Below the Red Line

Heyl Royster
Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *April 2012*

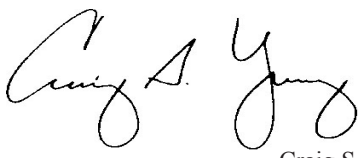
A Word From The Practice Group Chair

The Workers' Compensation Practice Group at Heyl, Royster, Voelker & Allen is working diligently to prepare a stellar seminar for you on May 17th of 2012. As we continue to gain experience with the new system and the new Arbitrators following the legislative changes of 2011, it is becoming increasingly clear additional defense opportunities exist as we move forward in the management of our Workers' Compensation cases. Our seminar on May 17th will be an up to the minute report on additional options we all have available to save money as a result of improvements to the Illinois Workers' Compensation system.

One way we improve our ability to represent you is through involvement in relevant organizations affecting the workers' compensation industry. Please note the announcement in this newsletter regarding the appointment of Brad Peterson as Chair of the ISBA Workers' Compensation Section Counsel. Also, I was recently appointed as the Chair of DRI's National Workers' Compensation Committee. Through leadership in these and other professional organizations, we continually lobby on your behalf, and stay updated on trends important to the defense of workers' compensation cases. Don't hesitate to contact us if you have questions about how our involvement in these organizations can help assist you in defense of your claims.

We are happy to highlight in this edition, Dana Hughes, with an excellent article on third party issues.

Please register soon to join us at our seminar on May 17th, 2012. You can register by clicking the link at the end of this newsletter, or online at our website, or by contacting any of our attorneys. We look forward to seeing you there.



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Announcement

Brad Peterson (Urbana) has been appointed as the ISBA Workers' Compensation Section Council Chair for 2012-2013. The Illinois State Bar Association has 33,000 members statewide and its Workers' Compensation Section is one of the Association's most active councils.

This Month's Author:

A native of Rockford, Dana has been an associate in our Rockford office since 2006. She represents employers before arbitrators and commissioners of the Illinois Workers' Compensation Commission and before the circuit court in third party liability claims. Dana has also represented businesses in subrogation matters, and has defended businesses and individuals in automobile negligence and premises liability actions. Her writing has been published in the Northern Illinois University Law Review and Kane County Bar Association newsletter. Dana has presented before the Illinois State Bar Association's Insurance Law Section and contributes to Heyl Royster's annual claims handling publication. Dana serves on the Winnebago County Bar Association's Board of Directors and volunteers as an arbitrator in the 17th Circuit's court-annexed arbitration system.

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

INTRODUCTION TO THIRD PARTY ISSUES

A thorough investigation of the alleged work accident can sometimes lead to the identity of a potentially liable third party, which presents a subrogation opportunity for the carrier or employer. For example, when an employee is injured on a construction site, on another's premises, in a fight, in an automobile, or as a result of a defective product or piece of machinery, someone other than the employer may be legally responsible for the employee's injuries. The employer can benefit from such a scenario, in that it can potentially recoup some of the monies paid to the claimant or on his behalf as a result of the work injury. The employer can also use this potential reimbursement as a bargaining chip in settlement negotiations.

In the materials below, which serve as the first of a multi-part discussion on the issues, we highlight the general rules and principles of third party civil litigation in the workers' compensation arena, and explore some scenarios which have recently been presented to our courts.

Due to the complexities associated with third party issues, we urge you to contact any of our Heyl Royster workers' compensation attorneys to discuss how a potential third party claim may affect your workers' compensation file.

Third Party Remedies – *Who's Suing Who?*

The exclusive remedy provision of the Act is found in Section 5(a), which states that the Act provides for the employee's exclusive remedy against the employer when an employee's injury arises out of and in the course of his employment. 820 ILCS 305/5(a). In pertinent part, Section 5(a) states:

> No common law or statutory right to recover damages from the employer…for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act… 820 ILCS 305/5(a).

While this Section is intended to define the employee's rights against the employer, it is not intended to limit the employee's rights to pursue damages against other third parties who may be liable for the employee's injuries. Nevertheless, the Illinois Supreme Court has held that an employee cannot sue his coworker for injuries sustained by the employee as a result of the coworker's negligence. *Ramsey v. Morrison*, 175 Ill. 2d 218, 585 N.E.2d 1023 (1997).

This rule was recently applied to bar a car rental company from pursuing a contractual indemnity claim against the renter for damages paid to the renter's coworkers for injuries sustained as a result of the renter's negligence. In *Enterprise Leasing Co. of St. Louis v. Hardin*, 2011 IL App (5th) 100201, the court relied on Section 5(a)'s "exclusivity provision," to hold that a group of employees was barred from suing their coworkers for negligently causing them injuries in the course of their employment. In that case, Enterprise rented the car to Hardin who negligently inflicted injuries on her coworkers as a result of a motor vehicle accident the group was involved in while on a business trip. Hardin's coworkers pursued claims against Enterprise, which Enterprise settled out of court. Enterprise then sought reimbursement from Hardin pursuant to an indemnification provision in the rental agreement.

