Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

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

A Word From The Practice Group Chair

With this edition of *Below the Red Line*, all of us at Heyl Royster would like to wish everyone a peaceful and happy Holiday Season. We know this time of year can be busy both at home and at work, and we hope you find some time to slow down just a bit. While holiday celebrations should be festive occasions we all know they can create issues in the workplace. In this edition, you will find a very good article by Lynsey Welch of our Rockford office outlining the current state of the law regarding compensability of injuries at voluntary parties and recreational activities. Hopefully you will find this article helpful in the event some of these claims emerge.

We in the workers' compensation group are looking forward to a busy 2013. We have a number of meetings set to visit you, our clients, in order to keep you informed on the developments we are seeing at the Workers' Compensation Commission. We would be happy to schedule a visit with you to update you on these important developments. Please do not hesitate to contact me if this would be helpful.

Most importantly, we hope the end of the year brings an opportunity for you to both accomplish your year-end goals, and also spend some time relaxing with family and friends. We appreciate our continued relationship with you and hope you find the information in this edition of *Below the Red Line* helpful.

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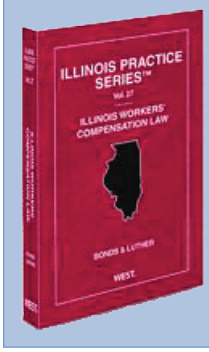
In this issue . . .

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.



VOLUNTARY RECREATIONAL ACTIVITIES: *WHAT EMPLOYERS NEED TO KNOW …*

by Lynsey A. Welch - Rockford Office

Introduction

With the holiday season upon us, 'tis the season for company parties, festivities, and holiday events. Given this season, we thought it was an appropriate time to address the impact Section 11 may have on an employer this time of the year.

The Illinois General Assembly enacted Section 11 of the Illinois Workers' Compensation Act in 1985 to address accidents that occur at such events. 820 ILCS 305/11. Section 11 states that accidental injuries incurred while an employee is participating in a voluntary recreational activity, such as a holiday party, are not compensable. While on its face this Section seems straightforward, case law on this topic is very fact specific and arguments are often made regarding whether specific activity is truly voluntary.

A claim is not automatically compensable just because the employee is injured while participating in a recreational activity. The pivotal issue in determining if the recreational activity is within the coverage of the Act is whether the claimant was ordered or assigned by his employer to participate in the activity. If an employee is injured while engaged in a recreational activity, the burden is on the claimant to establish Section 11 did not apply in order for his injuries to be found compensable. Therefore, the arbitrator's determination regarding the claimant's claim is based heavily on factual evidence submitted at the time of trial.

The more common recreational activities include sports activities, company picnics, and holiday parties. Benefits will not be awarded unless there is sufficient evidence that the employee was ordered or assigned to participate. Therefore, if a company has a holiday party or activity and makes it mandatory for the employees to attend, benefits may be awarded. However, issues arise when there is a disagreement whether or not the activity was mandatory. Courts have upheld Commission decisions regarding whether an activity is truly voluntary as long as the factual findings were not against the manifest weight of the evidence.

Voluntary Participation Precludes Recovery

Three cases in which the employee's injuries were found to be a voluntary recreational activity and benefits were denied include *Glassie*, *Gooden*, and *Caterpillar, Inc*.

Glassie v. Papergraphics

In *Glassie v. Papergraphics*, 248 Ill. App. 3d 621, 618 N.E.2d 885 (1st Dist. 1993), the plaintiff filed a civil complaint in circuit court against her employer alleging that while attending a holiday party on the employer's premises, she was burned when a portable stove erupted in flames. All company employees were invited to the party, which took place on company time and on company premises. Employees were relieved of their duties for the day and were free to leave and/or not return to work afterward. In attempting to skirt Section 11 and to allow her claim to fall outside the Act, the plaintiff argued that her attendance at the event was optional.

