Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals **December 2009**

A Word from the Practice Group Chair

This month's newsletter features a discussion of the intoxication defense in Illinois workers' compensation claims. The author is partner Dan Simmons of our Springfield office.

Many of you know Dan because he has spent his entire legal career with our firm. Having practiced now for 25 years, Dan brings a wealth of experience and expertise to our workers' compensation group. He represents numerous employers, worker's compensation carriers, and third-party administrators at many of the venues covered by our Springfield office and works closely with our other workers' compensation partner in Springfield, Gary Borah, to solve your workers' compensation issues and claims. We hope you find his article helpful.

I have been asked by Dr. David J. Fletcher of SafeWorks Illinois to participate in the Chicago Work Injury Conference that is scheduled for February 11, 2009. The conference will start at 8:15 a.m. and will take place at the Conference & Learning Center at U.S. Cellular Field in Chicago. The presenters at the conference include multi-disciplinary specialists who will address a number of topics that can provide you with tactical and strategic advantages in the workers' compensation arena. For registration and more information please visit www.safeworksillinois.com or call Christie Volden at (217) 356-6150.

From all of us at the firm, please allow us to wish you happy holidays and a prosperous 2010!

Kevin J. Luther
Chair, WC Practice Group
kluther@heylroyster.com

This Month's Author:

Dan Simmons is a partner in Heyl Royster's Springfield office. Dan concentrates his practice in the areas of workers' compensation and civil litigation defense, including auto, premises and construction liability cases, as well as the premises liability and third party defense of employers. Dan has extensive litigation experience, and has taken numerous cases to jury verdict both in state and federal courts. Additionally, he has arbitrated hundreds of workers' compensation claims before the Illinois Workers' Compensation Commission. Dan is a frequent author and lecturer on civil litigation and workers' compensation issues.

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Introduction

Intoxication as it affects a workers' compensation claim presents an important issue for employers, particularly where employees operate a motor vehicle as a substantial part of their employment. Intoxication may be caused not only by consumption of alcohol, but can also arise from drug use, including marijuana and prescription medications. In this issue of *Below the Red Line*, we will take a close look at the traditional defense of intoxication in Illinois, and also review the recent decision of the Workers' Compensation Commission Division of the Appellate Court in *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, No. 3-08-0530WC, 2009 WL 3417879 (3rd Dist., Oct. 20, 2009), a case in which the Court declined to adopt a new standard for assessing marijuana intoxication.

INTOXICATION IS A LEGAL DEFENSE TO COMPENSABILITY

In most states, intoxication is a separate statutory defense to a workers' compensation claim. In many of those states, intoxication acts as a complete bar to recovery, while in a few jurisdictions, a finding of intoxication reduces the amount of benefits the intoxicated employee can recover. Illinois, unfortunately, does not have a statutory provision and thus relies on an intoxication defense developed by case law.

The defense of intoxication arises in the context of the traditional "arising out of" and "in the course of" analysis. As most of us know, an injured worker is not entitled to compensation for injuries unless those injuries both "arise out of" and are "in the course of" his employment. *Parro v. Indus. Comm'n*, 167 Ill. 2d 385, 393, 657 N.E.2d 882 (1995). Under Illinois law, the intoxication defense applies where the facts show that the claimant's intoxication (1) was so great that it took him out of the course and scope of his employment or (2) that the intoxication was the sole cause of the injury. *District 141, Int'l Assoc. of Machinists & Aerospace Workers v. Indus. Comm'n*, 79 Ill. 2d 544, 558, 404 N.E.2d 787 (1980). The former ground is analogous to a departure from the course of employment, and intoxication of a sufficient degree is considered an abandonment of the employment. *Paganelis v. Indus. Comm'n.*, 132 Ill. 2d 468, 481, 548 N.E.2d 1033 (1989).

Partial intoxication is generally not sufficient to defeat a workers' compensation claim. As the Supreme Court announced in *District 141*, non-incapacitating intoxication will not bar recovery under the Workers' Compensation Act:

> Whenever an employee is so drunk and helpless that he can no longer follow his employment he cannot be said to be engaged in his employment, and when injured in that condition his injury does not arise out of his employment. But intoxication which does not incapacitate the employee from following his occupation is not sufficient to defeat the recovery of compensation although the intoxication may be a contributing cause of his injury. *District 141, Int'l Assoc. of Machinists & Aerospace Workers v. Indus. Comm'n*, 79 Ill. 2d 544, 558, 404 N.E.2d 787 (1980).

The Court reasoned that the Act was not designed to make an employee's contributory negligence (the intoxication) a defense or bar to recovery.

