Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *December 2010*

A WORD FROM THE PRACTICE GROUP CHAIR

This month's newsletter features a discussion of the recent appellate court case of *Vallis Wyngroff Bus. Forms*, which addresses who can and cannot sign an employer's appeal bond in the event the employer is no longer in business and cannot be located. The author is Brad Elward of our Peoria office. Brad concentrates in appellate practice and is the editor of our firm's workers' compensation newsletter. He offers some practical tips on how to avoid the pitfalls identified in *Vallis* so that the employer's appeal is not dismissed for want of jurisdiction.

We have also included a short legislative update from Bruce Bonds of our Urbana office. Bruce provides some background on recent developments in Springfield and the possibility of some major modifications taking place in January 2011. We will continue to keep you advised on these developments as they surface.

From all of us at the firm, please have a safe and wonderful holiday season!

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Word from the Commission …

The Chairman has realigned the Commission panels, effective January 1, 2011. Panel A will consist of Commissioners Donohoo, Lamborn, and Mason. Panel B will consist of Commissioners Dauphin and Lindsay, with a vacancy until the replacement for Commissioner Sherman is appointed. Panel C will remain the same with Commissioners Basurto, DeMunno, and Gore. Panel B will not schedule oral arguments for the month of January 2011 because of the current vacancy and the relative number of backlogged cases assigned to each Commissioner.

Recent Developments in Illinois Workers' Compensation Laws …

Change on the Horizon –

Reported by Bruce Bonds of our Urbana office

The Illinois House and Senate have created special committees to review and recommend changes in the Illinois Workers' Compensation Act before the 96th General Assembly adjourns on January 12, 2011. An informational hearing was held on December 8, 2010, in Chicago, at which time additional testimony was received on the issues of potential changes. At this time, the changes being sought are narrowly focused on a handful of topics. The business community's recommendations include the following: (1) changing the rules of causation to require that the accident be the prevailing factor in causing the medical condition or disability; (2) changing the rules on wage-loss differential awards, regarding how disability is defined and how such awards can be revisited; (3) allowing employers to choose the treating physician; and (4) requiring use of the AMA guidelines for ratings of disability.

The Senate has posted written testimony received by some of the groups which have appeared–see this web site:

http://www.ilga.gov/senate/committees/WorkersCompensationReformReports.asp?HearingDate=11292010

We will report back to you in January with any new developments.

This Month's Author:

Brad Elward of our Peoria Office was a contributing author to the current Illinois Association of Defense Trial Counsel *Quarterly Monograph*, *The Conflict of the Positional Risk Doctrine in Illinois: Its Rejection and Adoption*, which appeared in the publication's most recent issue, Volume 20, Number 4, Fourth Quarter 2010. Brad will be happy to forward copies of the *Monograph* upon request.

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APPEAL BONDS IN WORKERS' COMPENSATION CASES …

WHEN THE EMPLOYER IS NO LONGER IN BUSINESS AND CANNOT BE FOUND

by Brad Elward

Section 19(f) of the Workers' Compensation Act requires a party seeking judicial review to file, among other things, an appeal bond signed by the employer, as the party against whom the award was rendered, and by a surety approved by the circuit court. The bond portion of section 19(f) is found in subparagraph (2) and states:

> 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.
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> 820 ILCS 305/19(f)(2).

The bond requirement does not apply to governmental entities, so school districts, among others, do not need to file an appeal bond in order to perfect their judicial review.

All jurisdictional documents, including the appeal bond, must be filed with the circuit court within 20 days of the of the receipt of the Commission's decision. There is no provision for an extension of this time. 820 ILCS 305/19(f)(1).

Who Can Sign the Employer's Appeal Bond?

Generally speaking, the appeal bond must be signed by the party "against whom the Commission shall have rendered an award for the payment of money." 820 ILCS 305/19(f)(2). In practice, this means the bond must be signed by an individual who has the authority to financially bind the employer, be it a corporation, partnership, or sole proprietorship. This individual is typically a corporate officer or director, and, unless specifically authorized cannot be the employer's attorney. The cases have not established a bright line test as to who exactly qualifies as an appropriate person to sign a bond and bind the employer.