The defendant/employer moved to dismiss the plaintiff's complaint on the basis that her exclusive remedy was to pursue a claim under the Workers' Compensation Act, which was granted by the circuit court. On appeal, the plaintiff argued her attendance at the holiday party was that of a voluntary recreational activity within the scope of Section 11 of the Act. The Appellate Court reversed the judgment of the circuit court and remanded the case for further proceedings. The Court found the plaintiff's attendance to be voluntary because she had the option of attending the party. Moreover, there was no mention of any repercussions if she did not attend.

Gooden

In *Gooden v. Industrial Comm'n*, 366 Ill. App. 3d 1064, 853 N.E.2d 37 (1st Dist. 2006), the claimant alleged injuries to his back while participating in a volleyball game during a company picnic. The company picnic was a yearly event scheduled to take place during company time. The claimant testified that he spent the first four hours of the day attending a company picnic and the remaining four hours working at his machine. He was paid his regular salary for the entire day. Employees were given a choice to attend the picnic for half of the day and work the other half, or forego the picnic and work all day. The picnic occurred on the employer's grounds, it was attended exclusively by employees, and the employer provided all the materials and equipment.

The Appellate Court, Workers' Compensation Commission Division, affirmed the Commission's finding that the injuries occurred during a voluntary recreational program for purposes of Section 11 of the Act and did not "arise out of" and "in the course of" employment. The court held that claimant was not ordered or assigned to do so, and there was no punishment or repercussion for employees who chose to work rather than attend the picnic.

In both *Glassie* and *Gooden*, the appellate courts relied heavily on the specific factual evidence before them in determining whether the particular activities were actually voluntary. In both of these cases, the reviewing court determined that the activities were voluntary. Important evidence in demonstrating the activities were voluntary included whether attendees were paid to attend, whether alternative optional activities were available, and whether there were repercussions for not participating.

A different result was found in *Woodrum v. Industrial Comm'n*, 336 Ill. App. 3d 561, 783 N.E.2d 1072 (4th Dist. 2003). There, the employer held a company picnic during company time. Employees were advised if they chose not to attend they would have to take accrued personal or vacation time off to receive payment. According to the court, if an option to not attend meant the employee lost benefits, it was not truly optional. Thus, attendance was mandatory. For employers, testimony and written documentation supporting the proposition that the employee is not required or assigned to participate or attend is important.

Caterpillar, Inc.

Another Appellate Court decision from late 2011 also deserves some discussion. Although an unpublished Rule 23 decision, the Appellate Court in *Caterpillar, Inc., v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100660WC-U, addressed a lunchtime auto accident that killed the decedent. In that case, the decedent worked as technical manager in one of Caterpillar's divisions. On the morning of November 24, 2004, a fellow employee stopped by the decedent's office to remind him that it was another co-worker Eddy's last day. The decedent suggested they should go to lunch and they agreed to go to the Woodcutter. One witness characterized the event as "a little social lunch before [Eddy] left us for the winter." At the time of the collision, the decedent had driven from his office approximately four miles to an intersection approximately one-half mile from the Woodcutter. The arbitrator and Commission denied benefits, finding that the accident did not "arise out of" or "in the course of" the employment, and alternatively, applied Section 11 to find that the decedent was engaged in a recreational activity.

The Appellate Court reinstated the Commission's denial of benefits, finding that the employer exercised no control over the location where the decedent drove for lunch and gave him no instructions in that regard. The decedent's travel at the time was no different than any other person driving to the Woodcutter for lunch. Moreover, the decedent "was exposed to no greater risk than that faced by any other member of the general public and was not performing any duties incidental to his employment at the time he was injured. Simply having lunch with a co-worker on his last day of employment does not suffice. [The] [d]ecedent was not conducting any work-related activity at the time. He was just driving." *Caterpillar, Inc.,* 2011 IL App (4th) 100660WC-U at ¶ 20.

