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### Recommended Citation

Harry E. Kinzie III & Thomas D. Nyhan, *Workers' Compensation: A System in Need*, 30 DePaul L. Rev. 347 (1981)

Available at: <https://via.library.depaul.edu/law-review/vol30/iss2/6>

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## WORKERS' COMPENSATION: A SYSTEM IN NEED

Harry E. Kinzie III\*

Thomas D. Nyhan\*\*

*Since the 1975 amendments to the Workers' Compensation Act, Illinois employers have been plagued by rising compensation costs. Mr. Kinzie and Mr. Nyhan review the original purpose behind workers' compensation and then demonstrate Illinois' significant departure from this theoretical goal. In particular, they criticize Illinois' trend toward indemnity payments for injured employees and the ever expanding basis of employer liability under Illinois Supreme Court and Industrial Commission decisions. Finally, the authors argue for the redirection of Illinois' compensation system to better accomplish its legitimate purpose—monetary relief for employees' work-related injuries that reduce earning capacity.*

What is today known as workers' compensation<sup>1</sup> in Illinois began in Europe in the 1880's and 1890's during the industrial revolution. Termed "social legislation," workers' compensation was initially based on the need to compensate individuals who could not recover at common law for their industrial injuries.<sup>2</sup> Such legislation attempted to make employees partially whole for wage loss due to occupational injuries while shifting the cost of work place accidents to employers as an integral part of the cost of production.<sup>3</sup> From its inception to the present, workers' compensation has undergone dramatic change in Illinois.

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1. The title of the Illinois compensation act was amended in 1977, effective January 1, 1980, changing the title from the "Workmen's Compensation Act" to the "Workers' Compensation Act." Similarly, all references to "workmen" were revised to "workers." ILL. REV. STAT. ch. 48, § 138.1 (1979).

2. The general history and background of workers' compensation are discussed in 1 T. ANGERSTEIN, ILLINOIS WORKMEN'S COMPENSATION §§ 1-9 (rev. ed. 1952) [hereinafter cited as ANGERSTEIN]; 1 A. LARSON, WORKMEN'S COMPENSATION §§ 1-5 (1978) [hereinafter cited as LARSON]; 1 W. SCHNEIDER, WORKMEN'S COMPENSATION §§ 1-10 (3d ed. 1941) [hereinafter cited as SCHNEIDER].

3. In the words of Professor Larson:

The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

1 LARSON, *supra* note 2, § 2.20.

Change did not occur overnight or even within the last few years. The original Illinois statute compensated primarily on the basis of actual wages lost.<sup>4</sup> Within a scant six years, however, the legislature provided for an alternative recovery based upon presumed wage loss by successively enacting compensation schedules first for amputations,<sup>5</sup> next for total loss of use,<sup>6</sup> and, finally, for permanent partial loss of use.<sup>7</sup> The administration of the system, which came to focus largely upon permanent partial disability assessment, effected other alterations by adjusting disability awards upward for what was perceived to be a basic inadequacy in the statutory rates of compensation. Simultaneously, the Illinois courts acquiesced in an expanded basis of recovery by affirming the Industrial Commission's decisions that permitted recovery for almost any injury that could in any way be related to the employment.

Prior to the substantial changes made by the Illinois General Assembly in 1975,<sup>8</sup> compensation costs to Illinois employers were large but were not dramatic. After the legislature's 1975 enactments that substantially increased compensation rates, the impact of the previously expanded basis for workers' compensation became all too clear. The dramatic effect of the new statutory rates applied on the existing system is demonstrated by reported cost increases of up to 1000% to 1500% in some industries.<sup>9</sup> Unquestionably, these changes have had a significant adverse impact on the Illinois business climate. Faced with such prohibitive expenses, many businesses have begun to locate or expand in other jurisdictions.<sup>10</sup>

This problem is not as parochial as was once thought. Manufacturers in Illinois are facing increasing competitive pressures from abroad; today, comparisons of the sunbelt versus the snowbelt are not sufficient. Although the cost of workers' compensation is certainly not the sole explanation, it has clearly become significant enough to merit serious attention.

The need for change is manifest. Accordingly, this Article examines the shift from the original policy of compensating employees for actual wage loss

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4. See Act of June 10, 1911, § 4(a), 1911 Ill. Laws 317 (current version at ILL. REV. STAT. ch. 48, § 138 (1979)).

5. See Act of June 28, 1913, § 8(e), 1913 Ill. Laws 342 (current version at ILL. REV. STAT. ch. 48, § 138.8(e) (1979)).

6. *Id.*

7. See Act of May 31, 1917, § 8(e)(17), 1917 Ill. Laws 490 (current version at ILL. REV. STAT. ch. 48, § 138.8(e)(16) (1979)).

8. See Act of June 30, 1975, Pub. Act No. 79-79, §§ 7-8, 1975 Ill. Laws 224 (current version at ILL. REV. STAT. ch. 48, §§ 138.7-.8 (1979)). See generally Parrish, *Workmen's Compensation Law in Illinois: Some Economic Consequences of Recent Changes*, 27 DEPAUL L. REV. 715, 719-22 (1978).

9. *Hearings of the Joint Legislative Committee on Workers' Compensation Costs of the Illinois General Assembly*, 81st Gen. Assembly, 1979 Sess. (1979) (statement of William Shaw, Illinois' Manufacturer's Association).

10. See Parrish, *Workmen's Compensation Law in Illinois: Some Economic Consequences of Recent Changes*, 27 DEPAUL L. REV. 715, 723 (1978).

to the prevailing modern practice of employee indemnity regardless of loss in earning capacity. The Article also examines the concomitant trend expanding the underlying bases of employer liability. Such developments have created a system that today approaches the point of rendering employers the guarantors of their employees' health, a clearly improper result in light of the system's avowed purpose.

#### HISTORICAL BASIS AND IMPETUS

In the late 19th century, the complexities of the industrial revolution gave birth to a need for a new system to compensate employees who experienced a loss of or a diminution in earning capacity as a result of injuries sustained while performing tasks reasonably required to fulfill the duties of their occupations. Before compensation acts, workers who suffered bodily injury while engaged in their employment could take legal action against their employers only by suits at common law.<sup>11</sup> To recover, they had to show that their injuries arose from their employer's personal negligence.<sup>12</sup> In addition, the employee had to contend with other common law doctrines that imposed virtually insurmountable obstacles to recovery in most cases.<sup>13</sup> The common law deprived an employee of any personal injury recovery if he or she had assumed the risk of injury<sup>14</sup> or if the injury was due in whole or in part to his or her own contributory negligence.<sup>15</sup> The fellow servant doctrine, which freed the employer from liability for an employee's injury caused by a negligent fellow worker, proved an even more difficult hurdle in most cases.<sup>16</sup> Although in these cases the employee retained a common law action against a negligent fellow worker, such rights were practically worthless because most "fellow" workers lacked sufficient assets to warrant the litigation.

