

Border War: Key Differences Between Illinois & Indiana Investigation & Discovery

In a new column, two members of our Workers' Compensation team compare how Illinois & Indiana handle major workers' compensation issues. This month, associates [Ryan O'Malley](#) & [Daniel Korban](#) address **investigation & discovery**.



ILLINOIS

1. There is no pre-trial discovery
2. Subpoenas are a standard discovery tool used to obtain pre- and post-accident records, especially medical records
3. Medical canvassing assists with identifying pre- and post-accident records
4. Prior to issuing a subpoena for Petitioner's medical records, Petitioner must sign a Health Insurance Portability and Accountability Act and Genetic Information Privacy Act (HIPPA-GIPA) compliant release
5. Surveillance and social media canvassing results are not required to be disclosed prior to Petitioner's testimony at trial and is a commonly used tactic to discredit Petitioner's testimony



INDIANA

1. Permits pre-trial written discovery, including Interrogatories, Request for Production and Request for Admissions
2. Requires parties to file a Stipulation prior to trial outlining agreed-upon facts, exhibits and witnesses
3. Depositions are permitted and there are no limits with regard to number or scope, so long as they are reasonably expected to lead to the discovery of admissible evidence
4. Non-party subpoenas are also permitted. These are most commonly used to gather pre-accident medical records
5. Surveillance is an accepted form of investigation. Disclosing surveillance results is not required until after Plaintiff's deposition

Overtime Must Be Consistent and Mandatory

By [Emily Schlecte](#)

Income Member



The Illinois Workers' Compensation Commission recently addressed overtime and average weekly wage (AWW) calculations. In *Tantillo v. PTO Services, Inc.*, 29 IL WCLB 95 (Ill. W.C. Comm. 2021), Petitioner worked as a commercial truck driver and worked 48 hours every week. He further testified that he worked overtime 21 of the 27 weeks prior to the accident. The

Arbitrator found that Petitioner's overtime was mandatory and therefore included overtime wages in the AWW calculation.

However, the Commission disagreed, specifically noting the lack of evidence indicating mandatory overtime. The Commission also noted that Petitioner's wage statement reflected some overtime, but the number of hours worked were not regular and varied significantly. Relying on *Airborne Express*, the Commission concluded that without consistency and evidence that overtime was mandatory, overtime should be excluded in AWW calculations.

Practice Tip:

Overtime must be **consistent AND mandatory**. Make sure to thoroughly review wage statements and confirm with the employer that overtime was mandatory.

COVID-19 Exposure at Work Outweighs Community Exposure

By [Natalie Christian](#)

Associate



In the first COVID-19 Decision, the Arbitrator's ruling highlighted the weight of the rebuttable presumption. In *Edgar Lucero v. Focal Point, LLC* (20 WC 19985), Petitioner worked at an essential business shortly after the March 2020 Stay-at-Home Order was issued. He alleged that he was exposed to and contracted COVID-19 while working for Respondent in April 2020.

As Respondent was an essential business and employed more than 15 employees, Petitioner was entitled to the COVID-19 rebuttable presumption. At trial, Respondent presented **some** evidence (testimony, statistical charts, and procedural documentation) that showed their actions to reduce the transmission of COVID-19, which were consistent with CDC and local recommendations. Respondent also presented **some** evidence that Petitioner may have contracted the virus outside of work (his adult children lived in the upstairs flat and the community had a high transmission rate). The Arbitrator found that because Respondent presented **some** evidence, they overcame the COVID-19 presumption.

The Arbitrator found Respondent's actions to reduce transmission well intended. However, Respondent's evidence was inconsistent and showed that Respondent had multiple positive cases prior to Petitioner's COVID-19 illness. There were numerous opportunities for transmission (a large work meeting, close proximity between workstations and employee entrance/timelock) compared to Petitioner's interactions with the community (gas stations, limited interaction with his adult children and his unemployed wife). The Arbitrator found for Petitioner and awarded benefits.

Practice Tip:

Use investigation tools to identify Petitioner's potential COVID-19 exposures at work and outside of work, focusing on the 14 days immediately preceding the alleged exposure date.

Failing to Overcome the COVID-19 Rebuttable Presumption

By [Robert Kroeger](#)

Associate



The *Dalton v. Saline Care Nursing & Rehabilitation Center* (21 WC 08010) Decision was issued shortly after *Lucero*. In *Dalton*, the Arbitrator held that Respondent failed to rebut the COVID-19 presumption and even if they had, Petitioner's COVID-19 illness arose out of and in the course of her employment.