The majority of the court determined that the accident did not "arise out of" the employment. According to the court, the decedent was not on a special mission for respondent. Rather, he "drove to the Woodcutter to have lunch with a co-worker on his last day of employment. There was no request by the employer that decedent do anything special on the day in question." *Caterpillar, Inc.,* 2011 IL App (4th) 100660WC-U at ¶ 22. Of special interest to this article is the Special Concurrence of Justices Stewart and Holdridge, who concluded the accident did "arise out of" and "in the course of" the employment via the "street risk doctrine," but further concluded that the decedent was, at the time of his death, engaged in a recreational activity. As has been repeated in this article, "accidental injuries incurred by an employee while participating in a voluntary recreational program are excluded from coverage by Section 11 of the Act." *Pickett v. Industrial Comm'n*, 252 Ill. App. 3d 355, 358 (1st Dist. 1993).

According to the Special Concurrence:

> The evidence in this case is clear that the decedent was killed in a motor vehicle collision while traveling to a restaurant to attend a luncheon in honor of a co-employee who was retiring. His attendance at the luncheon was strictly voluntary. In my view, the luncheon would be analogous to a party under the above-quoted statutory provision. Thus, regardless of whether the accident would have been compensable under a traditional analysis of whether it arose out of and in the course of his employment, the activity in which he was engaged is excluded from coverage by section 11 of the Act.
>
> *Caterpillar, Inc.,* 2011 IL App (4th) 100660WC-U at ¶ 32.

Thus, for different reasons, the Special Concurrence reached the same conclusion to reinstate the Commission's denial of benefits. This Special Concurrence is significant because it provides some insight into how one branch of the Workers' Compensation Commission Division panel views not only Section 11 but also the aforementioned "street risk doctrine." We will be addressing the latter doctrine in forthcoming issues of this newsletter.

Participation Deemed Mandatory

Two cases in which the claimant's injuries were found compensable because the activities were deemed mandatory include *Elmhurst Park District* and *Pinckneyville Community Hospital.*

Elmhurst Park District

In *Elmhurst Park District v. Illinois Worker's Compensation Comm'n,* 395 Ill. App. 3d 404*,* 917 N.E.2d 1052 (1st Dist. 2009), the claimant worked as a fitness supervisor at a fitness facility operated by the Park District. He injured his right leg while playing in a wallyball game on employer's premises during his work shift. At arbitration, the claimant testified that he was asked by a coworker to participate in the team game. He initially declined the invitation because he was not feeling well and had other work to do; however, the coworker persisted in her request and told the claimant that the game would be canceled without his participation. The claimant decided to help out because he felt that it was part of his job, which was to promote different classes and programs. He had previously participated at least three times during work hours.

His supervisor testified she had never ordered or directed the claimant to play or participate in any wallyball league. She further testified that there was a policy prohibiting employees from playing while they were on duty.

The arbitrator found the injury "arose out of" and "in the course of" the employment and held the voluntary recreational activity exclusion of Section 11 did not apply because the claimant's participation was not a voluntary activity. The Commission affirmed.

The Appellate Court affirmed, finding that "recreation" was inherent in the claimant's job and that almost any activity in which the claimant took part could have been considered "recreational." The court noted the claimant participated in the game because he felt it was part of his job responsibilities. Therefore, his participation was not "recreational" within the meaning of the exclusion of workers' compensation benefits for an injury incurred while participating in voluntary recreational activities.

Jim Manning and Brad Elward will be speaking on February 27, 2013, in East Peoria, Illinois, as part of the Lorman "Workers' Compensation Update in Illinois," seminar. The topics include an update on the 2011 amendments, a 2012 case law update, strategies for terminating TTD benefits, preparing a case for arbitration (both perspectives) and using an appeal to your advantage. Please contact Jim or Brad for more details.

Pinckneyville Community Hosp.