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11. See, e.g., *Pioneer Fireproof Constr. Co. v. Howell*, 189 Ill. 123, 59 N.E. 535 (1901) (negligence action against employer by employee struck by rivet; employer had duty to use reasonable care to keep workplace in a reasonably safe condition). See generally 1 ANGERSTEIN, *supra* note 2, § 2.

12. The employer, for example, could be found negligent for failing to provide a reasonably safe working environment, for failing to warn of known hazards, for failing to provide safe tools, or for failing to hire competent co-workers. 1 ANGERSTEIN, *supra* note 2, § 2. See also P. COHEN, *THE BRITISH SYSTEM OF SOCIAL INSURANCE* 196 (1932).

13. Statistics indicate that perhaps 50% of all industrial injuries at that time were unavoidable occurrences, with no negligent antecedents. Workers, of course, could not recover in such cases. In fact, less than 15% of injured workers recovered damages through common law tort liability. See 1 ANGERSTEIN, *supra* note 2, §§ 2-3. See also Eason, *Workmen's Compensation: 1974 What the Future Holds*, 10 FORUM 145, 146-47 (1974).

14. See, e.g., *Chicago & E. Ill. R.R. v. Heerey*, 203 Ill. 492, 68 N.E. 74 (1903) (employee cannot recover for injury resulting from incidental risks of employment of which he or she should have known).

15. See, e.g., *King v. Illinois Midland Coal Co.*, 158 Ill. App. 351 (3d Dist. 1910) (slight lack of due care by employee sufficient to defeat recovery).

16. See, e.g., *Gartland v. Toledo, Wabash & W. Ry.*, 67 Ill. 498 (1873) (minor denied recovery when injury caused by co-worker in same line of duty).

Because of the restrictions on recovery, uncompensated employees rendered incapable of supporting themselves and their families after industrial accidents sustained through their own fault, the fault of their fellow workers, or no one's fault at all far outnumbered those able to recover damages. Hardship forced these employees to turn to the charitable resources of the community for survival, and the resulting burdens placed on society were decried as intolerable as a matter of public policy.<sup>17</sup> Consequently, in industrial injury cases, the practice of assessing monetary damages based upon fault was deemed inadequate to meet the problems of a burgeoning industrial economic society.<sup>18</sup>

To correct this deficiency, a concept of no-fault recovery emerged in Europe during the 1880's and 1890's.<sup>19</sup> Underlying this theory was the philosophy that employees needed protection from wage interruption or loss resulting from employment-related injuries, and that the particular industry being served should bear the costs of that protection.<sup>20</sup> Thus, early workers' compensation statutes were based upon a simple premise: irrespective of fault, each industry should shoulder the responsibility for their industrially injured employees who incurred loss of earning capacity, a loss previously borne by employees. The quid pro quo for this unprecedented expansion of liability was the elimination of employer liability at common law.

This concept of no-fault recovery spread to the United States in the early 1900's.<sup>21</sup> The development of workers' compensation laws, however, progressed slowly. As each state dealt with the issue,<sup>22</sup> it faced the arguments that workers' compensation ran afoul of the provisions of the Federal and

17. See, e.g., *New York Cent. R.R. v. White*, 243 U.S. 188, 197 (1917). The *New York Central* court noted that the common law doctrines were merely fictions that were inadequate to apply to modern employment conditions, that the expense and delay of a common law action frequently defeated justice, that the burden of injury is almost entirely sustained by the employees who are often forced to depend upon charity, and that prolonged litigation often results in antagonism between employer and employee. *Id.* at 197. See also D. GAGLIARDO, *AMERICAN SOCIAL INSURANCE* 390 (1949).

18. NATIONAL COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, *THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS* 33-34 (1972).

19. See D. GAGLIARDO, *AMERICAN SOCIAL INSURANCE* 390 (1949).

20. See McCloskey, *The Changing Face of Illinois Workmen's Compensation: In Search of a Workable Response to Federal Guidelines*, 8 *LOY. CHI. L.J.* 543, 544 (1977).

21. The year 1911 marked the true beginning of worker's compensation laws in the United States. In that year, California, Illinois, Kansas, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Washington, and Wisconsin, all enacted workers' compensation legislation. This activity came after a false start when Maryland's 1902 statute was held unconstitutional in *Franklin v. United Rys. & Elec. Co.*, 2 *Baltimore City Rep.* 309 (C.P. Baltimore 1904), cited in 1 *LARSON, supra* note 2, § 5.20 n.40. By 1921 all but a few states had enacted workers' compensation legislation. See generally Grillo, *Fifty Years of Workmen's Compensation—An Historical Review*, 38 *CONN. B.J.* 239 (1964); Larson, *The Nature and Origins of Workmen's Compensation*, 37 *CORNELL L.Q.* 206 (1952).

22. The states were left to resolve workers' compensation problems by virtue of the tenth amendment's reserved powers clause. See C. HOBBS, *WORKMEN'S COMPENSATION INSURANCE* 81, 83 (2d ed. 1939) [hereinafter cited as HOBBS].

state Constitutions by denying employees the right to sue at common law.<sup>23</sup> There was also much concern about the effects of such a no-fault statute on employer liability.<sup>24</sup> After considerable deliberation, however, various states began to adopt compensation acts based upon the European precedent that, without regard to fault, employers pay compensation to those injured while performing the tasks required by their employment.<sup>25</sup> Significant in this early legislation was the limitation that only those injuries arising out of and in the course of the employment be compensated.<sup>26</sup> Perhaps even more significant, however, was the provision that the benefits to be paid for compensable injuries would be based only on actual wage loss suffered by an employee as a consequence of the injury.<sup>27</sup>

Under the no-fault concept of employer liability, the array of common law damages are unavailable.<sup>28</sup> In return, however, the injured worker need only prove that he or she sustained disabling injuries as a result of risks reasonably assumed in order to perform the duties of the employment.<sup>29</sup> Not only were employees no longer required to prove employer fault, but the employer was also stripped of the common law defenses previously available and which, in most cases, had barred the employee's recovery. Thus, the defenses of contributory negligence, the fellow servant doctrine, and assumption of risk were no longer applicable.<sup>30</sup>

While the avowed purpose of workers' compensation has not changed from its inception, the Illinois system today bears little resemblance to its initial expression. Not only have legislative changes and administrative policies altered the system's compensation payment scheme, but Illinois Supreme Court decisions and administrators' awards have dramatically changed the purview and effect of workers' compensation. Unfortunately, they have done so by unreasonably expanding both the basis for compensability and the assessment of disability.

