Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *August 2013*

A Word From The Practice Group Chair

Welcome to the August edition of *Below the Red Line*, Heyl Royster's workers' compensation update. There is important workers' compensation news this month from virtually every branch of Illinois state government. We highlight new Commissioner and Arbitrator appointments made by the Governor, along with some discussion of additional potential legislation. On the judicial front, please note our discussion of the Illinois Supreme Court's decision in *Gruszeczka v. Illinois Workers' Compensation Comm'n*. This decision, although finding in favor of the petitioner, adopts the mailbox rule for perfecting judicial reviews to the circuit court. This will be a beneficial holding for all parties practicing in the appellate court, particularly for respondents.

We also discuss some appellate court decisions which unfortunately continue to expand the scope of what is considered a compensable accident in the State of Illinois. This is a trend we are tracking very closely. We are confident you will be hearing from petitioners' attorneys who will be arguing for expanded compensability, especially when the petitioner can arguably be construed as a traveling employee. In a related note, the Illinois Supreme Court has set oral argument on the traveling employee case of *Venture-Newberg Perini Stone and Webster v. Illinois Workers' Compensation Comm'n*, (Ronald Daugherty, appellee), No. 115728, for September 18, 2013, which hopefully will clarify the recent appellate court decisions on this issue. We will keep you posted on these developments.

Please feel free to contact us in any traveling employee situation so we can help you defend against this troubling trend from the appellate court.

We hope your summer is concluding successfully and we look forward to working with you throughout the remainder of 2013 in defense of your workers' compensation cases. As always, if we can help in any way with an in-house educational presentation, please do not hesitate to contact me directly.

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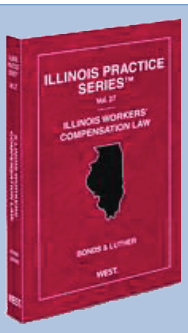
In this issue . . .



Heyl Royster is pleased to announce that two of our partners, Bruce Bonds and Kevin Luther, have authored Illinois Workers' Compensation Law, 2012-2013 edition (Vol. 27, Illinois Practice Series, West). The book, which can be obtained at store.westlaw.com, provides a full overview of Illinois Workers' Compensation law and practice including the 2011 Amendments to the Illinois Workers' Compensation Act, and is a "must" for risk managers and claims professionals.

NEW ARBITRATOR AND COMMISSIONER ANNOUNCEMENTS

Illinois Governor Pat Quinn has appointed the following new Arbitrators:

Molly Dearing

Jeffrey Huebsch

Ketki Steffen

He has also appointed Michael Brennan as a new Commissioner to fill an existing public sector vacancy on one of the two panels currently with an opening.

The following twelve Arbitrators were re-appointed to their currently assigned zones:

William Gallagher (Zone 1 - Collinsville/Herrin/Mt. Vernon)

Joshua Luskin (Zone 1 - Collinsville/Herrin/Mt. Vernon)

Douglas McCarthy (Zone 2 - Urbana/Springfield/Quincy)

Gregory Dollison (Zone 4 - New Lenox/Geneva/Ottawa)

Edward Lee (Zone 5 - Rockford/Waukegan/Woodstock

Kurt Carlson (Zone 6 - Chicago/Wheaton)

Carolyn Doherty (Zone 6 - Chicago/Wheaton)

Robert Williams (Chicago)

Barbara Flores (Chicago)

Deborah Simpson (Chicago)

Brian Cronin (Chicago)

Molly Mason (Chicago)

GRUSZECZKA: ILLINOIS SUPREME COURT ALLOWS USE OF MAILBOX RULE FOR FILING JUDICIAL REVIEWS TO THE CIRCUIT COURT

On August 1, 2013, the Illinois Supreme Court handed down its decision in the case of *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, and officially allowed the use of the mailbox rule for filing a section 19(f) judicial review from the Commission to the circuit court. Section 19(f) governs the filing of a judicial review from the Commission to the circuit court and states, "A proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission." 820 ILCS 305/19(f). The 20 days under the Act is triggered from the date the party seeking reviews receives the Commission's decision. In a 5-2 opinion authored by Justice Thomas, the majority addressed the specific question of *how* a party strictly complies with the time limit imposed by section 19(f) – by getting the requisite documents in the mail within the 20 days or by having them file-stamped by the circuit court within 20 days. The majority acknowledged the modern trend is to apply the mailbox rule to equate mailing with filing. In reaching its decision, the majority concluded that section 19(f) was, in this regard, ambiguous. This conclusion then allowed the majority to examine the interplay of the mailbox rule with other similar provisions.

