

# LEGAL LINES

## INSIDE THIS ISSUE:

The Power Line	2
<i>By John F. Power III</i>	
Between the Lines	3
<i>By Daniel J. Cronin</i>	
Seminar Highlights	3
<i>By John P. Fassola</i>	
What's My Line	4
<i>By Martin J. Deely</i>	

## Special points of interest:

- Legal developments in the world of Workers' Compensation
- Legislative Update
- Seminar Highlights



## *Front of the Line*

### **An Employee's Improper Conduct: Compensable or Not?**

**By: Carol A. Cesaretti**

What type of improper conduct is enough to remove an employee from the sphere of employment under the Illinois Workers' Compensation Act? This issue was specifically addressed by the Illinois Supreme Court in *Saunders v. Industrial Commission*, 189 Ill 2d 623, 727 N.E.2d 247 (2000). In *Saunders*, the claimant, in violation of a known safety rule, hitched a ride on a forklift that was operated by his co-worker. The claimant engaged in this activity in order to retrieve his lunch more quickly as he had a limited amount of time for his break. As a result of this activity, the claimant's ankle was run over by the forklift. The claimant subsequently filed a workers' compensation claim. The Court held that the claimant's conscious violation of the well-known Company safety rule was purely for his own convenience. This act was not in any way required by his employer nor was it a benefit to his employer. Therefore, the Court found the accident did not arise out of his employment, and compensation was denied.

At first glance, *Saunders* seems to be a hard and fast rule standing for the proposition that when an employee engages in actions that are a direct violation of an established safety rule by the employer, the employee's injury is not compensable as it takes him/her outside of the sphere of his or her employment. The proposition, however, is not the rule or standard that was created under the *Saunders* case. In fact, the Industrial Commission has had several cases wherein the Respondent cites to *Saunders* to dispute a claim, and the Commission, for a variety of reasons, distinguishes *Saunders*.

One such example, is *Knight v. Wal-Mart*, 01 IIC 000725. In this case, the claimant was injured while climbing steel racks to stack tires. The claimant admitted that he knew he was supposed to use the ladders provided by the employer; however, it was sometimes more efficient to climb the racks. The Respondent argued that *Saunders* was applicable and the claim should therefore be denied under workers' compensation. The Industrial Commission, however, distinguished this case from *Saunders*, finding the injury arose out of and in the course of claimant's employment

since his actions were in furtherance of his employment, rather than for his own personal comfort.

Another example of how the Commission has distinguished *Saunders* is found in *Madon v. Onesource Facility Services, Inc.*, 01 IIC 000826. In this case, the claimant was a window washer, who was injured when he fell. This fall occurred due to the fact that he was in violation of his employer's safety rule requiring the use of safety lines when descending from a higher to a lower roof. The Commission not only distinguished this case from *Saunders* but specifically noted that the claimant's actions in *Madon* were for the sole purpose of accomplishing his employer's business of washing windows, and therefore he sustained an injury arising out of and in the course of his employment.

Finally, in *Hubbard v. Wal-Mart*, 02 IIC 0605, the claimant was injured when she was climbing on a "blue-cart" to get an item for a customer. The claimant's action was in direct violation of her physical restrictions, which included no ladder climbing. Further her employer indicated that the "blue-carts" specifically had stickers indicating they were for merchandise only. The Industrial Commission held that the claimant's injuries arose out of her employment, as she was performing an activity that benefited her employer, rather than an activity that was of personal benefit to the claimant.

The mere fact that a claimant acts in direct violation of an employer's rules, does not automatically take him outside of the sphere of the Act. Consideration must be given to the activity claimant was performing at the time he/she violated the rules set forth by the employer.

Therefore, the specific facts of each case must be closely analyzed and reviewed for all possible outcomes. Always ask, did the act/violation benefit the employer or was claimant acting in furtherance of his employment? This should provide you with some guidance; however the Commission may continue to distinguish and differentiate the *Saunders* decision; so be cautious!

## *The Power Line* News From The World Of Worker's Compensation

By John F. Power III

Past Re-Visited: *Hydraulics v. Industrial Commission*, is the law in the State of Illinois. Therefore, communications between an injured worker's health care provider and the employer, or their legal representative are prohibited 201 Ill. 2d 567, 329 Ill. App.3d 166 (2002).

