

WORKERS' COMPENSATION PUBLICATION TEAM

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A WORD FROM THE PRACTICE CHAIR

Welcome to Fall 2021!

Everything is still green in central Illinois, but I am very much looking forward to watching Mother Nature change her colors and impress us all. Oh, and getting dressed up for Halloween! Whether you are back at the office or still at your home office, I hope you are well and staying safe. There is so much to share...so let's get started.

On the home front, I experienced my first Parent's weekend visiting my daughter at college. It seems like it was just a few months ago my parents were coming to visit me. The one big difference: all the bills come to me instead of my father. It is fun to be on this side of things. We had a great visit and because there is a big smile on my kid's face at the end of the day, it makes it easier to deal with her not being at home anymore. We are still trying to get used to that new normal at our house.

On to some very exciting Heyl Royster

news. We hired as our newest Of Counsel, former IWCC Arbitrator [Melinda Rowe-Sullivan](#). Melinda started on Monday, September 27 and I want to personally welcome her to the Heyl Royster Workers' Compensation Team. She will be working out of our Peoria office, alongside the Peoria workers' compensation practice group manager, Jessica Bell. She will be working mainly in Zone 3 (Peoria, Bloomington, and Rock Island), but of course, helping where and when the need arises. This will be the first time Heyl Royster has brought aboard a former Arbitrator as an attorney, and we look forward to her insights and exceptional legal skills. We are so excited that Melinda has agreed to call Heyl Royster her new "work home."

Let's move on to some news at the Commission level: there has been some shifting of Arbitrator/Commissioner assignments by Workers' Compensation Chairman Michael Brennan. Here is the update:

- Arbitrator Roma Parikh Dalal will be assigned to Zone 4 (New Lenox, Ottawa, Kankakee)
- Arbitrator Carolyn Doherty will become a Commissioner (Public representative)
- Arbitrator Kurt Carlson will be assigned to Zone 3 (Peoria, Bloomington, Rock Island)
- Arbitrator Nina Mariano will be assigned to the Cook County Zone/docket
- Arbitrator Ana Vasquez will be assigned to the Cook County Zone/docket
- Arbitrator Antara Nath Rivera will be assigned to the Cook County Zone/docket

If any of these new Arbitrators or Commissioners will be involved with a file you are presently handling, then you can expect to hear from your Heyl Royster team members as to the impact (if any) on the claim based upon this change in assignment.

[Heidi Agustsson](#) is the author of our September newsletter. Heidi is Of Counsel with Heyl Royster and works in the Rockford office with Kevin Luther and his team. The article deals with the Occupational Diseases Act. This is not something that typically comes up each day as we usually see orthopedic injuries dealt with under the Workers' Compensation Act. But, from time to time we do get occupational exposure cases and it is always a good idea to let our clients know there are differences between the two types of claims. This article touches on what an employee must show to prove up an exposure case, what can be recovered, the rules to follow, and some exceptions to those rules. A great reminder when these cases come up.

If you or your Team need any kind of training or workers' compensation tutorials (in person or virtual) don't hesitate to contact me and we can set something up and tailor it to your needs.



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Latent Diseases Which Give Rise to Claims Brought Under the Workers' Occupational Diseases Act- What Is Required, What is Recoverable, and Exceptions to the Rule

by Heidi Agustsson

The Workers' Occupational Diseases Act provides a remedy for an employee with a slowly developing disease or latent disease which arises out of and in the course of employment, or which has become aggravated and rendered disabling as a result of exposure of the employment. 820 ILCS 310/1(d). Common diseases alleged to have arisen out of employment include black lung disease (CWP), cancer from benzene exposure, lung cancer, asbestosis, mesothelioma, silicosis, tuberculosis, and hepatitis. The focus concerning these types of claims is on the "exposure" rather than an "accident." So what constitutes an exposure? The Act defines it as when an employee for "...any length of time however short... is employed in an occupation or process in which the hazard of the disease exists..." and does not require the employee to provide proof of the amount, time or duration of the exposure. *Id.*

What Proof Is Needed?

The petitioner only has to demonstrate employment in an occupation in which the hazard exists. Layperson testimony can be used and often times, a co-worker or spouse testifies that the petitioner was covered in dust or other chemicals when he arrived home. This personal observation of the petitioner, as well as testimony concerning the labels on a chemical or materials used at the place of employment, can be sufficient to establish exposure. See **Service Adhesive Co. v. Industrial Comm'n**, 226 Ill. App. 3d 356, 589 N.E.2d 766 (1st Dist. 1992). (Claimant filed an application for adjustment of Claim under the Workers' Occupational Diseases Act after developing leukemia which was found to be causally connected to his occupational exposure to benzene.)