In *Lee v. Industrial Comm'n*, 82 Ill. 2d 496, 498, 413 N.E.2d 425 (1980), the Supreme Court acknowledged that a partner would in fact be authorized to bind a partnership under section 19(f)(2). *See also Deichmueller Constr. Co. v. Industrial Comm'n*, 215 Ill. App. 3d 272, 276, 574 N.E.2d 1208 (3d Dist. 1991), *rev'd on other grounds*, 151 Ill. 2d 413, 603 N.E.2d 516 (1992). Moreover, at least one case makes positive reference to the officer/director status. "Decisions relating to a corporation's financial obligations are typically reserved for corporate officers and directors, not for attorneys representing the corporation." *Illinois Armored Car Corp. v. Industrial Comm'n*, 205 Ill. App. 3d 993, 563 N.E.2d 951 (4th Dist. 1990). Likewise, in *First Chicago v. Industrial Comm'n*, 294 Ill. App. 3d 685, 691, 691 N.E.2d 134 (1st Dist. 1998), the Appellate Court, Workers' Compensation Commission Division, held that "[a] corporate officer is similar to a partner who signs an appeal bond."

From these cases, we can safely conclude that the following individuals can sign an appeal bond on behalf of an employer and bind it financially: an officer, director, or partner. Beyond these individuals, caution must be taken to ensure that the individual can in fact bind the employer.

The purpose behind these seemingly archaic rules is that the court wants to ensure that the party is truly bound to pay the award. "The purpose of requiring a bond is to bind the principal. A bond without a principal's signature does not further that purpose." *Freedom Graphic Systems, Inc. v. Industrial Comm'n*, 345 Ill. App. 3d 716, 720, 802 N.E.2d 1262 (1st Dist. 2003).

In most cases, identifying the appropriate person to sign the appeal bond for the employer is not a difficult task. While it may be a logistical nightmare to track down and obtain a signature from an individual in a large corporation spread across the state or even the country, overnight services largely have reduced that concern to a minimum provided adequate time is available to use those services.

However, there is one scenario where danger looms for employers and their workers' compensation insurance carriers. While it may be widely accepted in the insurance business that the workers' compensation insurance carrier steps into the employer's shoes and assumes the defense of

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the workers' compensation claim, Illinois law has yet to catch up to reality and still holds true to the fiction that the employer is the sole entity liable and that the insurance carrier, unless named as a party in the litigation, has no standing in the case.

In a recent 2010 case, the Appellate Court, Workers' Compensation Commission Division, created a significant problem for workers' compensation insurance carriers in that small subset of cases where the employer is no longer in business and cannot be located. This problem is becoming more frequent given the economic times in which more businesses are failing. In those cases, when the employer either cannot be found or the employer has gone out of business or is bankrupt, who can sign the appeal bond as the party "against whom the Commission shall have rendered an award for the payment of money?"

In *Vallis Wyngroff Bus. Forms, Inc. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 91, 930 N.E.2d 587 (1st Dist. 2010), the Appellate Court upheld the circuit court's dismissal of the employer's judicial review because the appeal bond had not been signed by the employer, but rather had been signed by Basinski, the national claims administrator of the employer's workers' compensation carrier, Atlantic Mutual Insurance Company. The evidence showed that the employer was no longer in business and that a representative of the employer could not be located. Because no one was available to sign the bond for the employer, Basinski signed the bond as principal and submitted an affidavit stating that Atlantic was Vallis' workers' compensation insurance carrier; that under the terms of its policy of insurance, Atlantic acted as Vallis' agent in securing legal representation in the case filed by the claimant; that as carrier, it was bound to defend and indemnify Vallis from and against the claimant's action; and that Vallis was "believed" to be out of business and no representative of the company could reasonably be found.

The circuit court granted the claimant's motion to dismiss on jurisdictional grounds, finding that the employer had failed to strictly comply with the requirements of section 19(f)(2). The circuit court's ruling was affirmed by the Appellate Court, which unanimously held that the language of section 19(f)(2) meant that the individual signing the bond for the employer must be able to financially bind the employer. According to the opinion:

> Basinski executed the bond which was filed in this case. Neither in the bond nor in the affidavit which was filed with it does Basinski allege that she is an agent of Vallis. She alleges only that she is the national claims administrator for Atlantic, Vallis' workers' compensation insurance carrier. Although she avers that Atlantic has acted as the agent of Vallis in securing legal representation in this case, she does not even allege that Atlantic has the authority to execute a bond on behalf of Vallis. Further, she does not even allege that she has the authority to execute a bond on behalf of Atlantic. Simply put, nothing in the record at the time of the filing of the bond or which was filed during the 20-day period provided in section 19(f)(1) of the Act establishes Basinski's authority, either express or implied, to bind Vallis to pay the bond.
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> *Vallis Wyngroff*, 402 Ill. App. 3d at 94.

