Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals — *October 2020*

A Word From The Practice Chair

I broke down the other day and wore a coat to work. It always comes way too soon in my opinion. Yes, it is cold and some of our counties in Illinois have already had their first snowfall. It has been a beautiful Fall from the perspective of the colors and the changing of the seasons. It is important to make the time to take in what Mother Nature does each year because it is so darn impressive. I want to wish everyone a fun and safe Halloween with lots of candy. I know it may look a little different from years past, but you just cannot beat the kids coming over, the adorable costumes, and huge smiles on their faces walking away with a heavier bag loaded down with sweets. I do hope you do not have to miss any of that fun.

A quick update here in Illinois. Due to the pandemic we are still following the policy and practice per Chairman Brennan of no in person docket calls. Those docket calls are still taking place via WebEx video conferences, which have proven to be safe and secure. As the months go by, each Arbitrator is getting better and better at handling these virtual dockets, as are the attorneys who are participating. We still get the dog barking, child crying, or other background noise which may interfere with the normal flow of the docket call, but that is getting to be less and less as we get used to this new normal. Pre-trials are still mandatory in order to get a trial date. And, I can report there is a significant increase in the number of pre-trial hearings filling up all time slots for these hearings as set by the Arbitrator. The Arbitrators are limiting the number of pre-trial hearing to make sure no one is rushed during the process and hearing. Finally, I can report we are arbitrating cases in person, but the number of trials, generally speaking, are down. The Arbitrators must limit the number of trials set on any given day so that the number of actual people sitting around at a trial site is not too significant. We are very focused on social distancing and keeping each other safe. If we need and want a trial date we can get one but the frequency across the board as far as the number of trials going on is definitely down in number.

This month my partner John Flodstrom does a deep dive into Section 6(c) of the Act and the use of a notice defense by Respondent. It can have teeth and be used at trial if we have the right set of facts. This is not a defense that is used as much as say an accident or medical causal connection defense, but it is still one that we always want to consider and explore. It is a good idea to understand what you need to have in place before such a defense can prevail.

Our Workers' Compensation Team at Heyl Royster has been busy each month providing our clients with uniquely crafted and designed virtual presentations. We are able to also record these presentations for use later by your team. If you are in need of a virtual seminar on a certain topic to help achieve some goals for your workers' compensation team, then we are ready to work with you to make that happen. All you need to do is contact me and we can iron out details and get something set up. I know with most of you that your offices are not yet open for business due to this pandemic. But, that does not mean you and your team have stopped working or don't have workers' compensation needs. We are here to help and look forward to hearing from you.

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When the Employer is the Last to Know: Is Lack of Timely Notice a Viable Defense under the Illinois Workers' Compensation Act?

By: John Flodstrom, Champaign Office

One of the critical aspects of defending a workers' compensation claim is having the opportunity to conduct an early investigation of an alleged work injury. The best time to investigate a claim is when the evidence is fresh and memories are intact. The 45 day notice requirement in the Illinois Workers' Compensation Act (the Act) would seemingly assist employers, claims handlers, and defense attorneys in performing an early investigation of a claimed work injury because it imposes a deadline on the employee to give notice to his employer of the alleged work injury. This article will discuss how the notice provision of the Act is applied by the Illinois Workers' Compensation Commission (IWCC) and reviewing courts and the circumstances under which it can be used as a defense to a workers' compensation claim.

The 45 Day Notice Requirement

Section 6(c) of the Act provides in part,

> Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident.
>
> No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy.

820 ILCS 305/6(c).

Form of Notice

Section 6(c) allows for notice of the accident to be provided orally or in writing, and the employer is entitled to notification of the approximate date and location of the accident, if known. It is not necessary for the notice to come directly from the employee, and the notice element of the Act is satisfied if the employer becomes aware of the accident from observation or from receiving reports from sources other than the injured employee. As a general matter, notice should be given to a management level person. *Atlantic & Pacific Tea Co. v. Industrial Commission,* 67 Ill. 2d 137 (1977).

How is the Statutory Notice Requirement Applied by the IWCC and Courts?

As employers, claims handlers and defense attorneys are well aware, Illinois workers' compensation claimants tend to receive the benefit of the doubt in workers' compensation proceedings. There is no question this is due at least in part to political factors. However, it is also rooted in a longstanding tradition of statutory interpretation. The Act is a remedial statute and the courts have held that it should be liberally construed to achieve its purpose, which is awarding claimants compensation and other benefits for work related injuries. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). The 45 day notice provision in § 6(c) of the Act is no exception to this practice, as the IWCC tends to view the denial of claims for failure to give notice as a harsh result that should be avoided. As a result, while the lack of notice should be raised when supported by the evidence, employers are faced with an uphill battle in presenting a notice defense.

