act. In this way, the benefits available for the police officer or fireman will be properly coordinated under both the Illinois Workers' Compensation Act and the applicable Pension Code.

2. *Health Insurance Benefits Available to Injured Employees Receiving Disability Pension*

Section 10 of the Public Safety Employee Benefits Act provides that health coverage benefits will be made available for employees who sustain a catastrophic injury under specific circumstances.[70] The type of employees who are entitled to this benefit include full-time law enforcement, correctional probation officers, or firefighters. For instance, a police officer would be entitled to continue in a municipality's group health insurance policy if awarded a disability pension. For catastrophic injuries to the injured police officer where the disability pension is awarded, the employer is required to pay the entire premium of the employer's health insurance plan for the injured employee, the injured employee's spouse, and for each dependent child of the injured employee until that child reaches the age of majority, or until the end of the calendar year in which the child reaches the age of twenty-five. In addition, increases are regularly provided for in connection with the disability pension benefits. Catastrophic injury under the Public Safety Employee Benefits Act has been interpreted by the courts as including any injury that prevents the employee from performing his or her job duties, which would entitle that employee to the disability pension. This is a significantly important benefit that would be available to the injured employee and his or her family.

All employees who are entitled to disability pension benefits necessarily meet the requirement of "catastrophic injury." In *Krohe v. City of Bloomington*,[71] the Illinois Supreme Court found that a "catastrophic injury" is synonymous with an injury resulting in a line of duty disability under the Pension Code. There is no need for further analysis of definition of a catastrophic-type injury. The Supreme Court relied upon legislative history in order to make this determination.

This particular holding is contrary to that of the earlier appellate court in the decision of *Villareal v. Village of Schaumburg*.[72] In that case, a police officer was operating a contracting business after his work-related disability retirement pension was approved. Under the special facts of that case, it was determined that he did not meet the "definition" of catastrophic injury; therefore, he was not entitled to payment of lifetime health insurance benefits.

The benefit provided to the injured employee under the Public Safety Employee Benefits Act relates to health coverage. The Public Safety Employee Benefits Act does not specifically state that the health insurance plan must provide coverage for a work-related injury. If the worker decides to pursue settlement of his or her workers' compensation claim after

obtaining a disability pension, consideration must first be given to the employee's future medical treatment. The employee must understand that it is quite possible that under the particular employer's health insurance plan, there may not be any coverage for treatment for the person's work-related injury based upon a "pre-existing condition." This must be verified since "exclusions" may vary among different group policies.

If the injured employee is of the opinion that future medical care will be required, then a decision needs to be made as to whether the workers' compensation case should proceed to hearing for purpose of obtaining an award from an arbitrator. In this way, the injured worker will maintain his medical rights under Section 8(a) of the Workers' Compensation Act.[73] The injured worker must distinguish between the type of coverage available under the employer's health insurance plan and those medical benefits available under Section 8(a) of the Workers' Compensation Act.

V. Conclusion

This article has explored the interrelationship between specific benefits under Illinois Pension Codes and PEDA for police officers and fire fighters with benefits under the Illinois Workers' Compensation Act. It is quite clear that in two specific areas, both the employee and employer must consider the impact of each applicable statute. First, PEDA benefits, as compared to temporary total disability benefits, are available during the first year that the worker is disabled from work. Second, the injured public employee, in a case involving a career-ending injury must choose the appropriate theory of recovery for the workers' compensation claim in light of the potential off-set/reduction of the injured employee's disability pension benefits. The injured worker may sustain a significant economic loss if the correct theory of recovery is not pursued at the Workers' Compensation Commission in light of available disability pension benefits. It is quite clear that, when benefits are available under the Illinois Workers' Compensation Act and may also be available under the Pension Code, the worker should pursue benefits under the Pension Code first, and leave the workers' compensation claim pending at the Illinois Workers' Compensation Commission, until there is a final determination from the pension board. This should assure the best recovery for the worker. ♦

** Grateful recognition is given to my partner, Cameron B. Clark, whose research and editing aided in the preparation of this article.*