The court held that because the contract provided for Enterprise Leasing Co. to step into the shoes of the renter, Enterprise's claim against Hardin was barred pursuant to Section 5(a). The court reasoned that Hardin could never be sued by her coworkers under Section 5(a), so she could not legally be required to reimburse Enterprise for payments made to her coworkers as a result of their injuries.

Although an employee cannot make a claim against his coworker for injuries negligently inflicted by the coworker in the course of employment, Section 5(b) does provide for third party litigation where the work injury or death "was caused under circumstances creating a legal liability for damages on the part of some person other than his employer." 820 ILCS 305/5(b). The employee can bring a claim against the other person or entity to recover damages, notwithstanding the employer's payment of or liability to pay benefits under the Act. The right is exclusive of the Act. In order to avoid a windfall from the amount received from judgment, settlement, or otherwise from the third party, the employee must reimburse the employer for compensation paid to the employee or on his

behalf pursuant to the Act. The employee must notify his employer of his third party claim or lawsuit by personal service or registered mail, so that the employer is aware of the claim and can then join in the action to protect its right to reimbursement.

Section 5(b) also allows the employer to file suit against the third party if the employee fails to do it. The employer can file suit if the employee fails to do so in the time leading up to three months prior to the expiration of the statute of limitations. If the employer decides to file suit, the employee's cooperation is critical.

The employer's right to reimbursement is statutory. As such, the Illinois Supreme Court has held that an employer need not reserve this right in the terms of a workers' compensation settlement contract. *Gallagher v. Lenart*, 226 Ill. 2d 208, 874 N.E.2d 43 (2007)

How Much Will the Employer Recover?

The employer must pay its *pro rata* share of the employee's attorney's fees and costs with any reimbursement. In the absence of another agreement between the employer and the employee's attorney, the employer's share of attorney's fees is 25 percent. Agreements between the employee and his attorney will not govern the percentage of attorney's fees an employer is required to pay in the event of a judgment or settlement. If the employee's attorney is entitled to additional fees pursuant to his agreement with the employee, then the attorney will have to look to the *employee* for the additional fees.

Below is a hypothetical example of a third party settlement where the workers' compensation claim has already been resolved via settlement contract and the employee's attorney has $10,000 in costs/expenses. The example below illustrates the method used to calculate the employer's recovery in this simple scenario:

Workers' Compensation Lien:	$100,000
Third party settlement:	$200,000
Employer's Recovery:	
Gross recovery for employer	$100,000
Less:	
25% attorney's fees	-$25,000
Expenses (prorata share)	-$ 5,000
Net to employer:	$70,000

As many of you well know, not all claims involve this ideal recovery, and many times the third party judgment or proposed settlement is insufficient to cover the workers' compensation payments. In the event there is a judgment in a third party case and employer's lien is greater than the third party judgment, the employer is not required to compromise on its lien. The Illinois Supreme Court has held that, in the instance where the judgment will not satisfy the lien, the employee is required to tender the entire judgment to the employer. The employer is then required to pay the employee's attorney the statutory 25 percent in attorney's fees, rather than 1/3 of the judgment (or whatever fee is contemplated in the attorney/client fee agreement.) *Silva v. Electrical Systems, Inc.*, 183 Ill. 2d 356, 701 N.E.2d 506 (1998).

With regard to settlement, the reality is that the employer is often asked to compromise its lien in order to recover any monies from the third party. The employer can use this potential compromise to leverage a reduction in future payments, or even to obtain an outright dismissal of the workers' compensation claim.

Other difficult issues can also arise in this context, particularly when a workers' compensation claim is pending and future benefits are uncertain. Under that scenario and using the hypothetical settlement discussed above, assume the employee continues to seek medical treatment, collect temporary total disability benefits, and has not returned to work. Under that set of facts, and assuming the employer's future liability in workers' compensation is disputed and unknown, then how will the $200,000 be distributed?

The employer will receive a credit against future payments up to $100,000 (less 25 percent attorneys' fees and costs).

As discussed throughout this article, the employer will need to evaluate all issues and decide how to use the credit to his advantage. Applying the same hypothetical settlement to a workers' compensation claim where the employer has a $100,000 lien for past benefits and is also paying future, fixed benefits that will amount to $150,000 the employer will get a credit in the amount of the $100,000 (less 25 percent attorneys fees and costs) against its future payments. If the future payments are made weekly, then the employer can apply the credit against its weekly payment. Under that scenario, the employer would pay the 25 percent attorneys fees and costs in weekly installments to the employee and his attorney.