Close is Good Enough in Horseshoes, Hand Grenades, and Notice

The standard for giving notice of a work injury is quite low, as the IWCC will accept defective, inaccurate, and incomplete reports of injury. The notice element is satisfied if the employer is generally aware of the employee's medical condition or injury, even if there is no knowledge the condition or injury is work related. *Yellow Freight Systems v. Industrial Commission*, 124 Ill. App. 3d 1018 (2d Dist. 1984).

In situations where an employee has furnished defective or inaccurate notice, §6(c) shifts the burden to the employer to prove there was undue prejudice as a result of the defective or inaccurate notice. In *Zion-Benton Township High School Dist. 126 v. Industrial Commission*, 242 Ill. App. 3d 109 (2d Dist. 1993), the claimant had two separate work accidents. Notice was given to the employer of the first accident, but it was undisputed the employee did not furnish notice of the second accident. The appellate court noted the petitioner's supervisor was generally aware the petitioner was having medical issues around the date of the second accident, and that the employer had failed to prove that it had suffered "undue prejudice" from any defective or inaccurate notice of the second injury. Undue prejudice is found when a party has experienced improper or unfair treatment. Thus, it is not required that an employee give specific notice of a work related injury to the employer, and general knowledge of a medical condition or injury is sufficient, particularly where the employer cannot demonstrate that it was unduly prejudiced by the improper notice.

Notice in Repetitive Trauma Claims

The application of the notice requirement is particularly murky in repetitive trauma claims. In these cases, it is difficult to pinpoint a particular accident date and when the employee became aware that the medical condition is related to his or her work activities. In repetitive trauma claims, the date the notice is required to be given depends on the manifestation date for the petitioner's medical condition as defined in *Peoria County Belwood Nursing Home v. Industrial Commission*, 115 Ill. 2d 524 (1987). The potential accident dates in repetitive trauma claims can include the petitioner's last day of employment or the date a reasonable person would be on notice that a medical condition is related to work activities. *Three "D" Discount Store v. Industrial Commission*, 198 Ill. App. 3d 43 (4th Dist. 1989). The different manifestation dates in repetitive trauma cases give petitioners multiple options for giving notice to their employer, and it is very difficult to raise a notice defense in these cases.

Tolling of Notice Requirement While Medical Bills are Paid under Group Health Insurance

Section 8(j) of the Act tolls or postpones the deadline for giving notice of an accident during the time the employee is receiving medical benefits from a group plan that receives contributions in whole or in part from the employer. In this instance, § 8(j) provides:

> In such event, the period of time for giving notice of accidental injury and filing Application for Adjustment of Claim does not commence to run until the termination of such payments.

820 ILCS 305/8(j).

The tolling period in § 8(j) applies when an employee is under active medical care that is being paid by a group health plan that receives premium contributions from the employer. The employee is not required to give notice of a claimed work injury

until 45 days after the termination of the payments under the group health plan. This can delay the deadline for months or years if the employee is under active medical care that is paid by group health insurance.

Takeaways

On its face, § 6(c) affords an employer a defense in instances where an employee fails to give notice of a work related injury within a 45 day deadline. However, this defense has been eroded through a series of IWCC and judicial decisions. The triggering date for the 45 day notice deadline is a moving target in repetitive trauma claims, and the time limit can be extended indefinitely if the employee is receiving group health insurance benefits. Moreover, the burden is placed on an employer to show that it is "unduly prejudiced" by defective or inaccurate notice. However, a notice defense can be effectively used in certain cases, particularly if it is supported by a thorough investigation. The employer will have to present clear evidence that is received no notification of the claimed work injury within the 45 day deadline. In the experience of the author, the strongest notice defenses are found in cases where the employee has intentionally withheld notice due to embarrassment, fear of reprimand, or other concerns. The IWCC is less inclined to give an employee the "benefit of the doubt" if the employee has deliberately kept the employer in the dark.