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23. See, e.g., *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911) (New York's statute held to violate due process clause). The amended version of the New York legislation was held constitutional in *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

24. See HOBBS, *supra* note 22, at 83.

25. See generally 1 LARSON, *supra* note 2, §§ 5.10, .20.

26. *Id.* § 6.10.

27. See generally *New York Cent. R.R. v. White*, 243 U.S. 188, 193 (1917). The *New York Central* court, in describing the New York statute, stated that "[c]ompensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the employee and the character and duration of the disability. . . ." *Id.*

28. 1 LARSON, *supra* note 2, § 2.40.

29. See, e.g., Act of June 10, 1911, § 1, 1911 Ill. Laws 315 (current version at ILL. REV. STAT. ch. 48, § 138.1(b)(2) (1979)). See generally 1 LARSON, *supra* note 2, § 2.40.

30. See, e.g., Act of June 10, 1911, § 1, 1911 Ill. Laws 315 (employers could not rely on doctrines of fellow servant, assumption of risk, or contributory negligence) (current version at ILL. REV. STAT. ch. 48, § 138.1 (1979)). See also Krause, *Statutory Torts in Illinois*, 1967 U. ILL. L.F. 1, 3.

## FROM WAGE LOSS TO SCHEDULED BENEFITS

With the exception of New Jersey,<sup>31</sup> the first compensation acts in the United States were pure wage loss statutes providing for payment of disability benefits on the basis of lost weekly wages.<sup>32</sup> These first laws did not include compensation schedules as we know them today. Schedules soon began to appear, but only for those losses resulting in amputation of specific members of the body. These early schedules in effect established an irrebuttable presumption that an amputation would result in a specific wage loss, thereby relieving employees of the burden of proving actual wage loss.<sup>33</sup> Professor Bohlen of the University of Pennsylvania opined:

The determining consideration [for presumed wage loss] was that, by rendering the amount definite, litigation would be prevented since whenever a mutilation of this sort occurred, there could be no question as to the extent of disability. It was to prevent all litigation over the extent of disability that the schedule was adopted.<sup>34</sup>

Ironically, those limited loss schedules, adopted to reduce litigation, were expanded so as to become a most fertile source of worker's compensation litigation. It was but a short, simple legislative step from a limited presumption of a specific wage loss for major member amputations to a statutory presumption of wage loss when the loss of use of a retained body member was total.<sup>35</sup> Four years later in Illinois, the presumption of wage loss was further expanded to include injuries resulting in a permanent partial loss of use.<sup>36</sup> The law did not require the employee to prove an actual loss of wages; it merely required proof of actual loss of use, to which would then attach a presumed loss of earning capacity.<sup>37</sup> As early as 1921, the Illinois

31. See Act of June 10, 1911, § 11(c), 1911 N.J. Laws 137 (New Jersey statute based compensation for permanent partial disability on 66 2/3% of daily wages and extent of permanent partial disability) (current version at N.J. STAT. ANN. ch. 34, § 15-12 (West 1959 & Supp. 1981)).

32. See, e.g., Act of June 10, 1911, § 1, 1911 Ill. Laws 315 (current version at ILL. REV. STAT. ch. 48, §§ 138.1-.28 (1979)). See generally R. MEEKER, WORKMEN'S COMPENSATION LAWS 48 (1914); SCHNEIDER, *supra* note 2, at 7 n.13.

33. See, e.g., Ch. 226, § 27, 1917 Kan. Sess. Laws 1923 (specific presumed wage losses in weeks were attached to the total or partial amputation of a member) (current version at KAN. STAT. ANN. § 44-501 (Supp. 1980)).

34. Address by Francis H. Bohlen, Pennsylvania Bar Association (1912) *quoted in* Address by Dr. Arthur Larson, Annual Meeting of the Illinois Self-Insurance Association (Sept. 30, 1980).

35. See, e.g., Act of June 28, 1913, § 8 (e), 1913 Ill. Laws 335 ("[f]or the loss of a hand, or the permanent and complete loss of its use, fifty per centum of the average weekly wage during one hundred and fifty weeks") (current version at ILL. REV. STAT. ch. 48, § 138.8(b)(9) (1979)). See also *Ballou v. Industrial Comm'n*, 296 Ill. 434, 129 N.E. 755 (1921) (there can be loss of use without actual severance of hands).

36. Act of May 31, 1917, § 8(e)(17), 1917 Ill. Laws 490 (current version at ILL. REV. STAT. ch. 48, § 138.8(e)(16) (1979)).

37. See, e.g., *Cameron Coal Co. v. Industrial Comm'n*, 326 Ill. 646, 158 N.E. 399 (1927) (injury must be shown to be reasonably certain to result in permanent partial incapacity in

Supreme Court began to affirm Industrial Commission awards for permanent partial disability.<sup>38</sup>

The expansion of the system to include scheduled losses for partial loss of use of body members not only defeated the schedule's stated purpose, that of limiting litigation, but, in fact, spawned what many perceive as a veritable litigation crisis.<sup>39</sup> It has been estimated, for instance, that in excess of 60% of the litigation in workers' compensation involves the parties' attempt to resolve the question of the extent of partial loss of use.<sup>40</sup>

Today, the Act continues to permit compensation in cases of reduced earning capacity, but the practice of awarding recovery on the basis of actual or prospective wage loss in partial permanent disability cases has been virtually replaced in many states, including Illinois, by what amounts to an indemnity payment based on the employee's weekly earnings at the time of the injury. Some states, however, have persisted in the wage loss concept,<sup>41</sup> and others have,<sup>42</sup> or are considering,<sup>43</sup> returning to the wage loss concept.

Recent amendments to the Illinois Act demonstrate the continued commitment to compensate on a basis other than actual or prospective wage loss.<sup>44</sup>

pursuing claimant's usual and customary line of employment); *Swift & Co. v. Industrial Comm'n*, 302 Ill. 38, 134 N.E. 9 (1922) (claimant failed to prove permanent partial loss of use). See also *Harrison Sheet Steel Co. v. Industrial Comm'n*, 404 Ill. 557, 90 N.E.2d 220 (1950).

38. See *Hafer Washed Coal Co. v. Industrial Comm'n*, 295 Ill. 578, 129 N.E. 521 (1920) (award based on 33 1/3% permanent partial disability; affirmed).