In rejecting the employer's argument that the requirement of issuance of summons meant the circuit court filing was indeed a new action, the majority observed that a review proceeding under section 19(f) was more akin to an appeal rather than the instituting of a new action. The majority stated that in those cases where a new action is commenced, the filing is similar to a complaint; it must be sufficiently pleaded and filed within a prescribed time. None of these concerns are present in section 19(f), which is in essence a continuation of the appeal process.

Justices Freeman and Burke dissented, calling for a strict interpretation of section 19(f) and one that required a adherence to the prescribed 20-day period for filing. According to the dissent, applying the mailbox rule becomes, "in effect, an extension of the 20-day period, undermining strict adherence to this jurisdictional requirement."

The implications of *Gruszeczka* are clear – a judicial review from the Commission *will* be deemed timely if the appropriate papers are placed in the mail prior to expiration of the 20-day period set forth in section 19(f). While this will obviously help claimants in their handling of judicial reviews, it will likewise be of great assistance to employers across the state, particularly where there are no potential issues concerning the sufficiency of the surety bond. In the end, this rule has the potential to save employers and their carriers money.

We will look for opportunities to utilize this ruling in our cases in order to help you avoid the additional expenses associated with physically driving the requisite documents to the court house. Unfortunately, some venues, such as Cook County and some of the so-called Collar Counties, have unique local filing requirements and special rules concerning the approval of appeal bonds; moreover, some venues have less experience in filing these reviews and often have questions of counsel on filing. Given these concerns, we may need to continue to adhere to prior practice of filing these documents in person in many jurisdictions.

RECENT APPELLATE COURT DECISION

In another decision which seems to be expanding an employer's obligations under the Act, the Appellate Court, Workers' Compensation Commission Division, awarded compensation to an employee who worked for a cleaning service cleaning businesses, churches, and homes, and who used a company-provided van, as a result of injuries she received when walking to the van in the morning as she prepared for work. In *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, the Commission denied benefits, concluding that the claimant faced the same risk as faced by the general public and further concluding she was not a traveling employee. In unanimously reversing the Commission, the appellate court found that the claimant was a traveling employee and that her injuries were reasonable and foreseeable.

According to the appellate court, "[t]he evidence establishes that claimant's injury occurred after she left home, while walking to a vehicle used to transport her to work." *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶ 19. The appellate court stated, as a traveling employee, the claimant was compelled to expose herself to the hazards of the streets and the hazards of automobiles much more than the general public. "Since claimant is a 'traveling employee,' her exposure to the hazards of the streets is, by definition, greater quantitatively than that of the general public, as long as her conduct at the time of the injury was reasonable and foreseeable to the employer." *Id*. The court added, "Claimant testified that the accident occurred as she was walking to the vehicle used to transport her to a work assignment for respondent. Claimant's walk to the minivan constituted the initial part of her journey to her work assignment. As such, it was reasonable and foreseeable." *Id*.

The appellate court also addressed comments made by the employer's counsel during oral argument wherein counsel asserted that even if claimant is a traveling employee, her injury was not compensable because she had not left her private property when the injury occurred and therefore had not yet been subjected to the hazards of the street or an automobile. "We find, however, that the evidence does not support the premise that claimant's fall occurred on private property. [The claimant's husband] testified that he did not observe claimant fall. Claimant testified that the accident occurred adjacent to the driveway on a 'public sidewalk' leading from the house to the driveway. Respondent presented no evidence to the contrary, and we find claimant's testimony sufficient to establish that the accident, which occurred on a 'public sidewalk,' exposed claimant to the hazards of the street." *Id*. at ¶ 20.

