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Workers' Compensation Report

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Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission: Is an AMA Rating Report Necessary and Should the Defense Obtain One?

Corn Belt Energy Corp. v. Illinois Workers' Compensation Commission, 2016 IL App (3d) 150311WC may have been the most monitored and significant workers' compensation claim in the last decade. In late November, the Illinois Supreme Court denied the employer's petition for leave to appeal the appellate court's decision. *Corn Belt Energy Corp. v. Ill. Workers' Comp. Comm'*, 65 N.E.2d (Table Nov. 23, 2016). The Illinois Appellate Court Third District, Workers' Compensation Commission Division's decision in *Corn Belt Energy* interpreted the so-called AMA impairment rating report provision and held the provision did not require the claimant to obtain and introduce an AMA impairment report as set forth in subsection 8.1b(a) of the Workers' Compensation Act. *Corn Belt Energy*, 2016 IL App (3d) 150311WC, ¶¶ 42-48. The *Corn Belt Energy* decision has a significant impact on the defense of the issue of the nature and extent of injuries in workers' compensation claims. The dilemma for the respondent's attorney is whether he or she should obtain an AMA impairment report, knowing the petitioner's attorneys most likely will not obtain one. This article seeks to provide background regarding *Corn Belt Energy* and provide tips for defending the nature and extent of work injuries moving forward.

Background

James Lind filed an Application for Adjustment of Claim in November of 2012 relating to a work accident on August 30, 2012. *Id*. ¶ 1. Lind, a lineman for Corn Belt Energy, had to twist and rotate while exiting his vehicle which was parked in a ditch on an angle. He claimed he felt symptoms in his back while exiting. *Id*. ¶ 5.

He began receiving chiropractic treatment directed to his lower back and cervical spine that lasted through April 2013. *Id*. ¶ 6. He continued to work while experiencing symptoms. *Id*. ¶ 8. At the time of hearing, he noted some lower back symptoms of pain and tightness that did not hinder his work, though he had now begun performing the less strenuous work of a serviceman for Corn Belt. *Id*. His pay rate was higher as a serviceman than as his former position as a lineman. *Id*.

Following a hearing the arbitrator found Lind sustained a work-related accident and awarded 3% loss of use of person-as-a-whole, among other benefits. *Id*. ¶ 20. The arbitrator found he suffered a cervical, thoracic and lumbar strain along with subluxations throughout his spine as a result of the work injury. On review, the Workers' Compensation Commission addressed section 8.1b of the Act in connection with the arbitrator's PPD award but otherwise affirmed and adopted the award. *Id*. ¶ 21. One of the 3 Commissioners dissented, finding Lind was only entitled to PPD benefits of 1% loss of use of person-as-a-whole. *Id*. The circuit court of Bureau County confirmed the Commission, and Corn Belt

appealed to the Illinois Appellate Court Third District, Workers' Compensation Division, regarding the PPD award, among other issues that will not be addressed in this article.

Appellate Court

The appellate court provided an extensive analysis of section 8.1b of the Act. *Id*. ¶¶ 40-61. This section, entitled "determination of permanent partial disability," was hoped by employers to link permanency awards with the American Medical Association (AMA) impairment rating system. The section provides:

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
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> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
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> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

820 ILCS 305/8.1b. At the time of passage there had been great hope that the provision would help reduce what had been perceived as unwarranted permanency awards by requiring the Commission to consider the AMA impairment rating report as one of five factors in evaluating permanency.

Prior to mid-2016, it had been the position of much of the defense bar that section 8.1b placed the burden of obtaining and offering an AMA impairment rating report into evidence on the claimant. In some cases, the defense had taken the position that the failure of the claimant to offer such a report meant the claimant had failed to comply with section 8.1b and therefore, failed to make a *prima facie* case of disability. Thus, the claimant should get a zero award of permanency. The appellate court held that "[s]ubsection (a) does not contain any language which obligates either a claimant or an employer to submit a PPD impairment report," and "it contains no language limiting the Commission's ability to award PPD when no report is submitted." *Corn Belt Energy*, 2016 IL App (3d) 150311WC, ¶ 45.

According to the appellate court, subsection (a) of section 8.1b is addressed "*only* to a' physician *** preparing a]PPD] impairment report.'" *Id*. (emphasis in original) (quoting 820 ILCS 305/8.1b(a)). "It sets forth what a physician should include in his or her report and establishes that the report must be 'in writing.'" *Id*.

According to the appellate court, an AMA impairment rating report may be submitted by either party and, when one is admitted into evidence, it must be considered by the Commission, along with other identified factors in subsection (b), in determining the claimant's level of PPD. However, none of the factors set forth in the statute is to be the sole determinant of the claimant's disability, and, in accordance with *Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Commission*, 2015 IL App (5th) 140445WC, ¶¶ 17-18, nothing in section 8.1b precludes a PPD award when no AMA impairment rating report is submitted by either party or when the report submitted is valued at zero impairment. *Corn Belt Energy*, 2016 IL App (3d) 150311WC, ¶ 48.

According to *Corn Belt Energy*, when the Commission issues its decision, it must "set forth each of the aforementioned factors in its decision along with the basic facts applicable to each factor." *Id*. ¶ 52. However, the court concluded that the Commission did not explain the relevance or weight it attributed to each factor when determining claimant's level of disability, and thus, "the Commission failed to comply with section 8.1b(b) of the Act." *Id*. As a result, the appellate court reversed the Commission's PPD award and remanded the case back to the Commission for compliance with the Act's requirements. *Id*. ¶¶ 52-55. This is where the case stands now as of the time of this writing.

Tips on Handling Your Case

So, why would the defense go through the trouble of obtaining an AMA impairment rating report if they are not required? We know from the cases that if a report is desired, it will almost always have to be obtained and offered by the employer. Since the Supreme Court's November order denying the employer's petition for leave to appeal in *Corn Belt Energy*, the claimant's bar will undoubtedly take the position that it no longer needs to obtain such a report and will not do so. Most AMA impairment reports work to drive down the ultimate disability rating and we do not anticipate that claimants will be in a hurry to move their cases in that direction. In reviewing Commission decisions involving AMA reports, the report has almost always resulted in a lesser permanency award than what would have been expected absent the report. Employers will have to obtain and offer AMA impairment rating reports, if they want one.

Since the employer will now carry the burden of obtaining and introducing an AMA impairment report, in most situations a report should be obtained once the claimant reaches maximum medical improvement (MMI). However, each case needs specific, factual evaluation to determine whether obtaining an AMA rating report is even cost efficient. For example, for smaller value claims, the costs of obtaining the AMA rating may outweigh the expected decrease in permanency value obtained from the Commission as a result of the rating. This is especially true when considering some physicians are charging upwards of $1,000 to $1,500 for the AMA examinations. This is also true if claimant's attorney requires the deposition of the physician who performed the AMA impairment rating examination, which adds the costs of the doctor's deposition fee. But even the smaller value claim may merit the AMA impairment rating report if claimant is being unreasonable in his/her settlement negotiations and there is no chance of settlement. It is still evident that the AMA impairment ratings influence the arbitrators' and commissioners' evaluation of permanency. The ratings are being factored into the Commission's evaluation of the nature and extent of injuries, along with the other four factors enumerated in subsection (b) of section 8.1b. It is still necessary to develop favorable evidence to reduce the weight of the other four factors because the AMA impairment rating cannot be the sole determinant of permanency. Although AMA impairment reports are not required and can be costly, they should still be utilized under the right circumstances to help drive down the potential exposure of a workers' compensation claim.

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