Illinois Association of Defense Trial Counsel
P.O. Box 7288, Springfield, IL 62791
IDC Quarterly Vol. 13, No. 2 (13.2.43)

Appellate Practice Corner

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Securing Appeal Bonds in Workers' Compensation Appeals From the Industrial Commission

Employers are placed in a precarious position should they choose to appeal from an unfavorable Illinois Industrial Commission decision. Section 19(f) of the Workers' Compensation Act ("the Act"), which governs appeals of an Industrial Commission decision to the circuit court, requires that employers not only obtain an appeal bond, secured by a surety, but the bond must be obtained, filed with and approved by the circuit court within 20 days of the employer's receipt of the Commission's decision.[1] And, to make matters worse, many employers – or, more accurately, their insurers – do not make the decision to pursue an appeal until well into that 20-day period.[2]

Moreover, many are unwilling to commit to obtaining a bond until after they decide to appeal. Thus, counsel is often left with the task of obtaining both the employer's signature on the bond and a subsequent surety signature within a very short time frame. This can be troublesome where the signatory is located a good distance away. Hopefully this article will provide a compact overview of the bond requirements and some of the common pitfalls encountered so that this process is less daunting.

General Appeal Requirements

Section 19(f) of the Act provides that a party seeking judicial review of an Industrial Commission decision must file the following documents with the circuit court in an appropriate venue: (1) a written request to commence proceedings and a request for issuance of summons; (2) proof of payment of the probable costs of preparing the record on appeal; (3) a bond signed by the person against whom the Commission rendered the award and a surety;[3] (4) an appropriate summons; and (5) a certification for the clerk that summons were in fact issued.[4] All of this activity must be completed within 20 days [5] of the date of receipt of the Commission's decision is received, or the circuit court lacks jurisdiction over the appeal.[6] Indeed, because the right to appeal from an Industrial Commission decision is statutory, a party seeking review is generally held to a strict compliance standard.[7]

Securing the Bond

To satisfy Section 19(f)(2) of the Act, the appeal bond must be conditioned so that the employer, if unsuccessful in prosecuting its appeal, will pay the award plus the costs of the proceedings in the appellate courts.[8] Any member of the Commission may fix the amount of the bond and the bond surety or sureties shall be approved by the clerk of the court.[9] The amount of the bond is usually stated at the conclusion of the Commission's decision. The acceptance of the bond by the clerk of the court constitutes evidence of the approval of the bond.[10] Unfortunately, at this point, this apparently simplistic provision gives way to a harsh reality of confusion. Questions now arise such as who may sign the bond for the employer; whether an employer's workers' compensation attorney can sign the

bond for the employer; who is considered a viable surety; what happens if the employer is no longer in business and a representative cannot be found; whether a photocopy of the bond can be filed, with the original bond filed after expiration of the twenty days; how does a self-insured employer satisfy the bond requirement; and what happens if the Commission fails to set a bond amount? While most of these questions have been resolved through litigation over the past decade, some remain unanswered.

Wisdom tells us to discuss the possibility of an appeal with our client as soon as the Commission argument date is set. In this discussion, counsel should apprise the client (and its insurance carrier) of Section 19(f)'s filing requirements and the strict time constraints associated with such an appeal. Moreover, at that time counsel should identify who will be signing the bond for the employer and where they are located. Securing this information without pressing time constraints will go a long way towards ensuring a timely filing for circuit court review.

Perhaps the most critical inquiry is who can sign the bond on behalf of the employer. If the employer is an individual or sole proprietorship, the answer is simple – the sole proprietor must sign. Likewise, for partnerships, any partner may sign the bond.[11] For corporations, the signatory should be a corporate officer or director, or a senior department manager, such as one from Human Resources.[12] One rule of thumb is to have one of the individuals listed on the employer's corporate 10K securities form serve as the corporate signatory. In all of these examples, however, it should be clear that the person signing the employer's bond must have the authority to bind the company.

To keep matters simple, the signatory must identify himself and date the bond. In *First Chicago v. Industrial Commission,*[13] a corporate officer signed the bond for the employer, but failed to identify his position with the company. The court remanded the matter to give the respondent leave to submit further evidence identifying the corporate signatory. This ruling is entirely consistent with cases applying the substantial compliance standard, which looks to whether some document, albeit imperfect, has been filed.[14]

A related question arises when the employer's attorney signs a workers' compensation appeal bond. Prior to 1992, it was indeed a commonplace practice for a respondent's counsel to sign the bond on behalf of the employer.[15] That practice changed, however, with the Supreme Court's decision in *Deichmueller Construction Co. v. Industrial Commission,*[16] where the court held that an attorney did not have the legal authority to bind its employer client. Interestingly, responding to the motion to dismiss the appeal, the employer had provided its affidavit seeking to ratify the filing of the attorney-signed bond. The *Deichmueller* court rejected this, stating that the authority to sign the bond was not given to the attorney within the 20-day period, and thus, the bond failed to comply with the statutory requirements.

