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## Feature Article

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# Recent Cases Emphasize Need for Reform with Section 19(f) Appeal Bonds in Workers' Compensation Judicial Reviews

Two appellate court decisions issued in 2013 illustrate the potential troubles employers face when prosecuting a judicial review from the Illinois Workers' Compensation Commission to the circuit court, pursuant to Section 19(f) of the Illinois Workers' Compensation Act (Act), 820 ILCS 305/1, *et seq*. In *Illinois State Treasurer v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120549WC, ¶ 4, the appellate court held that the state, as *ex officio* custodian of the Injured Workers' Benefit Fund, was required to file an appeal bond in compliance with Section 19(f)(2) of the Act, 820 ILCS 305/19(f)(2). In *QBE Insurance Co. v. Illinois Workers' Compensation Commission*, 2013 IL App (5th) 120336WC, ¶ 24, that same appellate court panel held that an insurance carrier could not, by motion under Section 4(g) of the Act, 820 ILCS 305/4(g), intervene in an existing case and prosecute an appeal on behalf of the employer. As explained below, these cases emphasize why the Illinois General Assembly must amend Section 19(f)(2) of the Act and permit employers and insurance carriers more leeway in providing satisfactory bonds to secure judicial review.

### Judicial Review

Judicial review from the Commission to the circuit court is governed by Section 19(f)(2) of the Act. Section 19(f)(2) mandates that the party seeking review, if it is the party against whom an award is rendered, file an appeal bond. Specifically, the section provides that no summons to review a decision issued by the Commission shall be issued by the circuit court "unless the one against whom the Commission shall have rendered an award for the payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts." 820 ILCS 305/19(f)(2). The bond requirement is jurisdictional, *Berryman Equip. v. Indus. Comm'n*, 276 Ill. App. 3d 76, 78–79 (1st Dist. 1995), and strict compliance is required to vest subject-matter jurisdiction in the circuit court, *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502–03 (1st Dist. 2007).

Section 19(f)(2) expressly exempts certain local government entities from the appeal bond requirement. These excluded entities include "[e]very county, city, town, township, incorporated village, school district, body politic or municipal corporation against whom the Commission shall have rendered an award for the payment of money." 820 ILCS 305/19. Although recent cases suggest that the "party against whom an award is rendered" language has a broader scope than simply the employer, in reality, Section 19(f)(2) is meant to apply to non-governmental employers.

**The Decisions of 2013**

Two published decisions from 2013 addressed the sufficiency of appeal bonds filed by an employer in the prosecution of a judicial review. These cases, when viewed as part of the body of case law applicable to Section 19(f)(2) bonds, highlight some of the problems employers face in complying with the section and provide further support for amending it.

In *Illinois State Treasurer v. Illinois Workers' Compensation Commission*, 2013 IL App (1st) 120549WC, the Illinois State Treasurer, as *ex officio* custodian of the Injured Workers' Benefit Fund, filed a Section 19(f) judicial review of the Commission's decision awarding compensation against an uninsured employer. The State Treasurer did not file an appeal surety bond as required by Section 19(f)(1). The appellate court initially reversed the Commission's decision, but then on rehearing vacated its opinion and reinstated the Commission's decision because the State Treasurer had failed to comply with Section 19(f)(2). The court held that the State Treasurer was not filing a review on behalf of the State of Illinois, but rather as the employer, which under the Act was required to file an appeal bond because it was the party against which an award was rendered. *Illinois State Treasurer*, 2013 IL App (1st) 120549WC, ¶ 24. The court noted that, had the State Treasurer filed an appeal on behalf of the State, the appeal would have been barred expressly. *Id.* ¶ 15. Moreover, the State Treasurer did not qualify as a municipality under the Act and was not otherwise excluded from the bonding requirements. Because no bond was filed, the appeal was dismissed for want of jurisdiction. *Id*. ¶ 14.