39. One reason for litigation has been the need for delineating the territory covered by the phrase "loss of use" in specific fact situations. For example, the spinal cord may have been injured to produce a paralysis of the limbs, the limbs themselves having escaped direct harm. Should compensation be allowed for incapacity of the limbs or should the measure of compensation be the physical injury to the spinal column? It would seem proper to compensate for the measure of the worker's incapacity and not merely for the visible physical damage. See, e.g., *Northwestern Barb Wire Co. v. Industrial Comm'n*, 353 Ill. 371, 187 N.E. 468 (1933) (there is a compensable "loss" of member if normal use has been entirely impaired; no need for actual severance); *In re Burns* 218 Mass. 8, 105 N.E. 601 (1914) (compensation properly allowed for permanent incapacity of both legs, paralyzed by injury to spinal cord, although no actual injury to legs themselves).

40. See J. CHELIUS, *WORKPLACE SAFETY & HEALTH* 24 (1977).

41. See, e.g., MICH. COMP. LAWS ANN. § 418.361(1) (Supp. 1980) (compensation based on 80% of difference between the worker's after tax average weekly wage before the injury, and his or her after tax average weekly wage after the injury).

42. Compare FLA. STAT. ANN. § 440.15(3) (West 1966) (amended 1979) (providing compensation payments based on a schedule of presumed wage loss in weeks) with FLA. STAT. ANN. § 440.15(3)(b) (West 1981) (providing compensation payment based on 95% of the difference between 85% of the employee's pre-injury average monthly wage and his post-injury monthly earnings after reaching maximum medical improvement, but not exceeding 66 2/3% of the employee's pre-injury average monthly wage).

43. See H.B. 2600, Or. Legis. Assembly, 1981 Reg. Sess.

44. Act of June 30, 1975, Pub. Act No. 79-79, § 8(d)(2), 1975 Ill. Laws 224 (codified at ILL. REV. STAT. ch. 48, § 138.8(d)(2) (1979)), provides:

If as a result of the accident, the employee sustains . . . other injuries which injuries do not incapacitate him from pursuing the duties of his employment but which would disable him from pursuing other suitable occupations . . . or if such



Prior to 1975, the Act provided for maximum awards when demonstrable impairment resulted in cases of fracture(s) of the skull, vertebral bodies, transverse processes, or facial bones; the removal of a kidney, spleen or lung.<sup>45</sup> These scheduled injuries were added to the Act from time to time in order to avoid adoption of a "man as a whole" provision in the Act.<sup>46</sup> The compensation provided in the Act was the maximum amount for the scheduled injuries; however, in practice, administrators over the years had established a policy of awarding these maximums irrespective of the existence or extent of demonstrable impairment. This administrative policy became so ingrained in the Illinois system that the entitlement to the maximum became nearly automatic upon proof that the particular fracture or organ removal had occurred.<sup>47</sup>

Although the need for schedules for the above mentioned injuries ceased with the advent of the "man as a whole" provisions in section 8(d)(2) of the 1975 legislation,<sup>48</sup> the General Assembly reinforced the indemnity concept by changing what had formerly been maximum awards for other specified impairments to minimum awards.<sup>49</sup> To be sure, the legislature should have removed these scheduled injuries from the Act entirely rather than cloak them with the statutory presumption of a resulting disability.<sup>50</sup>

Although the legislature established presumptions of disability in only a limited number of areas, the Industrial Commission over the years established and applied its own set of presumptions of disability on a broader scale in spite of the frequent lack of credible evidence that any disability existed. Over the years, for example, Commissions have presumed that a minimum amount of disability would result from any fracture of an extremity. Awards for loss of use in such cases were routinely rendered notwithstanding that there was no evidence of disability.<sup>51</sup> This concept of presumed minimum

injuries partially incapacitate him . . . but do not result in an impairment of earning capacity . . . he shall receive . . . compensation at the rate provided in . . . this Section. . . .

*Id.*

45. Compare ILL. REV. STAT. ch. 48, § 138.8(d) (1973) (amended 1975) (providing for maximum awards and limitations on length of compensation period) with ILL. REV. STAT. ch. 48, § 138.8(d) (1979) (providing for minimum length of compensation period for various disabilities, with no maximum amount provided).

46. "Man as a whole" provisions permit decisional bodies to weigh the loss of use of a specific member against future employability of the entire person in rendering a compensation award. Such awards are supported by estimates of the functional loss to the whole person of a given lost body member. See 2 LARSON, *supra* note 2, § 58.11 app. B (Table 11).

47. See Stevenson, *The Illinois Workmen's Compensation System: A Description and Critique*, 27 DEPAUL L. REV. 675, 698 (1978) [hereinafter cited as Stevenson].

48. Act of June 30, 1975, Pub. Act No. 79-79, § 8(d)(2), 1975 Ill. Laws 224 (codified at ILL. REV. STAT. ch. 48, § 138.8(d)(2) (1979)).

49. *Id.* § 8(d).

50. In 1980, the General Assembly acted to reduce the minimum amounts payable for particular injuries, but it left the presumption intact. See Act of September 15, 1980, Pub. Act No. 81-1482, § 8, 1980 Ill. Laws 1695 (amending ILL. REV. STAT. ch. 48, § 138.8(d) (1979)).

51. See Stevenson, *supra* note 47, at 698.

disability was by no means limited to fractures. On the contrary, it was clear to anyone who regularly practiced before the Commission that there were, in fact, certain standard minimum amounts that the Commission would award for specific types of injury.<sup>52</sup> So ingrained had the practice become in our system that frequent legislative demands—vigorously opposed by the plaintiff's bar and organized labor—were made for a published schedule of these standards.<sup>53</sup> Because the schedule of presumed minimums was, in fact, unpublished, another informal adjustment could occur in the system. Former Commissions were able to adjust what were perceived to be inadequate maximum compensation rates. In years past, virtually all legislation in this field, including revision of those maximum rates, was the product of the Agreed Bill Process. Through that process, an agreement was reached between representatives of both labor and management as to what changes would be made in any given legislative session. There were occasions, however, when agreement was not reached between the parties, and the law, including the maximum compensation rate payable, was not changed. When the Agreed Bill Process failed to achieve such changes, the Commissions could, and often did, administratively adjust the perceived inadequate rate for all but the most serious injuries by simply increasing the presumed percentage of minimum disability applicable to a specific injury. Thus, for example, minimum awards in cases of simple fractures escalated from a range of 7 1/2% to 10%, to between 15% and 20% loss of use of the particular member involved.<sup>54</sup> This type of escalation was applied to all injuries except, of course, those where the genuine disability was so high that the award could not be escalated; an employee who had sustained a genuine 90% loss of use of a particular member clearly could not be awarded compensation for anything more than 100% of that member.