Zuber v. Illinois Power Co., 135 Ill. 2d 407, 553 N.E.2d 385 (1990). There are a number of potential recovery scenarios available to the employer, depending on the status of the workers' compensation and third party claims.

Keeping One Eye on the Prize When the Employer May Also Be at Fault:

The Impact of *Kotecki v. Cyclops Welding Corp.*

As we touched on above, there may be strategic reasons for the employer not to seek reimbursement of its workers' compensation lien. The most compelling reason is to avoid liability to a third party for contribution. *Lannom v. Kosco*, 158 Ill. 2d 535, 634 N.E.2d 1097 (1994). The doctrine of contribution allows a tort defendant to obtain monetary contribution from others, including the employer, who were also responsible for a plaintiff's injuries. The Illinois Supreme Court has held that an employer's liability to a tort defendant for contribution is limited to an amount not to exceed its liability for workers' compensation benefits to the plaintiff (employee). *Kotecki v. Cyclops Welding Corp.*, 146 Ill. 2d 155, 585 N.E.2d 1023 (1991). Generally, an employer can extinguish its contribution liability by waiving its Section 5(b) lien. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 399, 706 N.E.2d 441 (1998).

The employer can even waive its Section 5(b) lien after a jury returns its verdict. Again, an employer would do this in order to avoid contribution liability. Under this scenario, an employer would not be obligated to pay its *pro rata* share of attorneys fees and costs to the injured worker because it was not reimbursed any of its lien pursuant to the plain language Section 5(b). See *Corley v. James McHugh Construction Co.*, 266 Ill. App. 3d 618, 622, 639 N.E.2d 1374, (1st Dist. 1994); (holding that because the employer did not receive the benefit of reimbursement of its lien, it was not required to share in the fees and costs associated with the injured worker's lawsuit).

The employer may not be able to avoid contribution liability so easily if it has waived the protection afforded to it by the Illinois Supreme Court in the *Kotecki* case. The courts have found that certain contractual terms between an employer and other parties may give rise to a waiver of the "*Kotecki* cap." Whether the employer has waived its *Kotecki* protections is a factual determination. If an employer has waived its *Kotecki* protection, its contribution liability may be unlimited, and it will certainly not be able to avoid contribution liability by waiving its workers' compensation lien.

If the employer is fortunate enough to face no exposure for contribution, it still may choose to waive its lien. An example of this may be an automobile negligence claim where the employee is rear-ended by a negligent driver. If the workers' compensation claim is pending, an employer may choose to waive its lien (extinguish its right to reimbursement under Section 5(b)) in exchange for outright dismissal of the workers' compensation claim or a compromise on other disputed issues, including the permanency value of a compensable claim.

Conclusion

An early and thorough investigation of the alleged work injury can identify a potentially responsible third party. Practically speaking, a viable third party claim can affect the way a workers' compensation claim is handled. On the other hand, a seemingly viable third party claim may not make economic sense when any number of circumstances exists, *i.e.*, the third party is uninsured/underinsured/bankrupt, the venue is not plaintiff-friendly, or the facts simply do not establish liability. The decision of whether to pursue a third party claim or whether to compromise your Section 5(b) lien should be based on careful consideration of these issues.

Please feel free to contact any of our Heyl Royster attorneys to discuss potential third party issues that may affect your claims.

Recent Decision of Interest

The Appellate Court, Workers' Compensation Commission Division, handed down a decision addressing penalties and attorneys' fees in *Hollywood Casino-Aurora v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 110426WC. In that case, the Appellate Court majority affirmed the circuit court's order reversing the Commission's award of some $40,750 in penalties against the claimant's employer under Section 19(k) of the Act. 820 ILCS 305/19(k). In *Hollywood Casino-Aurora*, the claimant, who was a cocktail waitress, suffered a crushing injury to her right foot while working and was eventually diagnosed with reflex dystrophy of the fight foot and leg.

As part of her treatment, one of her physicians implanted a spinal cord stimulator. The case was arbitrated and the claimant was awarded temporary total disability and permanency benefits and the employer was ordered to pay for all reasonable and necessary medical expenses, including the cost of the spinal cord stimulator. That decision was not appealed and became final.

Approximately two years later, the claimant's physician forwarded a letter to the employer's insurance adjuster advising her that the claimant had responded favorably to the stimulator, but noted that the stimulator's battery was nearing the end of its life and would likely need replaced within the next six months. The cost of a replacement battery and charger was $77,000; the implant procedure was estimated at another $4,500. The physician asked the adjuster to contact him if there were any questions. She did not.