**July 2, 2003:** Congratulations go out to attorney Jeff Redick and **Crawford Construction** in their recent "zero" award before Arbitrator Er-bacci on the issue of causal connection involving an alleged urinary bladder rupture at work.

**September 5, 2003:** Congratulations go out to attorney John Fassola and **Meany Electric** for their reversal on appeal for compensable findings involving a carpal tunnel claim. In a unanimous decision, Commissioners Serkland, Shermer and Akemann reversed a compensability finding based upon a lack of causal connection.

**September, 2003** Chairman Dennis Ruth announced new arbitrator assignments as follows:

- \*Arbitrator Peterson will serve as the daily "pro se" arbitrator
- \*Effective 12-01-03, Arbitrator O'Malley will take over Arbitrator Akemann's call and Arbitrator Pulia will take over the call of Arbitrator Falcioni
- \*In January, 2004, Arbitrators Akemann and Falcioni will be re-assigned to downstate regions
- \*A twelfth Chicago call is being created and newly appointed Arbitrator George Andros will take over that call with the first status call being held on 12-9-03

(Source: *Industrial Commission*)

**October, 2003:** Chairman Ruth has indicated that immediately, all arbitrators will grant trials pursuant to Section 19 (b) of the Act on any case where the Petitioner is claiming past or current benefits that remain unpaid, regardless of the Petitioner's current work status. This includes past or future medical, TTD and maintenance. (The Chairman has indicated that if the Petitioner has returned to work, but TTD or medical remains unpaid, he or she has a right to trial pursuant to 19(b) and that this right will be supported by the Industrial Commission ) (Source: *Industrial Commission*)

**October 20, 2003:** Our office partici-

pated in a conference symposium put on by Medicare in the spirit of administrator's Tom Scully's open door initiative. This open door forum discussed Medicare as a secondary payer along with Medicare's feelings and rights towards future medical under workers' compensation. Following the presentation, Q's and A's made it clear that Medicare triggers previously enunciated are still in full force and effect. As you will recall, review by Medicare relative to future medical situations are triggered by the following:

- (a) The matter involves a current Medicare beneficiary or
- (b) The matter involves injured individuals who are resolving their compensation case for a sum greater than \$250,000 **and** there is a reasonable expectation of Medicare enrollment within thirty months

Reasonable Expectation criteria include, but are not limited to, the following:

- (i) Individual has applied for social security disability benefits
- (ii) Individual has been denied social security disability benefits, but anticipates appealing that decision
- (iii) Individual is in the process of appealing and/or re-filing for social security disability benefits
- (iv) Individual is sixty-two years and six months old
- (v) Individual has End Stage Renal Disease, but has not yet qualified for Medicare based upon End Stage Renal Disease

Please note we are following closely with Medicare regarding changes that could occur in the future, since this a fluid topic where not all the answers are currently known.

**October 26, 2003:** Congratulations to **American Airlines** for bolstering returning troops from Iraq . Upon entering the departing planes to America, the airlines crew places grass at the entrance threshold. The crew then sprinkles red, white and blue confetti on it! **American Airlines** has permitted the crew to bring sod from home so that when soldiers enter the plane they can literally feel the green, green grass of home. Great job **American Airlines!**

**March 11, 2004:** Save the date for the Power & Cronin St. Patrick's Day gathering!

*"...changes continue at the Illinois Industrial Commission as Chairman Ruth assigns, re-assigns and appoints Arbitrators."*

*Save The Date:*

*March 11, 2004*

## *Between the Lines—Legislative Update*

By Daniel J. Cronin

In the spring session of 2003, the legislature of Illinois was quite busy; however, the only major piece of legislation to be passed involving workers' compensation was contained in Senate Bill 1903, which is enacted as Public Act 93-32. This new funding mechanism is intended to infuse money into the operations of the Industrial Commission with a balance of dollars beyond the request of the Industrial Commission being ultimately funded through to the general revenue fund.

Specifically, this legislation provides a 1.5% surcharge on direct premium by insurance companies and a charge on self insured employers of .045% of annual actual state wages paid as reported in the employer's annual self insurance renewal filings.

There was a great amount of consternation in the general assembly regarding this and there is talk that a law suit will be filed by interested businesses to challenge the constitutionality of the diversion of the Industrial Commission funding process to the general revenue fund.