Recent developments will serve to correct some of these historic problems. In 1980, the Act was amended to require arbitrator's decisions handed down on and after January 1, 1981, to set forth findings of fact and conclusions of

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52. The present Commission's Chairperson has questioned this policy. See *Dixon v. Calhoun County Constr. Co.*, 79 W.C. 80,192 (Ill. Indus. Comm'n, Oct. 9, 1980) (Schneiderman, Comm'r, dissenting) (criticizing Industrial Commission's practice of granting awards despite the lack of proof of a permanent partial disability). See also *Stevenson*, *supra* note 47, at 699. "A set of other 'standards' has grown in the Commission. For example, a fractured os calcis is worth (at least) thirty-five percent loss of use of the foot. . . . One learns these 'standards' only by being associated with the Commission for they are not printed or published in any manner." *Id.*

53. S.B. 1739, 81st Ill. Gen. Assembly (1980) (introduced March 27, 1980), represents the latest proposal to codify such standards. This bill, which has failed passage on three separate occasions, would require the Industrial Commission to establish standards for determining the extent of the disability sustained in order to ensure uniform application of the Worker's Compensation Act.

54. These figures are approximations derived from the authors' practical experience before the Illinois Industrial Commission. Industrial Commission decisions have been published since January, 1981, therefore, statistical evidence of this trend should be discernible in the near future.

law.<sup>55</sup> In addition, decisions of the Industrial Commission are to contain findings of fact, conclusions of law and the Commission's reasoning in arriving at its opinion. The Commission's decisions are required to be regarded as precedent by the arbitrators.<sup>56</sup> Thus, any previously unpublished standards applied by the Commission should now manifest themselves in the developing body of new case law. Furthermore, Rebecca Schneiderman, the present Chairman of the Industrial Commission, has taken issue with the policy of automatic awards,<sup>57</sup> and from the Commission opinions published to date, it appears clear that credible evidence of disability is now essential to support an award.<sup>58</sup>

But irrespective of these changes, it is apparent that the original theory of workers' compensation based on wage loss is now virtually extinct in Illinois. Today's awards for loss of use in most cases amount to indemnity payments for injuries sustained which are totally unrelated to present or prospective loss in earning capacity. That this concept has developed into one of the most serious problems in Illinois is illustrated by the experience of one of the state's largest employers, a self-insured corporation, which paid 58% of its 1978 compensation dollars and 72% of its 1979 compensation dollars for partial permanent disability awards and settlements alone.<sup>59</sup> The remaining 42% of its 1978 compensation dollars and 28% of its 1979 compensation dollars went to pay all amounts for temporary total compensation benefits, wage loss compensation benefits and death benefits.<sup>60</sup> Although there are no accurate industry-wide statistics of this type available from the Industrial Commission or the insurance industry, these figures track with information received from other large self-insured employers in the state.<sup>61</sup>

#### BASIS OF EMPLOYER LIABILITY

Paralleling these legislative changes and the shifts in administrative attitudes has been a tendency of both the Illinois Supreme Court and various Commissions to expand the underlying basis of employer liability. Of course, the statutory basis for employer liability has not changed since the enactment of the first acts in the early 1900's. Employer liability was to be predicated on

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55. Act of September 15, 1980, Pub. Act No. 81-1482, § 19, 1980 Ill. Laws 1695 (amending ILL. REV. STAT. ch. 48, § 138.19(b) (1979)).

56. Act of September 15, 1980, Pub. Act No. 81-1482, § 19, 1980 Ill. Laws 1695 (amending ILL. REV. STAT. ch. 48, § 138.19(e) (1979)).

57. See note 52 *supra*.

58. Illinois Industrial Commission, Dec. No. 81 IIC 1, 5 (1981)(factors to be considered in determining nature and extent of disability).

59. See Illinois Workers' Compensation: The Caterpillar Perspective (June, 1980) (unpublished white paper available from Caterpillar Tractor Co., Peoria, Illinois).

60. *Id.* See also *Hearings on Workers' Compensation Before the Revenue Committee of the House of Representatives of the Illinois General Assembly*, 81st Gen. Assembly, 1980 Sess. (March 26, 1980) (statement of Timothy L. Elder, Caterpillar Tractor Co.).

61. Address by Thomas D. Nyhan, Machinery and Allied Products Institute Conference, January 31, 1980, in *Workers' Compensation: A System in Need of Reform*, a transcript of MAPI Conference, January 31 - February 1, 1980, Washington, D.C.

the nature of the risk and the circumstances surrounding the occurrence. Before an employer would be held liable under the Act, an accidental injury had to arise out of, as well as in the course of, the employment.<sup>62</sup> It should be understood that the phrases "arising out of" and "in the course of" are used conjunctively. Both elements must be present in order to impose liability under the Act.<sup>63</sup> "Arising out of" was initially defined to require the risk producing the injury to be one which the employee was reasonably required to assume in performing his or her job.<sup>64</sup> "In the course of" was defined to require that the injury be one which occurred at a time, place, and under circumstances reasonably required by the employment.<sup>65</sup> Later, this restrictive construction was weakened to encompass numerous employee injuries.

#### THE EARLY INTERPRETATIONS

As initially construed, these two elements served as constraints on employer liability and thereby prevented the employer from becoming an absolute insurer of the employee's health and well-being. Indeed, the supreme court once noted that "it was not the intention of the legislature to make the employer an insurer against all accidental injuries which might happen to an employee."<sup>66</sup> The following synopsis of cases make the court's earlier approach quite clear.

In its 1917 decision in *Dietzen v. Industrial Board*,<sup>67</sup> the supreme court barred recovery where an employee, whose duties involved polishing metal plates, sustained injuries while voluntarily attempting to clean an exhaust system. The injury was deemed uncompensable because it did not "arise out of" his employment within the meaning of the Act.<sup>68</sup> Similarly, in *Atlas*

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62. Compare Act of June 10, 1911, § 1, 1911 Ill. Laws 315 (1911) (repealed 1913) (compensation for injuries "sustained by any employee arising out of and in the course of employment. . .") with ILL. REV. STAT. ch. 48, § 138.2 (1979) (stating the same).

63. See, e.g., *United Disposal & Recovery Co. v. Industrial Comm'n*, 291 Ill. 480, 485-86, 126 N.E. 183, 186 (1920) (compensation denied because injury did not "arise out of" employment). For an early discussion of the Act's "arising under" language, see T. ANGERSTEIN, *THE EMPLOYER AND THE WORKMEN'S COMPENSATION ACT OF ILLINOIS* §§ 84-123 (2d ed. 1930).