Deichmueller has since been interpreted in *Berryman Equipment v. Industrial Commission,*[17] to allow an attorney to sign an employer's bond *provided* that he file with the bond a document indicating that he has the authority to sign on behalf of the company and that he was given that authority by the employer corporation *within* the 20-day period of Section 19(f).

In *Berryman*, the employer responded to the petitioner's motion to dismiss the appeal by providing a copy of a letter from the Stanley C. Berryman authorizing the company attorney to execute and sign an appeal bond on its behalf. The letter, however, did not include a date and further did not disclose Berryman's office or capacity with the employer. The employer also attached to its motion to reconsider an affidavit from an attorney for the surety stating that the bond was in full force and effect and remained valid, and a statement from Berryman (albeit neither notarized nor dated) stating that he was the company president and that he understood that the attorney would sign the bond as principal for the employer and bind the employer. The employer also provided an affidavit from its attorney John W. Billhorn stating that Berryman had signed the letter authorization before Billhorn signed the bond.

The Appellate Court, Industrial Commission Division, held that the letter was insufficient to confer authority on the employer's attorney to obtain and sign a bond on its behalf. According to the court:

> It is clear that there was nothing on file within the 20-day period which indicated respondent's attorney had the authority to sign the bond. Nor was there anything before the circuit court which indicated that the authority was given prior to the signing of the bond until Billhorn's affidavit was finally filed.[18]

The court added, "[t]o allow an attorney to sign a bond without requiring that the filing of the bond be accompanied by a written authority for the attorney to sign the bond 'as principal' in lieu of a corporate officer for the party, or an individual party, and to bind that partywould circumvent the effect of the rulings in *Deichmueller* . . . ." Evidence of the attorney's authority to sign the bond "must be filed with the bond in order to invoke subject-matter jurisdiction under the Act."

An equally interesting question is who is a surety for the purposes of Section 19(f). The Act is silent on the issue, and few cases have discussed it. Again, the preferred method of handling the bond is to have the employer's representative sign the bond and then obtain a separate surety company to act as the surety. However, even that can present problems. After reviewing the governing local circuit court rules, the best advice is to contact the circuit court where you intend to file your bond and ask this series of questions: (1) Do they have any surety requirements for workers' compensation appeal bonds? (2) Is your proposed surety listed on their "approved surety list?" And (3), if so, does that circuit court recognize your agent of record as a proper agent or attorney-in-fact?

To demonstrate this problem, despite being assured by the circuit court that my surety was on their list of approved sureties, I was disappointed to learn on the day of filing that my agent-in-fact was not recognized by the Cook County Circuit Court as an *approved agent* for my *approved surety*. As a result, I had to procure a new bond and present it for filing with only hours left on my filing clock!

Some petitioner's counsel have tried to confuse the issue concerning sureties by referring the respondent's attorney to the local rules governing sureties for estate or receivership matters. These attempts should be quickly defeated, as most such rules are limited to those specific proceedings. Cook County and Lake County, however, certainly have approved surety lists, and they will enforce their procedures by refusing to approve your bond if the surety or its attorney-in-fact is not listed.

Another situation arises when the Commission fails to set an amount for the bond. *Firestone Tire & Rubber Co. v. Industrial Commission*[19] provides some guidance, suggesting that counsel immediately file a motion for the correction of errors under Section 19(f). Yet, Section 19(f) only confers this right if a petition for correction is filed within 15 days of receipt of the Commission's decision. Should that avenue not be available, other reasonable solutions would seem to include computing the award rendered and adding $100, as required by Commission Rule 7060.10(b).[20] Also, keep in mind that no bond may be required in amounts exceeding $75,000.[21] Since most bonds can be procured for a fee of about $20 per $1,000, this is not a great outlay.

A tricky question arises if the employer is no longer doing business. The inquiry then becomes who can sign the employer's bond. In many cases, a defunct company will have designated a person to oversee matters in conclusion of the company's business. This may be a receiver or trustee, if bankruptcy is involved.

But what if the company is a sole proprietorship or a partnership and it simply ceases operates? Since your contact is generally with the workers' compensation insurance carrier, you may not know this fact until it is time to find a bond signatory. Moreover, even if there is such a person, you may not be able to locate him or her until after the twenty days for filing the appeal. In that event, the most logical step would be to file a bond signed by the carrier, with an accompanying affidavit explaining that the company no longer operates, that the carrier is defending and indemnifying the claim, that

there are no coverage issues, and that all efforts to locate the company representatives have failed. An independent surety should also be obtained.