In *QBE Insurance Co. v. Illinois Workers' Compensation Commission*, 2013 IL App (5th) 120336WC, the appellate court held that a workers' compensation insurance carrier could not intervene to prosecute a Section 19(f) judicial review where the carrier was not named in the original action by the claimant's application. The claimant prevailed on a Section 19(b) petition and the employer's insurer, QBE Insurance Co. (QBE), which had not been named as a party in the original application, sought to file its own review before the Commission. The employer already had filed a petition for review, but QBE argued that a last minute amendment of the accident date during arbitration implicated its policy coverage. *QBE Ins. Co.*, 2013 IL App (5th) 120336WC, ¶ 6.

QBE asked to be added as a named party in the case and made reference in its motion to Section 4(g) of the Act, which states that the insurance company, if the employer does not pay compensation, shall become primarily liable to the employee. The motion to add the carrier was granted by the Commission and the case was decided on the merits. It then proceeded on review to the circuit court, which affirmed the decisions below. The employer did not file a further appeal with the appellate court, although QBE filed a notice of appeal. *Id*. ¶ 13.

On its own, the appellate court addressed its jurisdiction to hear QBE's appeal and concluded that the motion to add QBE was improperly granted. The court held that Section 4(g) created a right for an employee to proceed directly against an insurance carrier in the event that the employer does not pay the award, but neither mandated that the carrier be made a party to a proceeding nor even be advised of a proceeding. *QBE Ins., Co.*, 2013 IL App (5th) 120336WC, ¶ 24. The court further concluded that nothing in the Act provided for intervention following a Section 19(b) award by an insurer who was not a party to the original proceedings and where the claimant chose to bring his claim against the employer alone. *Id.* ¶ 24.

The *QBE Insurance* case must be viewed in the context of the appellate court's 2010 decision in *Vallis Wyngroff Business Forms, Inc. v. Illinois Workers' Compensation Commission*, 402 Ill. App. 3d 91 (1st Dist. 2010), where the court held that an appeal bond signed by the employer's insurance carrier was defective, even though there was evidence that the employer was no longer in business and could not be located. In *Vallis Wyngroff Business Forms*, the court strictly interpreted the language of Section 19(f) that requires a signature

by the employer and held there was nothing in the record showing that the employer had specifically authorized the insurance agent to sign the bond on its behalf.

**The Problem: Non-Existent Employers**

In many situations, the employer is no longer in business, cannot be located, or both, and thus cannot sign an appeal bond. Moreover, it is common that an employer goes out of business in the time between the claimant's accident and the time the case is filed or tried or goes through judicial review. Without the employer's signature on the bond as the party against whom the award was rendered, the case law is clear that the appeal cannot go forward.

One frequently used practice to circumvent this "non-existent employer" scenario is to have the insurance carrier sign the appeal bond for the employer and attach an addendum and affidavit to the bond stating that, because the employer cannot be located and sign the bond, the insurance carrier assumes liability under the Act for payment of the award under Section 4(g) and is signing the bond in that capacity. The carrier then procures an independent surety to back the bond.

At first blush, *QBE Insurance* makes this approach questionable. A close reading of the case, however, actually supports the continued viability of this practice when faced with an employer that cannot be located. *QBE Insurance*, while prohibiting insurer intervention into the case based on Section 4(g), does not preclude the insurer from executing the appeal bond based on the authority of Section 4(g) where the employer is out of business and cannot be located and cannot pay the award. Also, in *QBE Insurance*, the employer had filed its own review and, for some unstated reason, had chosen not to file a notice of appeal to the appellate court. Thus, the scenarios are not analogous, and the case can be distinguished on its facts with respect to this issue.

Moreover, the reality of current workers' compensation practice is that the insurance carrier and not the employer, absent a self-insured employer, actually pays the award. The current expectations of the court and of Section 19(f)(2) as to who truly pays an award are pure fiction.

