

## Editor's Remarks

This quarterly edition of the Ganan & Shapiro Workers' Compensation update contains a number of interesting articles involving recent court decisions as well as some observations regarding the Federal National Healthcare Initiative. Included in this edition you will find a Nevada Supreme Court case deciding whether a self-insured is an insurer or an insured, a clear definition by the Illinois Appellate Court regarding jurisdiction over an appeal when all statutory requirements are not adhered to within the 20 day period allowing for appeals, the obvious and potential effect of the National Healthcare Reform Act on workers' compensation claims, the role of control over an employee in a question of independent contractor versus employee as defined by the Illinois Appellate Court, and the most recent decision of the Illinois Appellate Court defining the calculation of wages in a wage differential claim that is more favorable to the employer with regards to the inclusion of overtime pay. I believe that this quarterly update addresses many of the important issues currently affecting the practice of workers' compensation defense in Illinois, and as always we welcome any inquiries regarding the articles in our update as well as any suggestions for future editions.

*Cliff Ganan*  
Editor-in-Chief

### Self-Insured = "Insured", Not "Insurer"

On June 25, 2009, a Nevada Supreme Court decision may change the fundamental economic understanding of the self-insured employer. In a case of first impression, the Court overturned the Clark County District Court, and ruled that self-insured employers are classified as the "insured" and not "insurers". *MGM Mirage v. Nev. Ins. Guar. Ass'n.*, 209 P.3d 766 (2009). Therefore, self-insured employers can now recover payment

from the Nevada Insurance Guarantee Association, ("NIGA"), if and when their excess insurance carrier becomes insolvent.

The issue presented to the Court was one of statutory interpretation. Specifically, whether the self-insured employers shall be defined as "insured" and covered under the purview of the NIGA Act, or "insurers" and denied coverage. The NIGA Act did not define

"insurer" and the parties differed in both where the definition should be found and what the definition should be.

The Appellee, NIGA, claimed the definition from the Nevada Workers' Compensation Act, which defined self-insured employers as insurers, should be read in concert with the NIGA Act.

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## A RETURN TO FORM OVER SUBSTANCE: The Appellate Court backs away from *Berry and Jones*

The Illinois Appellate Court drew another line in the sand regarding Section 19(f)(1) of the Act. Recently, the Court upheld a circuit court decision to dismiss claimant's appeal with prejudice because it lacked subject-matter jurisdiction as applied to Section 19(f)(1). *Esquivel v. Ill. Workers' Comp. Comm'n.*, 2010 WL 2222788 (Ill. App. 2 Dist.)

On March 11, 2008, the Commission issued its decision, affirming the arbitrator's awards for medical expenses and temporary total disability. Additionally, the Commission fixed the probable cost of the record at \$35. The claimant admitted he received the Commission's decision on March 24, 2008. On April 9, 2008, claimant filed with the Circuit Court, a petition for administrative review, a request to issue

summons to the Commission and the parties of record, and a certificate of mailing of the summons to the Commission. The record indicated claimant did not tender a receipt as proof of payment of the probable cost of the record, nor did claimant file an affidavit stating the same had been paid to the Commission.

Respondent, employer, filed a motion to dismiss on the grounds the circuit court lacked subject matter jurisdiction, stating claimant did not comply with the provisions of Section 19(f)(1) of the Act. Claimant filed a motion to file an affidavit instanter, and claimant attached a copy of an April 8, 2008 check for \$35 for the cost of transmitting the record to the circuit court.

The circuit court held, and the appellate court affirmed, that the filing of a

receipt or an affidavit showing payment to the Commission of the probable cost of the record is a precondition to gaining subject-matter jurisdiction in the circuit court. Because the record indicated claimant did not file a receipt or affidavit by April 14, 2008, the end date to be within the twenty day statutory period under Section 19(f)(1) of the Act, the circuit court dismissed the claim with prejudice.

Claimant argued this holding placed form over substance, citing *Jones v. Indus. Comm'n.*, 188 Ill.2d 314 (1999) and *Berry v. Indus. Comm'n.*, 55 Ill.2d 274 (1973) in support of this argument. The appellate court reasoned while these two cases do exalt substance over form, they were factually different than the claimant's case. The court explained that in *Jones*, while appellant did not

exhibit proof of payment until after filing the request for summons, all statutory requirements were met within the twenty day time frame. *Citing Jones*, 188 Ill.2d at 324-27. Further, the court explained that in *Berry*, the appellant also met the twenty day requirement; however, instead of filing a receipt or affidavit verifying payment, the clerk telephoned the Commission. *Esquivel*, 2010 WL 2222788 (Ill. App. 2 Dist.) (*citing Berry*, 55 Ill.2d at 277-78).