64. See, e.g., *Irwin-Neisler & Co. v. Industrial Comm'n*, 346 Ill. 89, 93-95, 178 N.E. 357, 358-59 (1931) (automobile accident held to arise out of employment because it was a possible risk to a travelling employee); *Mueller Constr. Co. v. Industrial Bd.*, 283 Ill. 148, 152-59, 118 N.E. 1028, 1029-32 (1918) (injury while walking to use a public phone at a construction site held to arise out of employment because it was an actual risk of employment).

65. See, e.g., *Borgeson v. Industrial Comm'n*, 368 Ill. 188, 190-91, 13 N.E.2d 164, 164-65 (1938) (injury suffered in performance of duties on streets and highways held to be in course of employment).

66. *Mueller Constr. Co. v. Industrial Bd.*, 283 Ill. 148, 152, 118 N.E. 1028, 1030 (1918).

67. 279 Ill. 11, 116 N.E. 684 (1917).

68. *Id.* at 22, 116 N.E. at 688. *Accord*, *Lutheran Hosp. v. Industrial Comm'n*, 342 Ill. 325, 331, 174 N.E. 381, 383 (1931) (when previous scope of duties were related to valves and pumps, injuries resulting from voluntary work on boiler did not arise out of employment); *George S. Mephram & Co. v. Industrial Comm'n*, 289 Ill. 484, 490, 124 N.E. 540, 542 (1919) (voluntary services unrelated to employment held not to arise out of course of employment).

*Linen Supply Co. v. Industrial Commission*,<sup>69</sup> compensation was denied for injuries resulting when an employee removed a portion of a structure that a contractor had been hired to remove. Refusing to allow liability to follow a benefit accruing to the employer, the court found that the "danger was not one which arose out of [this employee's] work."<sup>70</sup> Nine years later in *Northwestern Yeast Co. v. Industrial Commission*,<sup>71</sup> a similar result followed when an employee opened and fell through a window in an area of the plant where he had no duties. There, the court concluded that any danger attending such acts was "quite outside any risk of his employment."<sup>72</sup>

The supreme court also denied recovery when risks were not peculiar to the particular employee's employment but were incurred by the public at large. Thus, an employee who slipped on ice while en route to work was denied recovery,<sup>73</sup> and so were employees injured by a defective match used to light a cigarette at work<sup>74</sup> or injured when crossing railroad tracks after leaving his place of employment.<sup>75</sup> Finally, compensation was denied when an injury occurred while an employee was en route to a company picnic.<sup>76</sup> In the court's words, "[i]t would be extending the provisions of the Compensation Act to undue lengths to hold that such an injury arose out of and in the course of his employment."<sup>77</sup> In each of the above cases, the court looked to the nature of the risk involved in the particular injury to determine whether it was one peculiar to the employment—one which the employee reasonably had to assume in order to perform his assigned duties.

As the case law demonstrates, early Illinois Supreme Court decisions consistently interpreted the key statutory phrases "arising out of" and "in the course of" employment narrowly. If an employee created an unnecessary risk by performing gratuitous or unauthorized services, any injuries resulting from that risk were deemed noncompensable. Along the same lines, recreational activities and risks not peculiar to the employment were also considered beyond the statute's coverage. Finally, the fact that any or all of the above types of conduct happened to benefit the employer was not sufficient to allow recovery under the Act.

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69. 348 Ill. 69, 180 N.E. 570 (1932).

70. *Id.* at 75, 180 N.E. at 572.

71. 378 Ill. 195, 37 N.E.2d 806 (1941).

72. *Id.* at 200, 37 N.E.2d at 809. *Cf.* *Sparks Milling Co. v. Industrial Comm'n*, 293 Ill. 350, 127 N.E. 737 (1920) (employee allowed compensation when he fell from a window which employees customarily used).

73. *Farley v. Industrial Comm'n*, 378 Ill. 234, 37 N.E.2d 787 (1941). *Accord*, *Northwestern Univ. v. Industrial Comm'n*, 409 Ill. 216, 99 N.E.2d 18 (1951).

74. *Hill Luthy Co. v. Industrial Comm'n*, 411 Ill. 201, 103 N.E.2d 605 (1952).

75. *Steel Castings Co. v. Industrial Comm'n*, 388 Ill. 66, 57 N.E.2d 454 (1944).

76. *Becker Roofing Co. v. Industrial Comm'n*, 333 Ill. 340, 164 N.E. 668 (1929).

77. *Id.* at 344, 164 N.E. at 670.

## THE EXPANSIVE TREND

In recent years the Commission and the courts have broadened the definition of "arising out of and in the course of employment." This expansion has not only extended the applicability of the Act well beyond the developed parameters by rationalizations which strain basic principles of logic and judicial consistency, but it has also made employers virtual insurers of their employees' general health and welfare.

For example, in a 1955 landmark decision, *Jewel Tea Co. v. Industrial Commission*,<sup>78</sup> the Illinois Supreme Court affirmed an award of compensation for injuries sustained by an employee in an after hours, company-sponsored baseball game. The record in that case demonstrated that the employer had both sponsored and promoted the activity. The proof also established that the employee's participation was voluntary; that he was neither hired to play baseball nor given time away from his job to practice for or participate in the games. Nevertheless, in finding that the injury arose out of the employment, the court apparently abandoned any inquiry into whether the risk involved in the injury was one peculiar to the employment or one which the employee was reasonably required to assume to perform his assigned duties. Instead the court focused on whether the injury occurred during activities that benefited the employer, and the court reasoned that the after hours, company-sponsored game was a significant, if not tangible, benefit to the employer. In support of its conclusion, the court stressed that the employer financed the activity and exerted "subtle" pressures on the employee to participate. Further, the court assumed that advertising benefits inured to the employer, and found that the resulting good will and esprit de corps among the employees benefited the employer.<sup>79</sup>

In 1958, the supreme court was confronted with another recreational injury case involving slightly different facts in *Hydro-Line Manufacturing Co. v. Industrial Commission*.<sup>80</sup> A foreman of the employer had posted a notice on the company bulletin board notifying anyone interested in participating in baseball games to sign an attached list. The president of the employer offered no objection to the plan and, in fact, agreed to purchase the equipment when the team was organized. The claimant, who had signed his name on the list, sustained injuries the next day while playing baseball

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78. 6 Ill. 2d 304, 128 N.E.2d 699 (1955). The *Jewel Tea* decision evoked considerable commentary. See Note, *Workmen's Compensation—Injury Occurring During Participation in Intra-Company Softball League Game Held Compensable*, 5 DEPAUL L. REV. 337 (1956); Note, *Workmen's Compensation—Injury Incurred in Company Sponsored Baseball Game Held Compensable*, 27 MISS. L.J. 158 (1956); Comment, *Workmen's Compensation Awards for Recreational Injuries*, 23 U. CHI. L. REV. 328 (1956).