While intoxication is not a *per se* bar to recovery in Illinois, the defense is generally applied unless other factors besides the intoxication can be proved to have caused the accident. *See, e.g., Jackson v. City of Chicago*, 04 IL.W.C. 022020 (Sep. 12, 2006) (excusing intoxication where injured worker was attacked; initial aggressor rather than injured worker's intoxication was the cause of the injury); *Lock 26 Constructors v. Industrial Comm'n*, 243 Ill. App. 3d 882, 612 N.E.2d 989 (5th Dist. 1993) (excusing intoxication where unrebutted testimony showed injured worker drank *after* injury thus confounding blood alcohol tests, and waste oil was a partial cause of the slip and fall injury); *Kropp Forge Co. v. Industrial Comm'n*, 225 Ill. App. 3d 244, 587 N.E.2d 1095 (1st Dist. 1992) (excusing intoxication where other factors contributed to the injury).

Some cases have added a foreseeability element, asking whether the intoxication was reasonably foreseeable to the employer. Those cases, however, are generally limited to scenarios where the employee consumes alcoholic beverages during the performance of his job functions or is engaged in an employer-sponsored event which involves alcohol. *See District 141, Int'l Assoc. of Machinists & Aerospace Workers v. Indus. Comm'n*, 79 Ill. 2d 544, 558, 404 N.E.2d 787 (1980) (the employee had been drinking during a work-related union meeting).

THE APPELLATE COURT IS CONFRONTED WITH A MARIJUANA INTOXICATION DEFENSE – *LENNY SZAREK, INC.*

On October 20, 2009, the Appellate Court, Workers' Compensation Commission Division, handed down the decision of *Lenny Szarek, Inc. v. Workers' Compensation Comm'n*, No. 3-08-0530WC, 2009 WL 3417879 (3d Dist., Oct. 20, 2009), which considered the defense of intoxication by marijuana. In that case, the claimant, a carpenter apprentice, was injured when he fell from the second floor through a hole in the first floor and into the basement of a home construction site. Urinalysis at the hospital revealed the presence of marijuana and cocaine metabolites. Further analysis revealed levels of 274 nanograms per milliliter (ng/ml) of cannibinoids and 536 ng/ml of cocaine. The employer raised the defense of intoxication, and backed that defense with a medical opinion concluding that the claimant's drug levels showed a functional impairment due to intoxication. The Commission rejected the defense and found the claim compensable.

On appeal, the Appellate Court affirmed. Initially, the court rejected the employer's suggestion to adopt a new test

for marijuana intoxication which focused on scientific evidence of impairment. According to the employer, recovery should be denied if scientific evidence established that the claimant was marijuana-impaired at the time of the accident. The court declined, noting that the standard on intoxication was well-settled and could not be overturned other than by the Supreme Court or the Illinois General Assembly.

Applying the established test of intoxication as set forth in *Parro*, the Appellate Court affirmed. The court deferred to the Commission, which had rejected the opinions of the employer's expert and which had further concluded that the claimant's usage could have occurred up to a day and a half prior to the accident. Moreover, the Commission had determined that the hole in the floor through which the claimant fell was not something the general public would have been exposed to, and therefore constituted an increased risk. According to the court, "even if the marijuana impairment was a contributing cause of claimant's injury, it was not the sole cause."

Injuries Sustained by a Traveling Employee Who is Driving While Intoxicated are Presumed Non-Compensable

One of the most difficult areas where we often seek to raise the intoxication defense is that involving a traveling employee who drives a vehicle as a significant part of his employment and who is or appears to be intoxicated at the time of the injury. The leading case for such a claim is *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 657 N.E.2d 1196 (1st Dist. 1995), where the Appellate Court affirmed the Commission's denial of benefits in a death claim filed on behalf of a worker who drove while intoxicated. The decedent Beattie in that case was the manager at a car dealership who drove a company car as part of his employment. On the night of his death, Beattie participated in a series of business meetings during which he drank alcohol. On his way home, Beattie collided with a semi-truck and died at the scene. Subsequent tests revealed that his blood alcohol level was over the legal limit and testimony showed that alcohol likely impaired Beattie's judgment.

The claimant sought to introduce evidence that some other factor must have contributed to the injury, noting that one witness "said Beattie seemed able to stand without wobbling and to walk in a normal manner and that he could converse professionally." *Beattie*, 276 Ill. App. 3d at 448. The Appellate Court rejected the proffered circumstantial evidence, absolving the employer and insurance carrier from the responsibility to pay benefits where it was not reasonably foreseeable Mr. Beattie would drink to the point of being "legally incapable of driving."