**Suggested Changes**

Section 19(f)(2) should be re-written to reflect the reality of todays' workers' compensation practice and to recognize that virtually all employers have workers' compensation insurance that pays the benefit awards. Recognizing that the carrier (and not the employer) generally is the entity paying the award, an amended Section 19(f)(2) should permit an authorized insurance representative to sign the bond as the party against whom an award is rendered. This proposed modification also addresses the situation where the employer is no longer in business or cannot be located to sign the bond. Allowing the insurance carrier to sign the bond, together with the added protection of an independent surety backing the bond, adequately protects the claimant during the appeal.

Additionally, as in civil appeals, a new Section 19(f)(2) should permit employers to post the insurance policy in lieu of a bond. The framework for such a process is already in place through Illinois Supreme Court Rule 305(j) and is time-tested in the civil appeal world. If there are any concerns that the policy might be inappropriate, legislation can provide for a short window to challenge the policy tender and a commensurate safety valve added for the submission of a bond. Although the courts have stressed that nothing should unduly delay the review process, given that most current workers' compensation appeals take from 12 to 18 months to resolve following the Commission's ruling, a brief delay of an additional two weeks is immaterial.

The current relevant portion of Section 19(f)(2) reads as follows:

> (2) No such summons shall issue unless the one against whom the Commission shall have rendered an award for the payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts. The amount of the bond shall be fixed by any member of the Commission and the surety or sureties of the bond shall be approved by the clerk of the court. The acceptance of the bond by the clerk of the court shall constitute evidence of his approval of the bond.
>
> Every county, city, town, township, incorporated village, school district, body politic or municipal corporation against whom the Commission shall have rendered an award for the payment of money shall not be required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons.

820 ILCS 305/19(f)(2). The following proposal should be enacted in place of the current section 19(f)(2):

(2) No such summons shall issue unless the one against whom the Commission shall have rendered an award for the payment of money, or the applicable insurance carrier, shall, upon the filing of the written request for such summons, file with the clerk of the court a bond conditioned that, if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts.

(a) The amount of the bond shall be fixed by any member of the Commission and the surety or sureties of the bond shall be approved by the clerk of the court.

(b) The filing of an insurance policy pursuant to section 392.1 of the Illinois Insurance Code (215 ILCS 5/392.1) shall be considered the filing of a bond for purposes of this section. No surety shall be required if the policy exceeds the amount of the bond set by the Commission.

(c) The acceptance of the bond, insurance policy, or funds tendered in escrow account by the clerk of the court shall constitute evidence of approval of the bond, policy, or escrow.

(d) No bond shall be required where the party against whom the award for money is rendered is a county, city, town, township, incorporated village, school district, body politic or municipal corporation.

In conjunction with this proposal, the time for filing a judicial review should be enlarged from 20 to 30 days. *See* 820 ILCS 305/19(f)(1). Furthermore, the Act should permit the filing of a corrected or substitute bond within a short period of time after filing of the action, wherein any challenges to the bond or surety may be addressed. The proposed amendment serves the dual purpose of giving an employer and insurance carrier additional workable options for filing an appeal bond, while providing the claimant with assurance that the award and requisite costs will be paid at the conclusion of the appeal.

Without question, any modification of Section 19(f)(2) should afford employees the same level of protection that the current statute provides. But all parties understand that this same level of comfort can be obtained through a variety of means not currently expressed in Section 19(f)(2). Indeed, the proposals herein accomplish both purposes: the proposed amendment to the Act gives employers more options in obtaining appeal bonds or their equivalent, and simultaneously provides claimants with the confidence that funds are available for payment of the award and the costs associated with the appeal.

The time has come for Section 19(f)(2) to be brought into line with modern workers' compensation practice, which depends heavily on the presence of insurance carriers. No appeal should be dismissed where compliance, in circumstances where the employer cannot be located, is physically impossible. The proposal outlined above should be part of the next round of amendments to the Workers' Compensation Act, if not proposed on its own merits.

## About the Author

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