In *Pinckneyville Community Hospital v. Industrial Comm'n*, 365 Ill. App. 3d 1062, 851 N.E.2d 595 (5th Dist. 2006), the claimant suffered an intracerebral hemorrhage and stroke while giving a speech at a retirement dinner. The claimant had been a nurse at Pinckneyville Community Hospital for 25 years. Her speech was to honor a retiring physician. The claimant had helped plan the dinner and testified that she was worried that she would lose her job if she did not attend. A committee from the hospital nominated her to give a speech at the retirement dinner since she had worked with the retiring physician for the longest. The claimant and another physician testified that someone from the committee ordered the claimant to make the speech. The claimant was not paid to attend. The Commission felt that because the claimant was designated or assigned to give the speech, her attendance was necessary.

The Commission found that the claimant's injuries were caused by the stress of giving the speech at the retirement dinner that the employer required the claimant to attend. Her activity was mandatory. The Appellate Court held that this finding was not against the manifest weight of the evidence.

In both *Elmhurst Park District* and *Pinckneyville Community Hospital*, the court emphasized the employee's perception of the circumstances surrounding their activities. Both employees testified that they felt their actions were required as part of their job duties. Unfortunately, in both cases there was not sufficient evidence submitted at trial to indicate that their perceptions were unfounded.

One possible means of defending against such actions would include submitting evidence on the behalf of the employer that the claimant's perceptions were unreasonable. Here, the best and most credible witnesses must be presented to build a fact base for the Commission to consider.

Also, it may not be enough to just have a written company policy restricting such action *per se*, if the policy is not enforced by the employer. Violating a rule of an employer is not necessarily a bar to compensation, especially if the rule was not enforced. For example, in *Elmhurst Park District*, the employer had a policy in place prohibiting the claimant's actions. However, this was disregarded because there was never any punishment or repercussions for violations.

Yet, if the employer can provide both a written policy signed and acknowledged by the claimant AND testimony that the policy was implemented, it may be stronger evidence that the claimant's participation was not required. Proper use of such evidence at the trial may have made it difficult for the claimant to prove that his or her perceptions were reasonable. It is important to note that incidental acts are not within the course of employment if done in an unusual, unreasonable, or unexpected manner.

Advice for Future Claims ...

For the employer and claims handler, when an employee reports an injury that appears to fall under Section 11 voluntary recreation activities, it is recommended that a full investigation into the details of the activity and participation be performed. Early investigation can lead to a successful defense posture. Documentation of the activity, such as announcements from the employer regarding participation, is important. Specifically, it is extremely important to document that the activity was not ordered or mandatory.

In addition to paper announcements, it is common place in today's electronic world for email communication or invitations to be sent to employees. Any such documents could be used as evidence to defend against claims that the claimant's participation was voluntary. Further, if an employee handbook is created, it is important to specifically limit the acceptable employee actions when on company premises, when on-duty, off-duty, and on breaks. As always, a signed signature page by each employee should be obtained as proof of receipt of such policy. If the employee understands what they are not allowed to do, it will be more difficult for them to later argue that their actions and perceptions were reasonable. A representative of the employer should be available to testify at trial regarding company guidelines, policies, and the usual and customary practice of employees.

Recent News ... Independent Contractors

In late October the Illinois Department of Employment Security (IDES) issued a news release entitled, "*Are You* Really *an Independent Contractor?*" as part of the agency's efforts to educate "honest business owners and workers while punishing scofflaws who knowingly break the law." In the release, IDES announced a new initiative "to level the playing field for businesses that lose work to lower-bidding companies that purposefully misidentify workers as independent contractors... ." Details on the fraud-reporting components of the effort are available at www.illinoismisclassification.com. The effort is a coordinated one on the part of the Illinois Department of Labor, Illinois Department of Employment Security, Illinois Department of Revenue, and the Illinois Workers' Compensation Commission. According to the news release, the effort is aimed at improving competition and protecting workers, but as the article admits, there is also a revenue component. The article acknowledges that the White House in 2010 estimated "increased enforcement nationally could yield in the next decade $7 billion through proper payment and penalties." Employers found to be breaking the law could face fines of at least $10,000 and up to 24 percent interest of failed payments.