Notes

1. 820 ILCS 305/1(b)1.
2. However, there is a provision allowing for coverage for disfigurement under §8(c), 820 ILCS 305/8(c); this would allow coverage for burn injuries sustained by City of Chicago firefighters.
3. 820 ILCS 305/8(a).
4. 820 ILCS 305/8(b).
5. 820 ILCS 305/8(d); 820 ILCS 305/8(e); 820 ILCS 305/8(f). For an excellent summary and analysis of the recent changes to the Act, see Markham M. Jeep, *What's New in the Workers' Compensation Reform Act of 2005*, 94 ILL. B.J. 298 (2006).
6. *See, e.g.*, 40 ILCS 5/3 (Pension Code for police officers employed by municipalities with populations of 500,000 or less); 40 ILCS 5/4 (firefighters employed by municipalities with populations of 500,000 or less); park 40 ILCS 5/12 (employees for cities with populations over 500,000); 40 ILCS 5/13 (sanitary district employees); 40 ICS 5/17-117.1 (public school teachers for cities with populations over 500,000).
7. 5 ILCS 345/1.
8. 820 ILCS 320/10.
9. 820 ILCS 305/8(a).
10. 820 ILCS 305/8.2.
11. 820 ILCS 305/8(a).
12. *Id*.
13. *Id*.
14. 820 ILCS 305/8.2.
15. 820 ILCS 305/8.2(e). (Also applies to denied claims where the injured employee has informed the medical provider that claim is on file at the Illinois Workers' Compensation Commission); 820 ILCS 305/8.2(e-5).
16. *Efengee Elec. Supply Co. v. Indus. Comm'n*, 36 Ill. 2d 450, 223 N.E.2d 135 (1967). The court stated that "the intent of section 8(a) is to make the employer's liability continuous," as it relates to payment for medical services. *Id.* at 453, 223 N.E.2d at 136. As a practical matter, most settlement contracts require that the worker waive future section 8(a) rights.
17. Payments begin after a three working day waiting period and continue for as long as the disability lasts; if the period of temporary total incapacity continues for 14 days or more, compensation begins on the day after the accident. 820 ILCS 305/8(b).
18. *Mt. Olive Coal Co. v. Indus. Comm'n*, 295 Ill. 429, 431, 129 N.E. 103, 104 (1920).
19. *W. Cartridge Co. v. Indus. Comm'n*, 357 Ill. 29, 33, 191 N.E. 213, 214 (1934).
20. *Freeman United Coal Mining Co. v. Indus. Comm'n*, 318 Ill.App.3d 170, 175, 741 N.E.2d 1144,1148 (5th Dist. 2000).
21. *Id.* at 179, 741 N.E.2d at 151.
22. 820 ILCS 305/8(b).
23. 820 ILCS 305/10. Generally speaking, Section 10 provides that average weekly wage means the actual earnings of the employee in the employment in which he was working during the 52 weeks preceding the date of injury.
24. 820 ILCS 305/8(b)(1).
25. These benefits are increased periodically. 820 ILCS 305/8(b)(4).
26. *See id*. (showing how to calculate maximum benefits).
27. 5 ILCS 345/1.
28. 5 ILCS 345/1(b).
29. *See supra* notes 21-24 and accompanying text.
30. 365 Ill.App.3d 526, 849 N.E.2d 1094, (4th Dist. 2006).
31. *Id.* at 529, 849 N.E.2d at 1097.
32. 820 ILCS 305/8(e).
33. As a result of recent amendments to the Act, the amount of compensation for specific loss, has been increased for accidents after February 1, 2006 and occurring between July 20, 2005 and November 15, 2005. 820 ILCS 305/8(e).
34. 820 ILCS 305/8(b)(2.1). The compensation rate for specific loss is computed at 60% of the average weekly wage, with maximum benefits set forth under 820 ILCS 305/8(b)(4).
35. 820 ILCS 305/8(c).
36 .820 ILCS 305/8(d).
37. 820 ILCS 305/8(d)(1).
38. 820 ILCS 305/8(b)(4). The maximum benefit, for injuries after February 1, 2006, has been increased to 100% of the state's average weekly wage.
39. 820 ILCS 305/8(d)(1).
40. 820 ILCS 305/19(h). The time period under 19(h) for 8(d)(1) awards has been increased to 60 months.
41. 820 ILCS 305/8(d)(2).
42. The permanency rate for section 8(d)(2) is based on 60% of the employee's average weekly wage with a maximum benefit and minimum benefit set by the Act. 820 ILCS 305/8(d)(2); 820 ILCS 305/8(b)(4).
43. 820 ILCS 305/8(d)(2).
44. *Id*.
45. See text accompanying notes. 65-68 *infra*.