Finally, there are still drum beats heard relative to the balance billing bills that generate from the mid-nineties, still without agreement between the various parties and players in the equation.

## Seminar Highlights

By John P. Fassola

On September 25, 2003, Power & Cronin presented our annual Medical-Legal Seminar. The seminar always provides us with a great opportunity to see our clients and to provide them with updated information on relevant medical and legal topics.

This year, the first presenter was, Dr. Gary Noskin, a leading infectious disease specialist from Northwestern Memorial Hospital. Dr. Noskin's presentation included a thorough cutting-edge discussion of recent public safety and bio-terrorism issues. In addition, he highlighted the applicability of infectious disease issues to a workers' compensation context, and in particular, discussed issues relevant to potential claims by "first responders" and the recent call to provide immunizations, with attendant potential side effects, to those employees.

Our second presenter was Dr. Daniel Fintel, a leading cardiology specialist, also from Northwestern Memorial Hospital. Dr. Fintel offered his thoughts on the issue of cardiology claims which face workers' compensation attorneys and claims handlers. Of specific interest was a discussion of definitive cardiac medical finding and their potential relationship to workplace claims of injury or illness. Clearly, given the prevalence of heart disease and related conditions in our society, great caution should be taken before associating the acute onset of those conditions with employment activities.

After a short break, Dan Cronin provided the group with recent legislative happenings and pending issues before State government. Dan noted the current challenging environment for insurance interests and defense litigators in Springfield. Senator Cronin also noted relevant aspects of recent legislation, including the development of a new employer-payer system for the funding of the Illinois Industrial Commission. These issues will require quite a bit of attention and vigilance in the future.

Finally, John Power presented a summary of one of the most rapidly developing issues in our field, the requirement for governmental approval of certain workers' compensation settlement agreements. John discussed the "triggers", which you can find on page 2 of this newsletter, which place a settlement contract under the auspices of the Centers for Medicare and Medicaid Services, as well as an instructional discussion on the approval process for claims falling within the system. This issue has been gaining a great deal of attention and importance and is highly fluid at this moment!

Of course, in addition to the information presented, we always welcome the opportunity to meet face-to-face with our clients and to enjoy the congeniality of the people we work with on claims and litigation.

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**Law Offices  
Power & Cronin, Ltd.**

Business Address:

900 Commerce Drive  
Suite 300  
Oakbrook, Illinois 60523

Phone: 630-571-2001  
Fax: 630-571-2025  
www.powercronin.com

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sue.harty@powercronin

**Our Law Firm**

John F. Power III JD  
Daniel J. Cronin JD  
Jeffrey B. Huebsch JD  
John P. Fassola JD  
Jeffrey B. Redick JD  
Carol A. Cesaretti JD  
William P. Dewyer JD  
Daniel J. Artman JD  
Kimberly A. Mezik JD  
Matthew P. Sheriff JD  
Martin J. Deely JD  
Tammy A. Paquette JD  
Donna Manning,  
Paralegal  
Maureen T. Sherlock RN  
MPH

***What's My Line***  
***By Martin J. Deely***

A few of you have already met and currently work with Martin "Marty" J. Deely. Marty joined Power & Cronin in January 2002 and came to us from the law firm of Jacobson & Riseborough where he specialized in construction law. Marty actually began his legal career at Pollina & Earl specializing in defense of automobile accident cases. It was at his previous firm that he met up with our own attorney's: Bill Dewyer, Dan Artman and Matt Sheriff. He gained extensive trial experience both from Jacobson & Riseborough and Pollina & Earl.

It is a little known fact that during his adolescent years, Marty and his family moved from the United States and lived in Ireland in Galway City where he still has many family members. His family moved back to the United States in 1982. Marty attended Fenwick High School in Oak Park, IL and went on to Northwestern University as an undergraduate. His law degree was earned at the University of California Hastings College in San Francisco. He is licensed in both Illinois and California.

Marty has interests in motorcycling and supporting his Rugby Club and claims he is semi-retired from active playing.

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*Civil Rights Defense*

*Professional Liability Defense*

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*At Power & Cronin, Ltd., we pride ourselves on expert legal representation and personal attention to details. We interact with our clients to assist in developing procedures to contain current losses and avoid losses in the future. Additionally, we provide aggressive and cost efficient representation in order to protect our clients' interests.*

*We thank you for considering our firm to represent you and we look forward to working with you in the future.*

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