If you utilize independent contractors, it may well be worth the time to review your contracts. As the news release states, "Generally speaking, to be considered an independent contractor, a worker must be free from direction or control. A worker is not an independent contractor just because an employer designates him or her as such – even if the worker agrees to the designation." The full definition of an independent contractor is set forth in the case law and will be dependent on a totality of the circumstances.

Please contact any of our workers' compensation attorneys if you have any questions concerning your employment contracts and whether your independent contractors are in compliance with the law.

Lynsey Welch - Rockford Office

A native of the Rockford area, Lynsey began her career at Heyl Royster as a law clerk in the Rockford office. While in law school, Lynsey was an Assistant Editor of the Northern Illinois University Law Review, a member of the Public Interest Law Society, and a member of the Women's Law Caucus. Following graduation in 2005, she joined the firm's Rockford office as an associate.

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.

Heyl Royster

Workers' Compensation Practice Group

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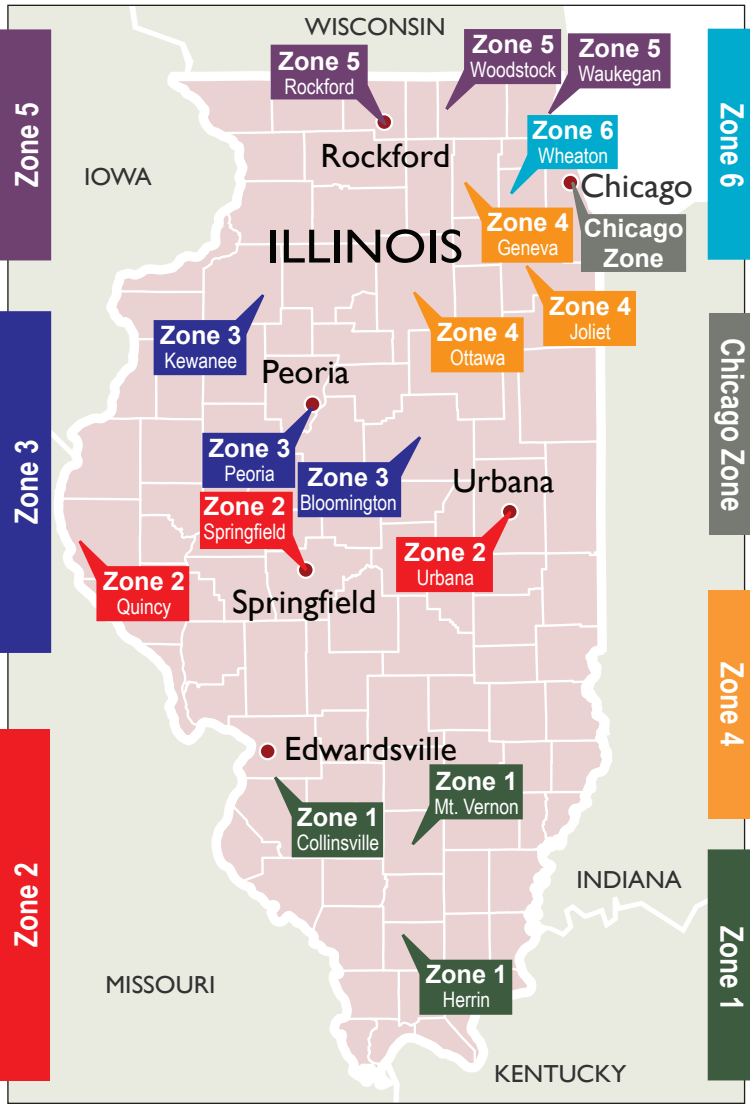

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