46. 820 ILCS 305/8(e)(18).
47. 820 ILCS 305/8(b)(4).
48. 820 ILCS 305/8(f).
49. In addition, an employee may establish a permanent total disability by applying the "odd-lot" theory. See *ABBC-E Services v. Indus. Comm'n*, 316 Ill.App.3d 745, 737 N.E.2d 682 (5th Dist. 2000).
50. Awards for permanent total may be reviewed before the Commission to determine if the award should be reduced or terminated. 820 ILCS 305/8(f).
51. *Id*.
52. See *supra* notes 31-50, and accompanying text.
53. 40 ILCS 5/3-114.1.
54. *Id*.
55. *Id*.
56. 40 ILCS 5/4-110.
57. 49 ILCS 5/4-114.
58. 40 ILCS 5/3-115.
59. 359 Ill.App.3d. 795, 834 N.E.2d 490 (1st Dist. 2005).
60. *Id*. at 799-801, 834 N.E.2d at 495-96.
61. *Id*. at 801, 834 N.E.2d at 496.
62. *Id*. at 802, 834 N.E.2d at 497. The three doctor certification requirement of Section 3-115 of the Pension Code provides, in part, that a disability pension will not be paid unless certificates of disability are filed with the pension board by three practicing physicians selected by the pension board. The constitutionality of Section 3-115 was recently addressed by the Illinois Supreme Court in *Marconi v. Chicago Heights Board* (Docket # 101418, Illinois Supreme Court, Filed October 19, 2006). In *Marconi v. Chicago Heights Police Pension Board*, 361 Ill.App.3d 1, 836 N.E.2d 705 (1st Dist. 2005), the appellate court held that the statutory requirement of three practicing physicians to provide certification that a police officer was disabled was unconstitutional as applied to the application filed by the police officer. The *Marconi* case presented a fact situation which allowed the supreme court to consider the constitutionality of the statute. According to the supreme court in *Turcol*, it is proper for a reviewing court to engage in Section 3-115 analysis only after deciding that the pension board erred in its determination that the officer failed to prove his or her disability. *Turcol v. Pension Bd.*, 214 Ill.2d 521, 524, 828 N.E.2d 277, 278 (2005). The *Marconi* case met the supreme court requirement for evaluating the constitutionality of the statute. According to the appellate court in *Marconi*, the pension board's decision to deny the disability was clearly erroneous. Thus, the decision as to whether the pension board's ruling should be affirmed turns on the constitutionality of Section 3-115. However, the supreme court reversed the appellate court and vacated that portion of the appellate court's opinion holding section 3-115 of the Pension Code unconstitutional. The supreme court upheld the findings of the pension board based on the evidence presented at the pension hearing. As a result, the supreme court declined to actually address the constitutionality of section 3-115.
63. 40 ILCS 5/3-114.1.
64. 352 Ill.App.3d 595, 816 N.E.2d 389 (2d Dist. 2004).
65. *Id*. at 601, 816 N.E.2d at 394. See also *Mabie v. Village of Schaumburg*, 364 Ill.App.3d 756 847 N.E.2d 796 (1st Dist. 2006.).
66. For police officers, see 40 ILCS 5/3-114.5(a); For firefighters, see 40 ILCS 5/4-114.2.
67. 232 Ill.App.3d 351, 597 N.E.2d 630 (1st Dist. 1992).
68. *Id*. at 357, 597 N.E.2d at 634.
69. 40 ILCS 5/22-306.
70. 820 ILCS 320/10. Section B provides for the specific circumstances which must be met in order to allow for payment of the premiums.
71. 204 Ill.2d 392, 789 N.E.2d 1211 (2003).
72. 325 Ill.App.3d 1157, 759 N.E.2d 76 (1st Dist. 2001).
73. 820 ILCS 320/8(a). ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes, the First Amendment, and the Family Medical Leave Act.

IELRA Developments

Discrimination

In *Abuzir v. Chicago Board of Education*, Case No. 2004-CA-0061-C (IELRB 2006), the IELRB held that the Chicago Board of Education (CBE) did not commit an unfair labor practice under IELRA sections 14(a)(1) and 14(a)(3) by suspending a teacher engaged in union activity. The IELRB reasoned that the suspension, despite its suspect timing, was not an unfair labor practice because it was not motivated by anti-union animus.