The Appellate Court further rejected the argument that because Vallis was out of business, it was impossible to have the bond executed by one of its officers or other employees. The court explained, "The argument is defeated, however, by the unambiguous language of the statute which requires the bond to be executed by the party 'against whom the Commission shall have rendered an award.' In this case, that party is Vallis, not Atlantic. When the requirements of a statute are clear and unambiguous, such as in this case, we must give the statute effect as written, without reading into it provisions that the legislature did not express." *Vallis Wyngroff*, 402 Ill. App. 3d at 94 [citations omitted].

During oral argument of the case, one of the justices told counsel that one solution was for the insurance carriers to issue policies with language whereby the employer specifically authorized the insurance company to sign any appeal bond on the employer's behalf for claims filed for injuries allegedly sustained during the coverage period. What was suggested essentially amounts to a power of attorney limited to appeal bonds. Whether this would be deemed legally sufficient is not clear. Indeed, numerous other issues would surface, including the authority of the person signing the policy for the employer, whether the "litigation" was sufficiently described

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so as to confer such power, and how long the power would last. For example, would an insurance policy authorizing an insurance carrier to sign an appeal bond on behalf of the employer, signed by corporate officer Jones, be valid if Jones is no longer employed in that capacity?

In some respects, *Vallis* appears to have been decided without due consideration to the reality of how workers' compensation claims are handled; *i.e.*, the workers' compensation insurance carrier steps into the case for the employer, assumes the defense of the case, and ultimately pays the award on behalf of the employer. It further ignored the fact that a bond signed by the insurance carrier, and backed by an independent surety, offers the employee significantly greater protection in the event of non-payment versus a defunct employer. Moreover, to say that a party who cannot be found must nevertheless authorize another to sign an appeal bond for it begs the question and tasks the carrier with the impossible. Indeed, if the employer cannot be found, and therefore, cannot be held to pay the award, section 4(g) of the Act mandates that the workers' compensation carrier shall be primarily liable to the employee. 820 ILCS 305/4(g). Thus, having the insurance carrier sign the bond as principal makes sense and satisfies the underlying purpose of the Act is assuring sufficient funds for payment of the award should the employer not prevail in the appeal.

How To Guard Against Appeal Bond Issues

Although obtaining the appeal bond is customarily counsel's obligation, there are several things that the employer and workers' compensation insurance carrier can do to facilitate the process and to ensure that a representative of the employer is available to sign the appeal bond.

Employers

From the employer's perspective, efforts should be made to keep the insurance company apprised of all business events, including pending bankruptcies, dissolutions, or generally going out of business. In addition, to minimize this potential problem employers may also want to delegate authority to sign appeal bonds to particular individuals within the company.

Insurers

Insurance companies can likewise monitor the business status of the insured, either directly or through the local agent. If it is determined that an employer is either going out of business, is out of business, or on shaky financial ground, the Act provides a mechanism allowing an insurance carrier to in effect intervene and be bound by any decision of the Commission against the employer. 820 ILCS 305/4(g). Section 4(g) is likewise available in the event that a company is entering bankruptcy.

One *caveat* – an insurance carrier should not consider Section 4(g) where there are coverage defenses to the workers' compensation claim, because by intervening under section 4(g), the insurance carrier agrees to assume the employer's liability under the policy. Thus, any coverage claim would be waived.

Both parties can also help the situation by making speedy determinations as to whether a Commission decision should be appealed, or at least permit counsel to begin the paperwork to secure the appeal bond while that decision is being made.

As you can see, executing valid appeal bonds in workers' compensation cases remains a complex and difficult task for employers and their workers' compensation carriers. These issues, as with others surrounding the appeal documents, are magnified by the extremely short time constraints (20 days) placed on employers for deciding whether to appeal. In the end, the General Assembly needs to intervene and revise Section 19(f)(2) to broaden not only who can sign an appeal bond on behalf of the employer, but also to permit the workers' compensation insurance carrier to post the insurance policy in lieu of the bond, as is commonly done in civil appeals.

Please feel free to contact us if you have any questions concerning appeal bonds or any other issues relating to workers' compensation.

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