In a rather troubling remark, the appellate court added, "we note that respondent cites no authority in support of its claim that a traveling employee who has left the physical confines of his or her home on the way to a job assignment and sustains an accident on private property cannot be subject to the hazards of the street." *Id*. In support, the appellate court referenced two prior decisions, *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (1st Dist. 2000) (noting that the street-risk doctrine has been extended to cover inside structures if it is a place where the source of the risk could be expected to exist) and *C.A. Dunham Co. v. Industrial Comm'n*, 16 Ill. 2d 102 (1959) (business traveler's death in an explosion and crash of a commercial plane). These cases, combined with the appellate court's ruling in *Mlynarczyk,* work to expand the situations where an employer may be liable for a workers' injuries.

In making these remarks, the appellate court specifically dismissed the Commission's concern that finding this claim compensable would expand the scope of what is considered compensable. "[W]e find misplaced the Commission's concern that such a holding would render compensable 'ANY movement by [claimant] at any time during the day or night.'" (Emphasis in original.) *Mlynarczyk*, 2013 IL App (3d), 120411WC, at ¶ 21. The Commission does not explain why it believes this would be the case, and we note that an employee seeking benefits under the Act would still be required to establish that his injury arose out of and in the course of his employment as well as the reasonableness of the conduct in which the employee was engaged at the time of the injury and whether that conduct might have been anticipated or foreseen by the employer." Nevertheless, the Commission's point has substantial merit. Using the appellate court's reasoning in *Mlynarczyk*, any action taken in preparation for work, going back to getting out of bed when the alarm sounds, might be considered in furtherance of the employment.

A line must be drawn that is both sensible and workable for employers and employees. Some risks, whether faced by a traveling employee or not, are simply risks faced equally by the general public. Exposure to those risks should not give rise to a compensable accident.

COMMISSION OBTAINS FELONY CONVICTION AGAINST EMPLOYER

In early August the Commission announced the first felony conviction by its Insurance Compliance Unit against an uninsured employer. The employer was convicted of a Class 4 felony for failing to obtain workers' compensation insurance. A Class 4 felony can impose penalties of 1-3 years in jail and/or fines up to $25,000. Full details are available at the Commission's website under "news."

POTENTIAL LEGISLATION

There is currently a Proposed SB26 House Amendment No. 1 circulating in Springfield to modify section 8(j) relating to medical services paid, such that if payment is made by the employee, the employee's health benefit plan, or the Department of Healthcare and Family Services, and the amount should be a compensable medical benefit under this Act, then the employer shall reimburse the payment. The proposed language reads:

4. If payment for medical services that should be a compensable medical benefit under this Section is made by the employee, the employee's health benefit plan, or the Department of Healthcare and Family Services, then the payments made by the employee, the employee's health benefit plan, or the Department of Healthcare and Family Services shall be reimbursed by the employer or workers' compensation insurer.

The employee, the Department of Healthcare and Family Services, or the health benefit plan that made such payments shall have 24 months from the latter of the date of payment or the date the case is ruled compensable to file a request for reimbursement. Such a request shall not be subject to the billing rules of the Commission that apply to original provider invoices and reports. The request for reimbursement need not contain original provider invoices. A written summary of services paid is adequate, so long as it includes:

(A) the injured worker's name, address, and date of birth;

(B) the date of the compensable injury;

(C) the provider of service with address;

(D) ICD-9 codes;

(E) quantity and type of service paid by CPT code, revenue code, or HCPCS code;

(F) date of each service; and

(G) amounts charged and paid by service.

The employee, the health benefit plan, or the Department of Healthcare and Family Services is not responsible to provide medical records if requested by the employer or the workers' compensation insurer.

The employer or carrier may object to the reimbursement on the grounds that:

(i) the employer had previously paid the provider for the same service;

(ii) the service paid was not related to the compensable injury;

(iii) the service had previously been reviewed and found to be medically unnecessary;

(iv) the injury in question had been denied as noncompensable; or

(v) the case in question is not the responsibility of the carrier receiving the reimbursement request.