Yusuf Abuzir, a tenured Chicago elementary school teacher, filed an unfair labor practice charge with the IELRB, claiming he was suspended three times for receiving assistance from the Chicago Teachers Union in disciplinary matters. The CBE responded that Abuzir was suspended for inappropriate conduct towards supervisors and students. The IELRB Executive Director dismissed Abuzir's unfair labor practice charge.

The IELRB affirmed the dismissal, relying on its three-part test to determine whether an employer's conduct violated sections 14(a)(1) and 14(a)(3) of the IELRA. The charging party must prove that: 1) he engaged in union activities; 2) the employer was aware of those activities; and 3) the employer, motivated at least in part by anti-union animus, took adverse action against the charging party to encourage or discourage union membership or support. *Board of Education, City of Peoria School District No. 150 v. IELRB*, 318 Ill. App. 3d. 144, 741 N.E.2d 690 (4th Dist. 2000). Factors demonstrating anti-union animus include expressions of hostility toward unionization, timing, targeting of union supporters, inconsistencies between the employer's reason for the adverse action and reason for other actions, and shifting explanations for the adverse action. *City of Burbank v. ISLRB*, 128 Ill. 2d. 335, 538 N.E.2d 1146 (1989).

The IELRB found that Abuzir engaged in protected activity when he received union assistance, that the CBE knew about the assistance, and that the CBE clearly took adverse action against Abuzir when it suspended him three times. However, the IELRB held that none of the suspensions were motivated by anti-union animus, because only the timing of the suspensions were suspect, and timing alone is not sufficient to establish a *prima facie* unfair labor practice case. *Hardin County Education Association v. IELRB*, 174 Ill. App. 3d. 168, 528

N.E.2d 737 (4th Dist. 1988).

The IELRB also held that it would not consider portions of Abuzir's unfair labor practice charge that were not timely. Under section 15 of the IELRA, the charging party has six months from the date he becomes aware or should have become aware of the unfair labor practice to file a timely charge. *Jones v. IELRB*, 272 Ill. App. 3d 612, 650 N.E.2d 1092 (1st Dist. 1995). Because parts of Abuzir's charge alleged adverse action outside the six-month period, those parts were not considered in the decision.

In *Tropp v. Illinois State Board of Education*, Case. No. 2006-CA-0008-C (IELRB, 2006), the IELRB held that the Illinois State Board of Education (ISBE) did not commit an unfair labor practice under IELRA sections 14(a)(1) and 14(a)(3) by terminating a special education consultant engaged in union activity, in part because the ISBE successfully rebutted the teacher's disparate treatment claim.

Agnes Tropp, a special education consultant for the ISBE, was suspended four times and then terminated for failing to produce quality written work. After termination, Tropp filed an unfair labor practice charge, claiming she was fired for filing grievances through her union eight months earlier. The IELRB Executive Director dismissed Tropp's unfair labor practice charge.

The IELRB affirmed the dismissal, relying on *Brown County Community Unit School District No. 1*, 2 PERI 1096 (IELRB 1986) which stated that the Executive Director must determine: 1) whether the charging party established a *prima facie* violation; and 2) whether the respondent's evidence rebutted the charging party's claim. The Executive Director may not, however, make any credibility judgments of either side's witnesses when making this determination. *Id.*

The IELRB first held that Tropp had not established a *prima facie* case, because she had not shown that her termination was motivated by anti-union animus. Even if Tropp had established a *prima facie* case, the IELRB further held that the ISBE successfully rebutted Tropp's disparate treatment claim by showing that two consultants not engaged in union activity were terminated, and by showing that other reprimanded consultants who remained employed were more effective than Tropp. Thus, the ISBE did not give preferential treatment to employees who were not active in the union.

The IELRB also rejected Tropp's second claim that the Executive Director's investigation was inadequate because the Director did not use his subpoena power and did not recite all details of Tropp's documents in the Recommended Decision and Order. Relying on *Lincoln-Way Area Special Education Joint Agreement District 843*, 21 PERI 163, (IELRB 2005) the IELRB explained that the Executive Director has broad discretion in determining the scope of the unfair labor practice charge investigation. Applying this rule, the IELRB held that the Executive Director properly conducted the investigation by deciding which powers to invoke and by distilling what was relevant from Tropp's documents.