The Arbitrator noted that Respondent's best chance at rebutting the COVID-19 presumption was to present sufficient evidence of its actions to reduce COVID-19 transmission. Respondent needed to show that they complied, "to the fullest extent possible," with industry-specific workplace sanitation, social distancing and health and safety guidelines issued by the Center for Disease Control (CDC) and the Illinois Department of Health (IDH).

Respondent offered evidence that it developed COVID-19 safety protocols, but failed to provide evidence that they were implemented and followed at the facility where Petitioner worked. Respondent's witness never visited the facility and did not have foundational knowledge to testify about the location's compliance with Respondent's safety measures. The Arbitrator refused to infer that Petitioner's facility followed procedures merely because they were told to do so by their corporate office.

The Arbitrator also highlighted that even if Respondent's safety protocols were followed, they were not in accordance with the recommended policies and procedures developed by the CDC or the IDH. Respondent offered no evidence to support their theory that Petitioner was exposed to COVID-19 by an alternate source, nor that she worked from home or was on leave 14 days prior to her injury. The Arbitrator found for Petitioner and awarded benefits.

Practice Tip:

Gather evidence of Respondent's COVID-19 protocol prior to Petitioner's alleged exposure as well as evidence that shows whether the protocol was implemented and followed.

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Firm News

Rich Lenkov, Kirsten Kaiser Kus & Tim Furman Present at WCI Conference in Orlando

Capital member [Rich Lenkov](#) and income members [Tim Furman](#) & [Kirsten Kaiser Kus](#) presented at the 75th Annual [Workers' Compensation Institute](#) Conference and 32nd Annual Safety & Health Conference in Orlando.

Tim presented "It's a Mad Mad Mad Mad World - What has the Pandemic Taught us in Regard to the Legal System?" on 12/14. The panel addressed how COVID-19 has impacted the workers' compensation industry.

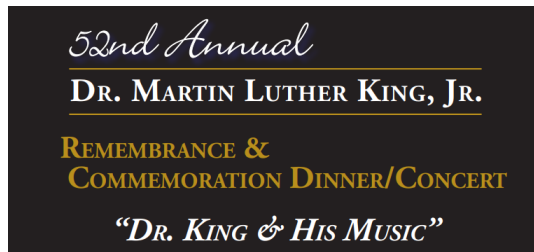
Rich, Kirsten and Tim participated in the "Breakout on Multi-State Workers' Compensation Laws" session on 12/15. The presentation covered the latest trends and insights in workers' compensation claims handling across 15 different states. Rich, Kirsten and Tim provided practical takeaways from Illinois and Indiana perspectives.



BDL Sponsors ICDHR's MLK Remembrance Dinner & Concert

We were proud to sponsor [Illinois Commission on Diversity and Human Relations'](#) 52nd Annual Dr. Martin Luther King, Jr. Remembrance Dinner & Concert on 11/13. The annual dinner commemorates the anniversary of Dr. King's death by honoring and elevating the ideas that he stood for.

Income member [Brian Rosenblatt](#) was selected to host this year's dinner, which featured a performance by five-time Grammy Award-winning artists, the Five Blind Boys Of Alabama.



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"I think overruling Roe will be an enormous blow to the Supreme Court's legitimacy. But I also think, in terms of

political consequences, it will make abortion the most salient and important political issue in state, local, federal and judicial elections in so many states across the country....abortion is going to be left to city councils, state legislatures, state judges and perhaps members of Congress. It is going to make it the dominant political question for elections to come."

**– Erwin Chemerinsky on SCOTUS's abortion ruling
Berkeley Law Dean & Professor**

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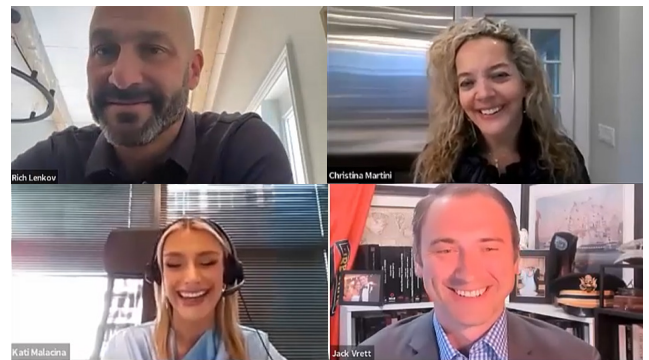
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