Six months later in May 2007, the battery ceased to function and the physician scheduled surgery for later that month. The physician again contacted the adjuster and requested authorization. The adjuster responded by requesting a report explaining the need for the procedure, additional medical records, and further inquired as to whether the procedure could be performed at a surgical center rather than a hospital. Due to the request for additional information, the surgery was postponed until July. In August, the claimant filed a petition for penalties and attorneys fees on the ground that the insurance carrier had unreasonably denied authorization of the procedure. The procedure was eventually authorized and performed in late August of that year.

The unanimous Commission awarded penalties of $40,750 for "unreasonably delayed authorization for the surgery performed … without good and just cause" but denied attorneys' fees and ignored the claimant's request for Section 19(l) penalties.

In an opinion authored by Justice Thomas Hoffman, the majority of the Appellate Court affirmed the circuit court's order vacating the penalties. According to the majority, a strict reading of Section 19(k) shows that there is nothing mentioned about "any award of additional compensation (penalties) for an employer's delay in authorizing medical treatment, even assuming arguendo that an employer has an obligation to give authorization in advance of medical treatment for an injured employee." *Id*. at ¶ 15. Rather, Section 19(k) says that penalties are appropriate "where there has been any unreasonable or vexatious *delay of payment* or intentional *underpayment* of compensation." *Id*. at ¶ 14 (emphasis in original). In this case, it was noted, there were no medical bills outstanding at the time of the hearing on the petition and the claimant's counsel admitted that there was no delay in the actual payment of the bills for the battery replacement surgery.

Justices Stewart and Holdridge each dissented, arguing that majority had read Section 19(k) too narrowly. Justice Stewart noted, "[d]elaying authorization for medical services is simply one means of delaying payment." *Id*. at ¶ 27. He added, "The majority's narrow interpretation allows an employer to completely refuse to provide medical services required by an injured worker and suffer no penalty." *Id*. at ¶ 26. Justice Holdridge, while agreeing with Justice Stewart's dissent, further added the record established a refusal to pay even under the majority's analysis because the adjuster had possession of all information necessary to determine if the surgery was needed for almost six months before asking for further information, and then only authorized the surgery once a petition for penalties had been filed.

27th Annual Claims Handling Seminar

Thursday, May 17, 2012 • 1:00 - 4:30 p.m.

Click here for more information and to register

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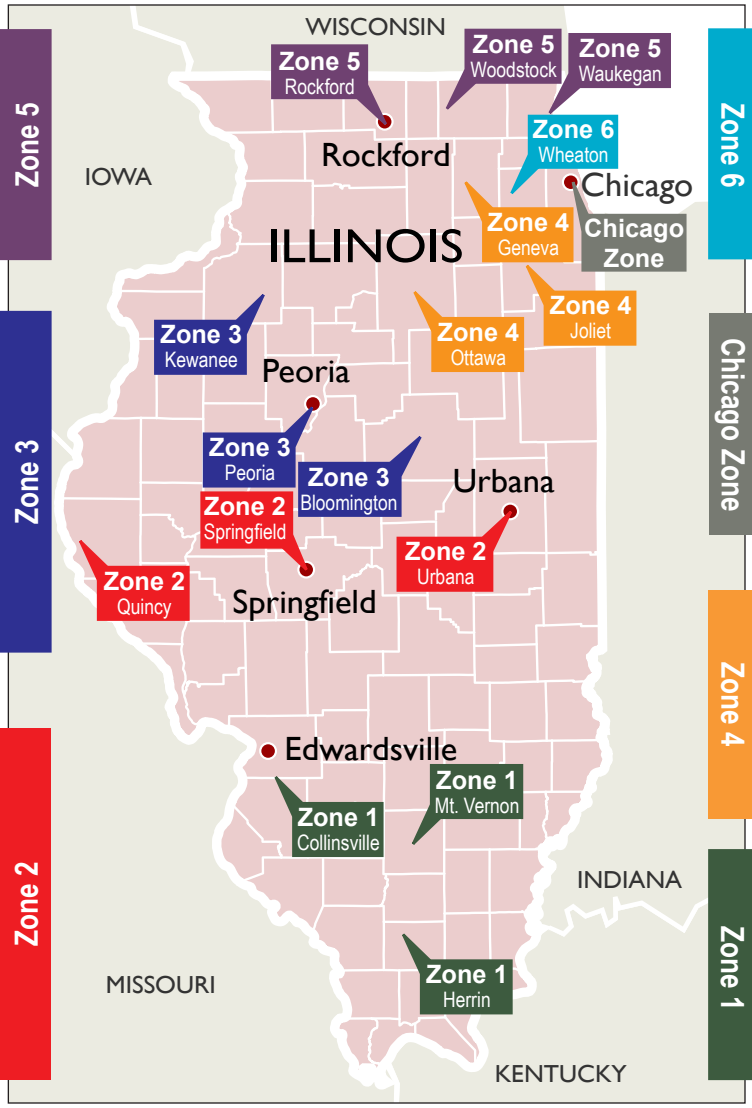

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