IPLRA Developments

Deferral to Arbitration

In *Alton Firefighters Association, IAFF Local 1255 and City of Alton*, No. S-CA-05-010 (ILRB State Panel 2006), the State Panel affirmed the decision and order of the executive director, dismissing an unfair labor practice charge against the City of Alton and deferring to the awards issued by the arbitrators.

In March 2004, the city of Alton terminated two employees. The Union grieved and arbitrated both terminations. In addition, it filed an unfair labor practice charge alleging that the terminations violated the IPLRA. Upon consideration by two separate arbitrators, the City of Alton was directed to reinstate each employee with full back pay but was not ordered to pay interest. The Executive Director then dismissed the unfair labor charge against the city and deferred to the awards issued by the arbitrators.

In affirming the decision of the Executive Director, the State Panel followed the National Labor Relation Board's *Spielberg* standard. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955). Under the *Spielberg* standard, the Board defers to an arbitration award where: (1) the arbitrator had been presented with and considered the unfair labor practices at issue; (2) the arbitration proceedings were regular and fair; (3) the parties agreed to be bound by the arbitration award; and (4) the arbitration award is not repugnant to the purposes of the Act.

The union argued that the Board should not defer to the arbitration award in this case because (1) neither arbitrator considered the unfair labor practice issue, partly because neither arbitrator considered how the combined effect of the discharges demonstrated animus and (2) the arbitrators' refusal to award interest on the backpay was repugnant to the purposes of the IPLRA. In response to the union's first argument, the Board found that even if the arbitrators' awards did not resolve the unfair labor practice charges, the arbitrators' decisions should be deferred to so long as the charges were considered. Because the transcripts from each arbitration proceeding reflected that the union raised the issues of the unfair labor practices charges, the Board found that both arbitrators did in fact have the opportunity to consider them. Regarding the union's second

argument, the Board held that deferring to the arbitration awards in this case would serve administrative efficiency, and that administrative efficiency is one of the important purposes of the Act. Thus, the Board found that deferral and dismissal were not repugnant to the purposes Act.

First Amendment Developments

Political Affiliation

In *Allen v. Martin*, 460 F.3d 939 (7th Cir. 2006), the U.S. Court of Appeals for the Seventh Circuit held that the Illinois Department of Transportation (IDOT) Bureau Chief of Accounting and Auditing could be terminated for political reasons without violating his First Amendment rights. James Allen was terminated from his position several months after Rod Blagojevich took office as governor of Illinois. The defense conceded that Allen was terminated for political affiliation.

Generally, the state may not terminate an employee because of the employee's political affiliation. However, under *Branti v. Finkel*, 445 U.S. 507 (1980), political loyalty may be demanded as a requirement of the job where the position involves making policy and the exercise of political judgment. The court evaluated Allen's position based on the position's established job description. It did so because the job description was written in 1985 and, thus, had not been recently changed in an effort to manipulate it for political purposes. Additionally, the court observed, that Allen's own description of his duties tracked those set forth in the job description.

The court found that the Bureau Chief of Accounting and Auditing had broad discretion and authority. He supervised four sections chiefs and a secretary and, through them, ninety-five other employees. He was responsible for directing audits, establishing procedures for fiscal control and informing management of problems in fiscal arrangements or expenditures. The court observed that effective performance of his functions was "of great political value" and had "great impact on the administration's public reputation." Furthermore, the Bureau Chief was responsible for responding to inquiries from legislators concerning expenditures in their districts. Consequently, the court concluded that political loyalty was an appropriate requirement for the job and that Allen's discharge based on political affiliation did not violate his right of free association.

The court also rejected Allen's claim that his discharge without a hearing violated his Fourteenth Amendment right to procedural due process. The court observed that the Illinois Personnel Code exempts IDOT's technical and engineering staff from its coverage. Allen's position was classified as a technical position. Consequently, the court held, Allen lacked a property right in his employment, and thus his discharge did not amount to a deprivation of property which would have required due process.