The claimant also relied upon some of the cases cited in this article above – *Jackson*, *Lock 26 Constructors*, and *Kropp Forge Co.* – where intoxication was excused for other reasons in the case. The court addressed this issue head on, finding those cases inapplicable where it "was the claimant's job function to drive a vehicle on a public roadway." *Beattie*, 276 Ill. App. 3d at 452.

The *Beattie* court's reliance on the fact that the injured worker drove for a living is consistent with our Supreme Court's recognition of the change in attitudes regarding drunk driving. In *Paganelis v. Indus. Comm'n.*, 132 Ill. 2d 468, 548 N.E.2d 1033 (1989), the Illinois Supreme Court overturned an award of benefits to the conservator of a man seriously injured while driving drunk. The majority distinguished prior Appellate Court cases, which had awarded benefits despite the claimant's intoxication, on the ground that "the probable public interest shift in recent years in the attitudes towards excessive consumption of alcoholic beverages in general, and towards driving while intoxicated… ." *Paganelis*, 132 Ill. 2d at 476. The Court concluded that the employee's blood alcohol level of .238 percent was sufficient to impair his ability to perform his work.

Concurring with the majority, Justice Ryan went even further, favoring a rule that once the General Assembly determined driving while drunk is a crime, that fact alone must suffice to deny benefits when a vehicular accident is at issue:

> I have no quarrel with the application of this rule to the usual employment activities. If the employee could perform the work associated with his duties, then, under the rule, recovery is and should be allowed, even though the employee had consumed a considerable amount of alcohol. However, when the legislature has enacted a statute making it illegal to drive an automobile with an alcohol concentration in the blood above a certain level, and the employee had an alcohol concentration in his blood above that, and was driving an automobile as part of his employment, then I would hold that the employee has departed from the course of his employment. He could no longer legally perform his duties of driving an automobile. I would therefore, hold that he was legally incapacitated. *Paganelis*, 132 Ill. 2d at 486-87.

It is notable that in *Paganelis* there appeared to have been many contributing causes to the accident other than intoxication. For example, the road conditions were poor, the accident occurred at night, and it was raining. Furthermore, the driver

was known to be a heavy drinker, who might have built a tolerance for alcohol. The Supreme Court applied common sense, however, holding that accident circumstances actually raise a presumption that a claimant must overcome in bearing his burden:

> As a separate matter, the description of the accident appearing in the police report, which indicated that the injured employee made a left turn in front of another vehicle, together with the evidence regarding the employee's blood-alcohol level, which showed that intoxication of that degree would have rendered him incapable of controlling a motor vehicle, supported *the inference that the accident was caused by the employee's intoxication and that his injuries therefore did not arise out of his employment*. *Paganelis*, 132 Ill. 2d at 485-86 (emphasis added).

See also Parro v. Industrial Commission, 167 Ill. 2d 385, 657 N.E.2d 882 (1995) (upholding denial of benefits to employee injured while intoxicated, despite testimony of other potential contributing causes and evidence that the employee did not "appear" drunk).

A similar decision was reached in *Riley v. Industrial Comm'n*, 212 Ill. App. 3d 62, 570 N.E.2d 887 (3d Dist. 1991), where the claimant, a salesman for the respondent, had attended an association luncheon and had consumed at least five glasses of wine over the course of an afternoon. The association dues were paid by the claimant's employer. The luncheon lasted until 2:30 p.m., after which time the claimant stayed to visit with other customers and then proceeded to deliver a tool to one of his clients. While delivering this tool, the claimant fell asleep and drove off the road. The court affirmed the denial of benefits, finding that the evidence showed the claimant was unable to perform his duties, which involved driving his car.

These decisions together stand for the proposition that, if an employee drives for a living and gets behind the wheel while intoxicated, he assumes the risk of any injuries sustained as a result of a collision caused by the intoxication. Indeed, the various rulings in cases involving traveling employees makes sense – if the employee's job requires driving and that employee is intoxicated beyond the legal limit for driving (0.08 percent in Illinois), the intoxication should be considered enough to remove the employee from the course and scope of the employment, as he is now driving in violation of the law.

In the recent case of *Lenny Szarek* discussed above, the Appellate Court declined to address some of the issues raised in *Paganelis* and *Beattie, e.g.* whether public policy against alcohol (or, in this case, drug) use in the workplace warranted a modification of the law, holding that such pronouncements must come either from the Illinois Supreme Court or the Illinois General Assembly.