A similar question arises with self-insured employers. In these situations, it is best to have the company official sign the bond, and then procure an independent surety bond meeting any requirements imposed by the governing local rules. It is not recommended that the company sign the bond as both the employer and surety, even though it is backing the claim with independent self-insured funds.

Finally, an occasional situation has arisen where the bond, signed by both the surety and the employer, simply cannot be obtained within the 20-day period. Here, filing a copy of the bond showing the date of signature within the 20-day period may suffice so long as the original bond is immediately filed when available. And *do not* accept petitioner's argument that a faxed copy of a bond violates local rules prohibiting the filing by fax; you are filing a faxed copy, not filing by fax. There is a difference.

This review should assist you in walking through the mine fields of workers' compensation circuit court reviews at least concerning appeal bonds. Unfortunately, there are additional issues associated with the other requirements that make life equally hectic for respondent's attorneys seeking circuit court review of Commission decisions.[22]

Endnotes

[1] 820 ILCS 305/19(f)(2).

[2] *Id.*

[3] The bond signed by the employer should state: "[i]f we, as the party against whom the award was rendered, shall not successfully prosecute the review, we will pay the award as it becomes due and payable and the costs of the proceedings in this Court." The surety portion should state: "[i]f the principal shall not successfully prosecute the review, we jointly and severally agree to pay the award as it becomes due and payable, and the costs of the proceedings in the courts."

[4] *Id.*

[5] Not only should the Illinois General Assembly modify Section 19(f) to expand the time for filing a workers' compensation review to the circuit court to a more reasonable time of 35 days (the same period as other administrative appeal times), it should also clarify the bond requirement and recognize that, in the vast majority of cases, it is the insurer who pays the workers' compensation award. A reasonable solution would permit an agent of the insurer or a third-party administrator, rather than the employer, to sign the bond. Moreover, the legislature should add a standard for determining who is a viable surety, and include an option, similar to that found in Supreme Court Rule 305(i), to permit the posting of the insurance policy in lieu of a bond.

[6] Compliance with the requirements of Section 19(f) is mandatory and jurisdictional. *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 721 N.E.2d 563 (1999).

[7] *Forest Preserve Dist. of Cook Co. v. Industrial Comm'n*, 305 Ill. App. 3d 657, 712 N.E.2d 856 (1st Dist. 1999). Substantial compliance may suffice, however, when the offending party complies imperfectly, rather than completely omits a required step of the appeal process. *See, Chicago Transit Authority v. Industrial Comm'n*, 238 Ill. App. 3d 202, 606 N.E.2d 236 (1st Dist. 1992).

[8] *Id.*

[9] Note that there is some dispute as to whether a surety must accompany every bond. The Act does not expressly require this but rather refers to approval of a surety or sureties in a separate sentence. Most counsel, however, are reluctant to proceed without a surety for fear that the appeal might fail.

[10] *Id.*

[11] *Deichmueller Construction Co. v. Industrial Comm'n*, 215 Ill. App. 3d 272, 574 N.E.2d 1208 (4th Dist. 1991), *aff'd*, 151 Ill. 2d 413, 603 N.E.2d 516 (1992).

[12] *Anderson v. Rolling Meadows*, 10 Ill. 2d 54, 139 N.E.2d 199 (1956); *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 691 N.E.2d 134 (1st Dist. 1998).

[13] 294 Ill. App. 3d 685, 691 N.E.2d 134 (1st Dist. 1998).

[14] *Bethlehem Steel Corp. v. Industrial Comm'n*, 41 Ill. 2d 40, 241 N.E.2d 444 (1968).

[15] *Deichmueller Construction Co. v. Industrial Comm'n*, 151 Ill. 2d 413, 603 N.E.2d 516 (1992).

[16] 151 Ill. 2d 413, 603 N.E.2d 516 (1992).

[17] 276 Ill. App. 3d 76, 657 N.E.2d 1039 (2d Dist. 1995).

[18] *Id.*

[19] 74 Ill. 2d 269, 384 N.E.2d 1329 (1979).

[20] 50 ILAC 7060.1(b) reads in part, "Bond shall be set at an amount equal to $100 over the total unpaid amount of the award rendered by the Commission on review subject to a maximum of $75,000."
[21] *Id.*
[22] *See,* Elward, *Workers' Compensation Reviews and Appeals: A Review and Suggestion for Change*, 22 NO. ILL. UNIV. L.R., 493 (2002); Elward, *Statutory and Administrative Procedures Governing Workers' Compensation Appeals*, 7 APPELLATE LAW REVIEW 20 (1996).

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