A request for reimbursement shall receive payment or a written response explaining any objections within 75 days after receipt of the request by the employer or carrier.

If, after 75 days, the requestor has received no response or has been denied for reasons that the employee or health benefit plan or the Department of Healthcare and Family Services deems inappropriate, the dispute may be submitted to arbitration at the initial expense of the employee or health benefit plan. If the requesting party is upheld by the arbitrator, in whole or in part, the costs of the arbitration proceedings shall be included with the amount to be reimbursed by the employer or workers' compensation carrier and payment shall be made within 20 days after the arbitration decision.

(Source: P.A. 97-18, eff. 6-28-11; 97-268, eff. 8-8-11; 97-813, eff. 7-13-12.)

Given these proposals, a "best practice" would be to confirm the status of all bills at the time of settlement and before contract approval. While many carriers and Third Party Administrators assume the claimant's attorney has collected and presented complete bills, paid by whatever source, we have found this is seldom the case.

We can assist in obtaining and reviewing the bills if necessary. The proposed legislation might present a conflict as to the amount of bills to be paid between the fee schedule and the requirement that health insurers and governmental entities be reimbursed for whatever amount they have paid.

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Workers' Compensation Practice Group

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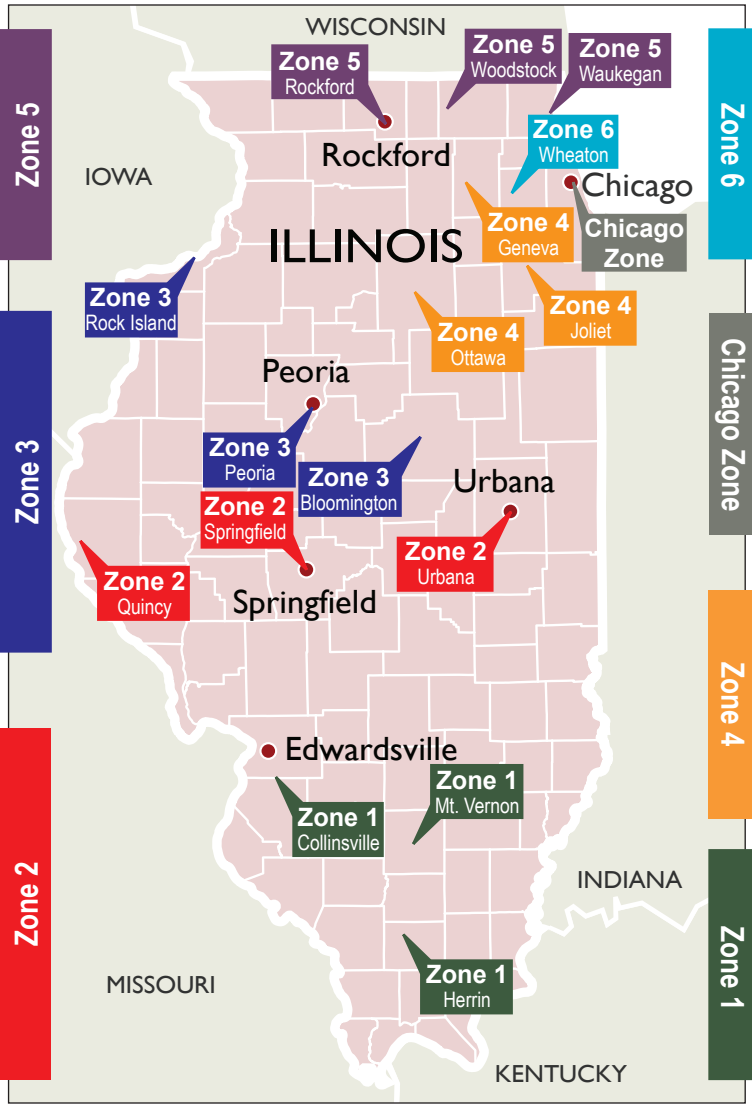

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