Intoxication Applies to Other Settings

Although not an alcohol intoxication defense case, another recent case (released as an unpublished Rule 23 order), addressed the situation where a claimant, who was a traveling employee, fell asleep at the wheel, possibly from sleep disorder medication. In *Addus Healthcare v. Workers' Compensation Comm'n*, No. 4-08-0675WC (Nov. 12, 2009), the claimant was a traveling employee who worked as a home helper, cleaning homes, running errands, and transporting clients to medical appointments or grocery stores. The claimant had finished her work with one client and was driving to her next assignment when she lost control of her car and drove off the road into a cornfield. The claimant had taken blood pressure medicine that morning and sleeping medication the night before. Medical records from the emergency room indicated that she did not recall how the accident happened, but that she had told the physicians she had fallen asleep at the wheel. The record also contained some evidence that the claimant may have fallen asleep due to her medications. The Appellate Court affirmed the Commission majority decision, which found the claim was compensable. According to the Commission, the medical evidence did not indicate that the mixture of medicines impaired the claimant's actions while driving.

Both *Addus* and *Lenny Szarek* suggest that the court will view intoxication by medications or by drugs in the same light as it does alcohol intoxication where the claimant is not involved in operating a motor vehicle. In each type of case, more specific proof is needed to show not only the level of chemical in the system, but that the intoxication specifically inhibited the employee in his or her work. With alcohol consumption involving driving or operating a vehicle, it seems that impairment may be more easily established by comparing the employee's blood alcohol level to the legal limit of 0.08 percent.

Please contact us if you have any questions concerning claims involving intoxication, whether from alcohol, medications, or illegal drugs.

Workers' Compensation Contact Attorneys

Heyl, Royster, Voelker & Allen

PEORIA

Supervising Attorney:
Bradford B. Ingram - bingram@heylroyster.com

Attorneys:
Craig S. Young - cyoung@heylroyster.com
James M. Voelker - jvoelker@heylroyster.com
James J. Manning - jmanning@heylroyster.com
Stacie K. Linder - slinder@heylroyster.com

Dockets Covered:
Bloomington • Galesburg • Peoria •Rock Island

SPRINGFIELD

Supervising Attorney:
Gary L. Borah - gborah@heylroyster.com

Attorneys:
Daniel R. Simmons - dsimmons@heylroyster.com
Sarah L. Pratt - spratt@heylroyster.com
John O. Langfelder - jlangfelder@heylroyster.com
Erin L. O'Boyle - eoboyle@heylroyster.com

Dockets Covered:
Carlinville • Clinton • Decatur • Jacksonville/Winchester
Quincy • Springfield • Taylorville

URBANA

Supervising Attorney:
Bruce L. Bonds - bbonds@heylroyster.com

Attorneys:
John D. Flodstrom - jflodstrom@heylroyster.com
Bradford J. Peterson - bpeterson@heylroyster.com
Toney J. Tomaso - ttomaso@heylroyster.com
Jay E. Znaniecki - jznaniecki@heylroyster.com
Joseph K. Guyette - jguyette@heylroyster.com

Dockets Covered:
Danville • Joliet • Kankakee • Lawrenceville
Mattoon • Urbana • Whittington/Herrin

ROCKFORD

Supervising Attorney:
Kevin J. Luther - kluther@heylroyster.com

Attorneys:
Brad A. Antonacci - bantonacci@heylroyster.com
Thomas P. Crowley - tcrowley@heylroyster.com
Lynsey A. Welch - lwelch@heylroyster.com
Dana J. Hughes - dhughes@heylroyster.com
Bhavika D. Amin - bamin@heylroyster.com

Dockets Covered:
Chicago • De Kalb • Geneva • Ottawa • Rock Falls
Rockford • Waukegan • Wheaton • Woodstock

EDWARDSVILLE

Supervising Attorneys:
Bruce L. Bonds - bbonds@heylroyster.com
Lawrenceville and Mt. Vernon Calls

Craig S. Young - cyoung@heylroyster.com
Collinsville Call

Toney J. Tomaso - ttomaso@heylroyster.com
Belleville Call

Attorney:
James A. Telthorst - jtelthorst@heylroyster.com

Dockets Covered:
Belleville • Collinsville • Carlyle • Mt. Vernon

APPELLATE:

Brad A. Elward - belward@heylroyster.com

Dockets Covered:
Statewide

Peoria
Suite 600
124 SW Adams St.
Peoria, IL 61602
309.676.0400

Springfield
Suite 575
1 North Old State
Capitol Plaza
PO Box 1687
Springfield, IL 62705
217.522.8822

Urbana
102 E. Main Street
Suite 300
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
Second Floor
120 West State Street
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Mark Twain Plaza III,
Suite 100
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646