Therefore, the appellate court concluded, unlike *Jones and Berry*, it would not consider claimant's case an issue of form over substance. Instead, the Court stated, in a situation where the record does not confirm all statutory requirements were met within the twenty day time frame, the circuit court indeed lacks subject-matter jurisdiction.

## Potential Effects of Health Care Reform on Workers' Compensation

President Obama's health care reform bill may change the face of workers' compensation law. While it is impossible to understand the true ramifications of the bill until it goes into effect and millions of Americans begin to purchase non-occupational health care coverage, it seems clear both some positive and

some negative outcomes will result.

The bill repealed the 1981 Black Lung Benefits Act, such that benefits levels for coal miners will no longer be mandated. The post reform bill era will now see the presumptions regarding pneumoconiosis, "black lung", change in favor of

coal miners. Basically, an employer will struggle to argue any coal miners' lung ailment was caused by anything other than black lung, even if the employee is a lifelong smoker.

One of the biggest problems for insurers in large coal mining areas such as Kentucky,

Pennsylvania, Wyoming, West Virginia, and Southern Illinois, is that recent policy does not reflect this potential for a large influx of claims, and if a drastic increase in claims occur it could cost insurers millions of dollars.

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## “Exercise of Control” Determining Factor for Employer-Employee Relationship

A company’s exercise of control over its workers remains the determinative factor whether an employer-employee relationship exists. The Illinois Appellate Court recently reversed the Commission’s decision finding a Chicago Sun-Times newspaper delivery person an independent contractor. *Skzubel v. Ill. Workers’ Comp. Comm’n. Div.*, 340 Ill. Dec. 236 (Ill. App. 1 Dist. 2010).

In *Skzubel*, claimant worked for the employer for almost two years, however, her husband signed the employment contract because claimant’s immigration status was still pending when she began working. Claimant’s checks were also issued in her husband’s name, but the employer admitted to knowing that the claimant

actually delivered the papers. Claimant worked exclusively for the employer, and never attempted to acquire any of her own customers. Claimant packaged and delivered newspapers according to the employer’s instructions.

Further, she was compensated for the cost of gasoline and paid a daily flat rate for collecting payments from the employer’s customers.

The original decision of the arbitrator found no employer-employee relationship by reasoning, “without any evidence of payment, there is no evidence of a contractual relationship”. The Commission, with one dissent, and the Circuit Court affirmed.

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## Health Care Reform

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The other risk, although more indirect, is the potential for an increase in workers’ compensation claims in general. Whereas many employees did not purchase health care coverage before, and were unlikely to seek medical treatment unless they knew for certain workers’ compensation would cover the cost.

Now, with an increasing number of people enrolled in non-occupational health plans, employees may be more inclined to file a workers’ compensation claim because they know they have back-up coverage from their own plan.

This article was adapted from a full-length article written by Roberto Cenicerros, *BusinessInsurance.com*

## Wage Differential Calculation Does Not Include Voluntary Overtime

In a unanimous decision, the Appellate Court recently held voluntary overtime cannot be used in calculation of a claimant’s wage differential benefits. *Copperweld Tubing Prod., Co. v. Ill. Workers’ Comp. Comm’n.* 2010 WL 2521020 (Ill. App. 1 Dist.).

Claimant underwent multiple left ulnar nerve surgeries in an attempt to relieve him of elbow pain following a work-related accident. After claimant’s final surgery, he underwent an FCE which determined he was unable to return to his job for employer. A vocational rehab expert found that claimant would likely be able to obtain a position paying between \$8-\$12/hour.

Claimant then performed a self-directed job search and began working as a security guard where he was paid \$8/hour. After two-and-a-half months, claimant voluntarily left his job, because financially, it made more sense for him to stay home and for his wife to work.

At arbitration, the claimant’s co-worker testified to his average weekly wage in 2005, \$78,000, when he worked in the same position, for the same

amount of hours, and at the same pay as the claimant. The co-worker also testified the average weekly wage included overtime, some of which was mandatory and some of which was voluntary.

The arbitrator found claimant entitled to a wage differential award, and calculated the award based upon the difference between the claimant’s wages of \$320/week, his wage

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“...voluntary overtime shall not be included in calculating an average weekly wage...”