FMLA Developments

Sovereign Immunity

In *Toeller v. Wisconsin Department of Corrections*, 461 F.3d 871 (7th Cir. 2006), the U.S. Court of Appeals for the Seventh Circuit held that a state is immune from suit for money damages for violation of the Family Medical Leave Act's (FMLA's) guarantee of leave for an employee's own serious health condition, except possibly where the health condition is related to pregnancy. The FMLA guarantees covered employees up to twelve weeks of unpaid leave for the birth or adoption of a child; where needed to care for a child, spouse or parent who has a serious health condition; or for the employee's own serious health condition. 29 U.S.C. § 2612. In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court held that Congress validly abrogated the states' Eleventh Amendment sovereign immunity to suit for damages for violation of the FMLA's guarantee of leave to care for a family member with a serious health condition. However, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court held that Congress did not constitutionally abrogate states' immunity to suits for violation of Title I of the Americans with Disabilities Act's prohibition on discrimination in employment on the basis of disability. In *Toeller*, the court held that suits for violation of the "self care" provision of the FMLA are governed by *Garrett* rather than *Hibbs*.

Toeller was fired by the Wisconsin Department of Corrections three days after he returned from an FMLA-protected leave for his own medical condition. The purported reasons for his discharge were threatening another employee, insubordination and excessive absenteeism. Toeller sued alleging that the reasons were pretexts for a discharge that retaliated against him for exercising his FMLA rights. The Department moved to dismiss the claim as barred by the state's Eleventh Amendment sovereign immunity. The district court denied the motion but the Seventh Circuit reversed.

The Seventh Circuit observed that to abrogate a state's immunity, Congress must issue a clear statement of its intent to abrogate and must have the constitutional authority to abrogate. Relying on *Hibbs*, the court held that Congress had issued such a clear statement in the FMLA. The issue thus turned on whether Congress had

the constitutional authority to abrogate the state's immunity.

The court focused on Congress' authority under section 5 of the Fourteenth Amendment. The Court observed that in *Hibbs*, the Supreme Court relied on Congressional findings of pervasive sex discrimination in the administration of family leave programs by state governments. The *Hibbs* Court thus upheld the FMLA's provisions governing family leave as necessary to prevent sex discrimination and gender stereotyping. Classifications based on sex are subject to heightened scrutiny under the Fourteenth Amendment's Equal Protection Clause.

On the other hand, the court reasoned, with the possible exception of medical conditions related to pregnancy, Congress made no findings and had no evidence of sex discriminations with respect to short term personal medical needs that must be addressed by absence from work. Consequently, the court concluded, the self care provision of the FMLA was governed by *Garrett* rather than *Hibbs*. In so holding, the court relied on similar holdings in two other circuits. *Touvell v. Ohio Department of Mental Retardation and Developmental Disabilities*, 422 F.3d 392 (6th Cir.2005), *cert. denied*, 126 S.Ct. 1339 (2006); *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir. 2003). ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Hoobler, Jenny M. & Swanberg, Jennifer. THE ENEMY IS NOT US: UNEXPECTED WORKPLACE VIOLENCE TRENDS. *PUBLIC PERSONNEL MANAGEMENT*. Vol. 35, no. 3. Fall 2006. pp. 229-246.

The authors contend that workplace violence is the most serious security threat to American workers, and they examine the prevalence of workplace violence in the public sector. Unfortunately, the authors claim that ignorance about workplace violence still exists among employees and supervisors, and there have been very little reports on the effects of "zero tolerance" policies toward workplace violence. They explore this issue by studying the results of a survey from 900 employees of a Midwestern municipal government on different forms of workplace violence. They conclude that public service organizations need to pay closer attention to the "disturbing frequency of experiencing and observing violent episodes." While employees are well aware of potential consequences of such episodes, HR policies do not adequately address this issue.

Mitchell, Daniel J. "THEY WANT TO DESTROY ME": HOW CALIFORNIA'S FISCAL CRISIS BECAME A WAR ON "BIG GOVERNMENT UNIONS," *WORKING USA: THE JOURNAL OF LABOR AND SOCIETY*. Vol. 9, no. 1. March 2006. pp. 99-121.

The author illustrates how Governor Arnold Schwarzenegger of California sought to resolve the state's budget crisis and how his initiatives eventually became a battle against "big government unions." Union membership in California has traditionally been higher compared to other states, and over a half of California union members are in the public sector.When Governor Arnold Schwarzenegger attempted to solve the state's budget crisis by directly going to the state election, his action consequently resulted in unifying union members in private and public employment, who had not necessarily maintained a unified voice in the past. The author suggests possible causes of his unsuccessful initiatives which only antagonized state union workers.

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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