Practice Tips for Developing a Notice Defense

- An early, well documented investigation is the key to establishing the notice defense. If the claimant is not represented by counsel, a recorded statement should be taken at the onset of the claim to determine when the accident happened (or when the petitioner became aware of a repetitive type injury that was related to his employment), and to whom and when notice of the claimed accident or injury was given.
- The supervisor who purportedly received the notice of the accident should be interviewed to determine exactly when the supervisor was notified and what was relayed to the supervisor by the employee.
- There should be a determination whether any medical bills have been paid under group health insurance and, if so, whether the employer contributed to the premiums of that insurance.
- When the case is arbitrated, evidence needs to be presented to establish the employer was unduly prejudiced by late notice (*i.e.* the employer lost the opportunity to conduct an early and thorough investigation of the claim).
- The timing of notice of an accident can raise a red flag regarding the validity of the claim. Employers should be wary of accidents reported after weekends, holidays, and vacations as it raises the possibility the injury occurred outside of the work place.
- It should also be noted that a delay in providing notice can also be useful in challenging whether an accident really occurred.

John Flodstrom, *Champaign Office*

John's workers' compensation defense practice entails representing employers of all sizes at dockets in Central and Southern Illinois. He has tried well in excess of 100 cases before various Workers' Compensation Commission Arbitrators, and has also handled numerous appeals at the Commission, Circuit Court, and Appellate Court levels. John is a frequent lecturer on workers' compensation issues. He has authored several articles regarding various issues faced by employers and insurers in workers' compensation matters, and has also provided in-house training to employers and insurers.

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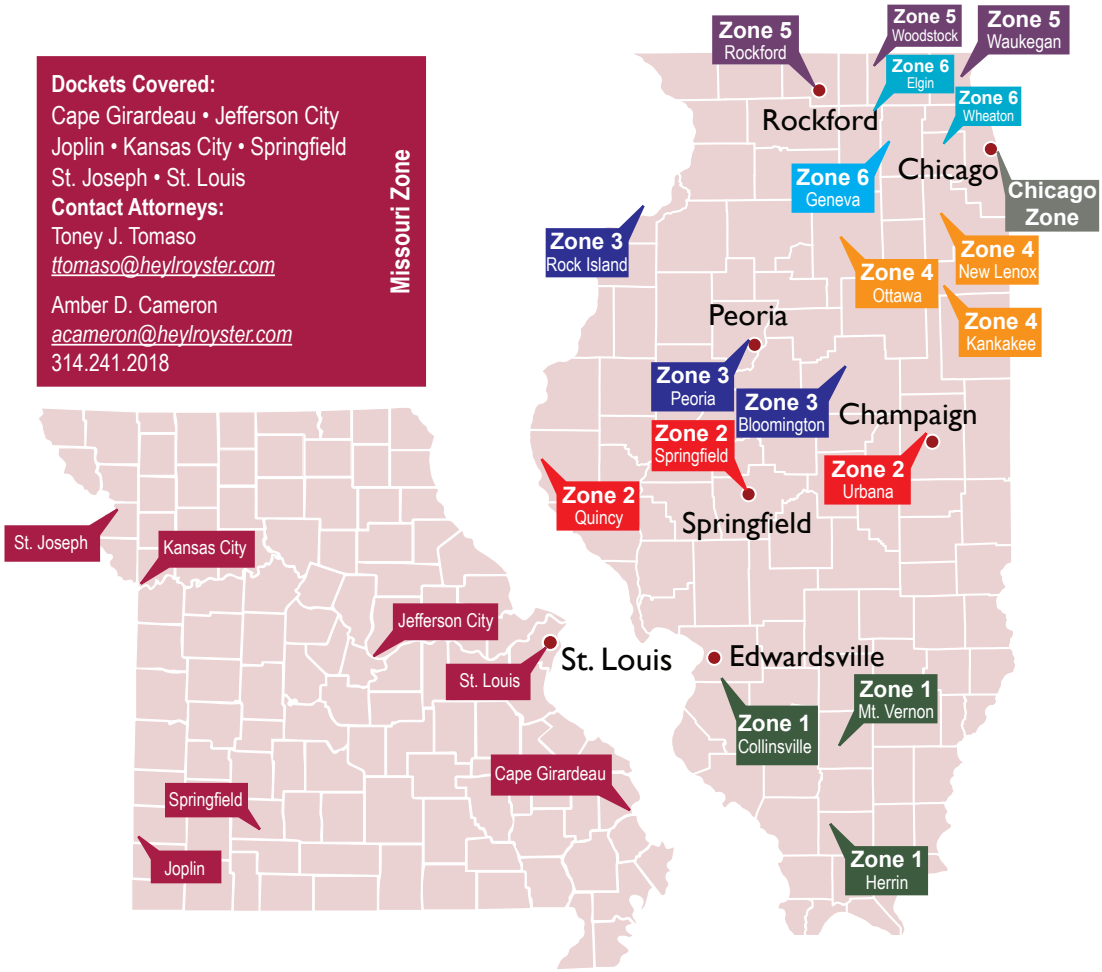

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