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as a security guard, and the \$78,000 his co-worker testified he earned in the same position in 2005.

The Commission and circuit court affirmed the decision of the arbitrator, and employer filed an appeal claiming the calculation of

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## Self-Insured = “Insured”, Not “Insurer”

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The Appellants’, MGM Mirage and Steel Engineers, Inc., believed certain other provisions of the NIGA Act implied self-insured employers were not insurers. Specifically, the NIGA Act provision which defined membership in NIGA to include persons or entities that “[w]rite [] any kind of insurance” and are “licensed to transact insurance in this state”. *Id.* at 769 (citing NRS 687A.037(1), (2)).

The Appellants’ argued because they are not licensed to transact insurance, nor do they attempt to make insurance transactions, they are not an “insurer” under NIGA but rather, the “insured”.

The Court accepted neither opinion. Instead, it turned towards the

legislative definition of “insurer” in other areas of Title 57; the same statutory title as NIGA. Several statutes within Title 57 defined “insurer” as “one who engages in the business of insurance” or “every person(s) engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance”. *MGM Mirage*, 209 P.3d at 770 (citing NRS 679A.100; NRS 679B.540)).

Because the Appellants do not engage in the business of insurance, they are excluded from being defined as “insurers” by NIGA. Therefore, the Court held the Appellants’ claims for reimbursement were recoverable.

As the Nevada Supreme Court states in its opinion, “only a few states have

considered the precise issue of whether self-insured employers are insurers under their Insurance Guarantee Association Acts” and “the majority of those states...hold that self-insurers are not insurers for Insurance Guarantee Association Act purposes...” This majority opinion includes Connecticut, Washington, New Mexico, Iowa, Florida, and now Nevada. It is reasonable to believe, especially given the current economic climate, that Illinois could accept a similar type of definition for “self-insured employers” if a similar statutory interpretation question reaches our Supreme Court.

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## “Exercise of Control” Determining Factor for Employer-Employee Relationship

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The Appellate Court reversed, stating the employer was aware claimant, and not her husband, was delivering newspapers, and that its compensation and paychecks were for claimant’s work. Further, the Court reasoned the employer had complete control over claimant’s actions. The employer

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*“...the factors weighing in favor of claimant being an independent contractor...were of minor significance compared to the amount of control the employer exercised...”*

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dictated the manner in which the papers were to be packed, who the papers were delivered to, gave specific delivery instructions, and could terminate claimant’s employment at any time. The Court stated the factors weighing in favor of claimant being an independent contractor, specifically the fact that the claimant’s husband was technically the

employee of record, were of “minor significance” compared to the amount of control the employer exercised over the claimant.

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**Wage Differential Calculation Does Not Include  
Voluntary Overtime**

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claimant's wage differential award was against the manifest weight of the evidence. The Appellate Court agreed.

Specifically, the Appellate Court found Section 10 of the Act, which explicitly states overtime is excluded from an average weekly wage calculation, applies to

Section 8(d)(1) and the calculation of wage differential awards. *Id.*

Further, the court, citing *Airborne Express, Inc. v. Workers' Comp. Comm'n.*, 372 Ill. App. 3d 549 (2007), stated voluntary overtime shall not be included in calculating an average weekly wage. Therefore, the court reasoned that because the testimony

from claimant's co-worker explicitly stated a portion of his \$78,000 salary included voluntary overtime, the wage differential award was improperly calculated.

**Ganan & Shapiro Welcomes Adrian Cherikos**

On July 19, 2010, the Law Firm of Ganan & Shapiro was pleased to announce that Adrian Cherikos joined the firm as an associate attorney.

Adrian joins the firm bringing with him his eight years of experience working in the workers' compensation defense community. We feel that he will become a valuable addition to our defense

team, and we are sure that you will appreciate and enjoy working with him on the defense of your claims.

The addition of Adrian to our Chicago office brings the Chicago defense team up to 13 attorneys that devote their entire practice to the defense of workers' compensation claims in Illinois along with the 7 attorneys that likewise,

devote their practice to the defense of workers' compensation claims, in our Peoria office.

***Our Pledge...***

Ganan & Shapiro, P.C. pledges to maintain a level of excellence for the clients that have remained loyal to the firm for so many years, and to the new friends that join our family in the future. We

make a commitment to the vigorous defense of claims, to provide personalized attention, and to meet or exceed the expectations of each of our clients. We will continue to actively

represent clients throughout the State of Illinois. We will also actively participate in statewide and national organizations which further interests of our clients.