79. 6 Ill. 2d at 313-16, 128 N.E.2d at 704-05. In developing this "benefits" analysis, the *Jewel Tea* court relied upon Minnesota, *Le Bar v. Ewald Bros.*, 217 Minn. 16, 13 N.W.2d 729 (1944), and New York, *Fagen v. Albany Evening Union Co.*, 261 A.D. 861, 24 N.Y.S.2d 779 (1941), precedent. The court, however, disregarded the seemingly compelling Illinois decision in *F. Becker Asphaltum Roofing Co. v. Industrial Comm'n*, 333 Ill. 340, 164 N.E. 668 (1929).

80. 15 Ill. 2d 156, 154 N.E.2d 234 (1958).

during the lunch hour on a lot adjacent to the plant. The evidence disclosed that the bat and ball used at the time were owned by a fellow employee and that the foreman was supervising the activity "in a form."<sup>81</sup> In reversing an award for compensation, the court concluded that: "We find the facts of this case totally insufficient to show any appreciable degree of employer control, supervision, encouragement, or benefit. We, therefore, find as a matter of law that the claimant's injury did not arise out of and in the course of his employment."<sup>82</sup>

Several years later in *Ace Pest Control, Inc. v. Industrial Commission*,<sup>83</sup> the court similarly abandoned any inquiry into whether the risk of injury was one peculiar to the employment and applied a new and different test. In this case, a man employed as an exterminator was required to travel to the homes of various customers who requested termite control services. The company supplied a truck bearing its name.

After completing one such assignment at approximately 5:00 p.m., the employee began his return trip to his company's offices. On the way, he came upon an immobilized vehicle, stopped to offer assistance, and found that a woman with four young children had run out of gas. The employee offered to acquire gasoline for the stranded motorist, but instead, at her request agreed to take her and her four children home. Thereafter, the employee drove the woman's husband to the immobilized vehicle. When the employee stepped from his truck to assist in starting the stalled vehicle, he was struck and killed by a passing automobile.<sup>84</sup> Without even addressing the question whether the risk of this injury was a part of, or incidental to the duties of termite control, the court found employer liability under the Act, reasoning that the employee's good samaritan gesture was reasonably foreseeable, was apparently not prohibited by the employer, and was beneficial to the company when motorists saw its truck stopped to aid a stranded family.<sup>85</sup>

In 1967, the court again considered the question of an employer's liability for company-sponsored recreational activities and held compensable the death of an employee who was involved in an auto accident while on his way home from a company-sponsored golf outing. In its opinion in *Lybrand, Ross & Montgomery v. Industrial Commission*,<sup>86</sup> the court ruled that substantial employer compulsion to attend such activities, coupled with the employer's sponsorship and an assumed business purpose was sufficient to bring the case within the province of the Act. The "substantial" employer compulsion

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81. *Id.* at 157-58, 154 N.E.2d at 235-36.

82. *Id.*

83. 32 Ill. 2d 386, 205 N.E.2d 453 (1965).

84. *Id.* at 387, 205 N.E.2d at 454.

85. *Id.* at 388-89, 205 N.E.2d at 455.

86. 36 Ill. 2d 410, 223 N.E.2d 150 (1967).

referred to by the court proved to be nothing more than the employee's option to attend the outing or stay at work.<sup>87</sup> If there was any doubt that the limits on employer liability were ever expanding, such doubt ended in 1978. In *Mid-Central Tool Co. v. Industrial Commission*,<sup>88</sup> the court affirmed a Commission award for total and permanent disability arising out of injuries suffered by an employee who slipped on an icy city sidewalk when he and his wife were returning home from a company-sponsored Christmas party. Despite the absence of any evidence or finding of compulsion by the employer to attend the party, the court found sufficient basis for imposing liability on the employer merely because the company had planned and paid for the party which was in part a benefit for the relatively low-paid employees.<sup>89</sup> If unproved, intangible benefits of improved esprit de corps among the employees played any part in the court's opinion, that role, like the benefits themselves, must be assumed for it was never mentioned. Yet, the apparent absence of a benefit accruing to the employer did not defeat liability.

In 1979, further expansion of the limits of employer liability was effected in *Chicago Extruded Metals v. Industrial Commission*.<sup>90</sup> The court affirmed the Industrial Commission's award of compensation for injuries sustained by an employee who fell from a stool while attempting to swat a cockroach climbing on the wall of the company shower room. Although the duties of the employee did not involve exterminating arthropods or maintaining the sanitary conditions of the premises, and notwithstanding that there was absolutely no evidence of employer compulsion, encouragement, or even acquiescence, the court ignored the purely voluntary assumption of the unnecessary risk, and concluded without supporting evidence that the presence of the insect could trigger a feeling of distaste and, if so, the claimant's reaction was understandable and really in the employer's interest.<sup>91</sup>

Two recent decisions may signal the final collapse of any remaining barriers to absolute employer liability. In the first case, *Sears, Roebuck & Co. v. Industrial Commission*,<sup>92</sup> the court affirmed an award for death benefits under such unusual circumstances that one is led to wonder what further action is needed by the court to make the employer the insurer of his employee's well-being. The case involved an employee who, over the years

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87. *Id.* at 418-19, 223 N.E.2d at 153-54. The facts of *Lybrand* appear indistinguishable from *F. Becker Asphaltum Roofing Co. v. Industrial Comm'n*, 333 Ill. 340, 164 N.E. 668 (1929). The *Lybrand* court, however, drew an unconvincing distinction. It argued that *Becker* involved less employer control and compulsion to attend, even though the *Becker* employees were paid to attend and *Lybrand* employees were not.

88. 72 Ill. 2d 569, 382 N.E.2d 222 (1978).

89. *Id.* at 577-78, 382 N.E.2d at 226.

90. 77 Ill. 2d 81, 395 N.E.2d 569 (1979).

91. *Id.* at 85, 395 N.E.2d at 571.

92. 79 Ill. 2d 59, 402 N.E.2d 231 (1980).



and because of a multitude of personal problems unrelated to his work, became an alcoholic. When his alcoholism began to affect his work, his supervisor and close friend advised him to seek help and referred him to an alcoholic rehabilitation program available under the company's group benefit program. He was warned that should his performance continue to deteriorate, he would probably lose his job. After some deliberation, the employee voluntarily entered the rehabilitation program, but during the course of the program, he suffered a heart attack. He survived, completed the program, and returned to work on a limited basis. One Sunday, the claimant suffered a second heart attack during his sleep and died.<sup>93</sup>

The court, after finding that the first attack was caused by the stress of the alcoholic rehabilitation program and could have contributed to the employee's death, concluded that the activity was job-related and therefore compensable.<sup>94</sup> Of course, to arrive at its decision, the court had to ignore the obvious fact that the risk of injury was the alcoholic condition, a condition which is purely personal in nature. Nevertheless, the court assumed that it was in the employer's interest to forestall, minimize, or eliminate the effect of the employee's alcoholic problem and to increase employee productivity by making the program available. The court noted that Sears sponsored the program through its employee benefit package and exercised persuasive pressures to induce participation. The court, however, was hard pressed to find that the employee's participation in that program directly or indirectly carried out the purposes or advanced the interests of the employer.

If *Sears* left any doubt that the Illinois Supreme Court would apply virtually any reasoning to find employer liability, such doubt was dispelled by the court's decision in *Eagle Discount Supermarket v. Industrial Commission*.<sup>95</sup> There, an employee employed as a shelf stacker was injured while he and other employees of Eagle were playing frisbee in the store's parking lot during a lunch hour. Although the essential facts were virtually indistinguishable from those in *Hydro-Line Manufacturing Co.*,<sup>96</sup> the court issued an unusual opinion in which it refused to categorize the case as involving recreational activity. Instead, the court affirmed the award of compensation based on a combination of theories involving lunch hour and personal comfort cases.<sup>97</sup> It is interesting to note, however, the court's following statement in dictum:

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93. *Id.* at 65-69, 402 N.E.2d at 234-36.

94. *Id.* at 71-73, 402 N.E.2d at 237-38.

95. 82 Ill. 2d 331, 412 N.E.2d 492 (1980).

96. See text accompanying notes 77 & 78 *supra*. Both cases involved lunch hour recreational activities that the company neither benefitted from nor sponsored, and arguably, *Hydro-Line Manufacturing* presented a stronger case for liability because the company had at least considered sponsorship.

97. 82 Ill. 2d at 338-39, 412 N.E.2d at 496-97. The *Eagle Discount* court summarized the lunch hour decisions as deciding that eating lunch is a reasonable incident of employment such that the course of employment is continuous. *Id.* Similarly, the course of employment remains intact when employees act to meet personal comfort needs, provided those needs arise from employment conditions. *Id.* Yet, the *Eagle Discount* decision eliminated that proviso.

If we were to categorize this case as such [recreational activity], we would be compelled to find sufficient employer sponsorship to render the activity incidental to the employment; that is, the recreational activity was an accepted, regular and normal one which occurred on the premises during an authorized lunch break.<sup>98</sup>

This statement indicates the court's apparent misunderstanding of its own decisions in the athletic activity cases. Not only does it ignore the personal nature of the risk, but it never mentions the oft-stated requirements of employer financing, presumed benefit to the employer, and employer compulsion to participate, the very requirements that the court found essential in prior cases.<sup>99</sup>

To summarize, since 1955 the Illinois Supreme Court and the Industrial Commission have repeatedly resolved compensation questions by focusing on whether an employee's activities resulting in injury benefited his or her employer, rather than whether those activities involved any risks required by or peculiar to the employment. By reviving the previously rejected employer-benefit standard, the court and Commission have silently overruled traditional compensability definitions that formerly served as restrictions on employer liability. To add insult to injury, recent applications of the employer-benefit analysis have allowed recovery for employees whose disabilities or deaths were caused by purely personal, non-business activities, such as consuming alcoholic beverages or playing frisbee during lunchtime. Cases like these, where the employer's benefit is so speculative and remote, raise serious doubts as to whether any meaningful limitations on employer liability now exist in Illinois.

#### WHERE TO FROM HERE?

While the foregoing is by no means a comprehensive, entirely impartial history of workers' compensation in Illinois, the particular selection of factual situations, cases, and historical developments illustrate an administrative and judicial attitude that has contributed to what many consider a workers' compensation crisis in Illinois. That the system has developed far beyond the parameters of its original intent and purpose is obvious. It can no longer be said that the major portion of compensation dollars spent by employers is related, in any way, to an employee's present or prospective loss in earning capacity. In fact, almost seventy-five percent of compensation dollars are spent on indemnity for injuries, many of which bear no relationship at all to a present or prospective loss of earning capacity.<sup>100</sup>

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98. 82 Ill. 2d at 338, 412 N.E.2d at 496.

99. Yet unclear is the precedential effect of this case in light of the recent amendment to the Illinois Workers' Compensation Act which excludes voluntary recreational activities from coverage. See ILL. REV. STAT. ch. 48, § 138.11 (Supp. 1980).

100. See Illinois Workers' Compensation: The Caterpillar Perspective (June, 1980) (unpublished white paper available from Caterpillar Tractor Co., Peoria, Illinois).

Furthermore, the commissioners and the courts, with the tacit approval of the legislature, have expanded the concept of employer liability far beyond that reasonably necessary to accomplish even the most liberal purposes of the Act. The conclusion compelled by the more recent decisions of our court is that the system has been converted into one under which the employer is the guarantor of the employee's well-being. The fact is that these decisions have drastically strained the scope and intent of the Act so as to create from workers' compensation a system more akin to general social insurance.

This Article in no way suggests a return to the common law as a proper method of redressing employee injuries or determining employer liability. That lesson was learned all too painfully in the late 19th and early 20th centuries. Redirection of the workers' compensation system is necessary, nonetheless, if all parties are to expect the system to function in a balanced manner. There is no easy solution. No solution will prove worthwhile, however, without cognizance of the historical basis and development of workers' compensation. That perspective suggests several directions in which any reasonable solution might proceed.

The efforts of the Commission, the Illinois courts, and the legislature must be redirected to accomplish the legitimate purposes of the worker's compensation system. It must be remembered that the system was designed with the intent to protect a worker and his dependents against loss of earning capacity, present or prospective, resulting from risks reasonably incurred in the performance of the workers duties and that such risks must occur at a time and place, and under circumstances reasonably required by the employment. With this purpose in mind, attention must be focused upon the fact that the system was never intended to allow recovery of monetary damages for injuries sustained, but which have no relationship to earning capacity.

Likewise, the system was never intended to provide recovery for injuries resulting from risks which the employee need not reasonably assume to do his job, but which in some way may be directly or indirectly related to the employer—employee relationship. The foreseeability of the injury and assumed employer benefit should no more be a basis for employer liability than unforeseeability or conduct inuring to the detriment of the employer are defenses. Rather, the statutory concepts of "arising out of" and "in the course of" must be reinstated as the sole basis for determining an employer's liability under the Act.