The petitioner must also prove a causal connection between the disability/illness and the workplace exposure. It is not enough to argue the mere possibility that the petitioner may have contracted a disease in the course of his employment. Therefore, the causal connection should be proven with a medical expert's opinion that the disease at issue could or might have been caused by the workplace exposure. **Mason & Dixon Lines, Inc. v. Industrial Comm'n**, 99 Ill. 2d 174, 457 N.E.2d 1222 (1983).

What Damages Are Recoverable?

One must keep in mind that an occupational disease is compensable if it is a causative factor in the petitioner's disability. This is true even if there are other non-occupational factors which may contribute to the condition. For example, the petitioner will recover for the full extent of his disability based on a lung condition, such as pneumoconiosis, despite the fact he also smoked cigarettes for a number of years. The Workers' Occupational Diseases Act limits a petitioner's recovery for loss of earning capacity to compensation for a wage differential pursuant to section 8(d)1 or to a percentage of a person as a whole pursuant to section 8(d)2 of the Illinois Workers' Compensation Act, which is incorporated into the Workers' Occupational Diseases Act. If the petitioner has a pre-existing condition that is only temporarily aggravated by the workplace exposure, he is still entitled to a disability award, but only for the time the aggravation is present. However, if that aggravation causes his condition to permanently worsen, then he would be entitled to a permanent and total disability award.

What Notice Must Be Given?

Because the focus is on the

exposure rather than an accident, notice of disablement from the disease is only required to be given to the respondent “as soon as practicable.” As such, there is no definite time set or prescribed form of notice to be given. Courts have held that the notice can be given orally or in writing. Even if it can be argued that the notice was untimely, the burden rests on the respondent to show it was substantially prejudiced from the delay. For example, a respondent may argue that it was prejudiced because it was unable to conduct an on-site inspection due to a delay in notice. However, even once a delay is demonstrated, the Illinois Workers’ Compensation Commission still has the discretion to allow the claim.

With that being said, petitioners who seek compensation under the Illinois Workers’ Occupational Diseases Act must file a claim within three (3) years from the date of disablement or death. However, if compensation has been paid, the disability claim must be filed within two (2) years from the date of the last payment. Death claims must be filed within three (3) years from the date of the last payment.

Exception To The Rule - Asbestos Exposure

Keep in mind that the exclusivity provided for by section 5(a) of the Illinois Workers’ Compensation Act does not apply when the latent injury is

alleged to be caused by asbestos exposure. In 2019, Illinois adopted legislation that created an exception to the workers’ compensation exclusive remedy for latent injury cases. This legislation amended the Illinois Workers’ Compensation Act and the Workers’ Occupational Diseases Act to allow employees to sue their employer in civil tort actions, subjecting the Illinois employers to unlimited liability in tort. In effect it eliminated Illinois’ 25 year statute of repose prohibiting civil actions filed 25 years or more after a worker’s alleged exposure.

This 2019 legislation was recently challenged in a lawsuit filed in Madison County, Illinois in October of 2019. The defendant employer in that case moved to dismiss plaintiff’s lawsuit arguing the case was barred by the Illinois Workers’ Compensation Act. Plaintiff worked as a carpenter for the defendant from 1969 through 1973 and had been diagnosed with mesothelioma in the fall of 2019. In arguing it’s Motion to Dismiss, the defendant claimed that the Workers’ Compensation Act and Workers’ Occupational Diseases Act were unconstitutionally amended by 820 ILCS 305/1.2 and 820 ILCS 310/1.1. Likewise, it argued the Construction Statute of Repose was unconstitutionally amended by 735 ILCS 5/13- 214(f). The trial judge denied the defendant’s motion without further reasoning in June of 2020 and denied the defendant’s motion for an immediate appeal. We continue

to monitor this case **Patton v. A.W. Chesterton, Madison Co.**, Case No. 2019 L 001460 to see if the defendant employer will take this matter to trial and further challenge the current legislation. If the current legislation continues to stand, when latent injuries in the workplace are caused by asbestos exposures, an employer cannot rely on workers’ compensation exclusivity protections and may be facing civil liability decades down the road. **HR**

[Heidi E. Agustsson](#) is a graduate of The John Marshall Law School (2000) and joined Heyl Royster’s Rockford office in 2006.



In 2019, she went in-house with an insurance company specializing in writing legal professional liability policies, where she obtained her adjuster’s license. Heidi returned to Rockford’s Heyl Royster office as an attorney of counsel in the Spring of 2020, bringing with her the expertise of working in-house.

Ms. Agustsson focuses her practice in civil defense litigation, including auto litigation, premises liability, business disputes, workers’ compensation, and the defense of asbestos claims.

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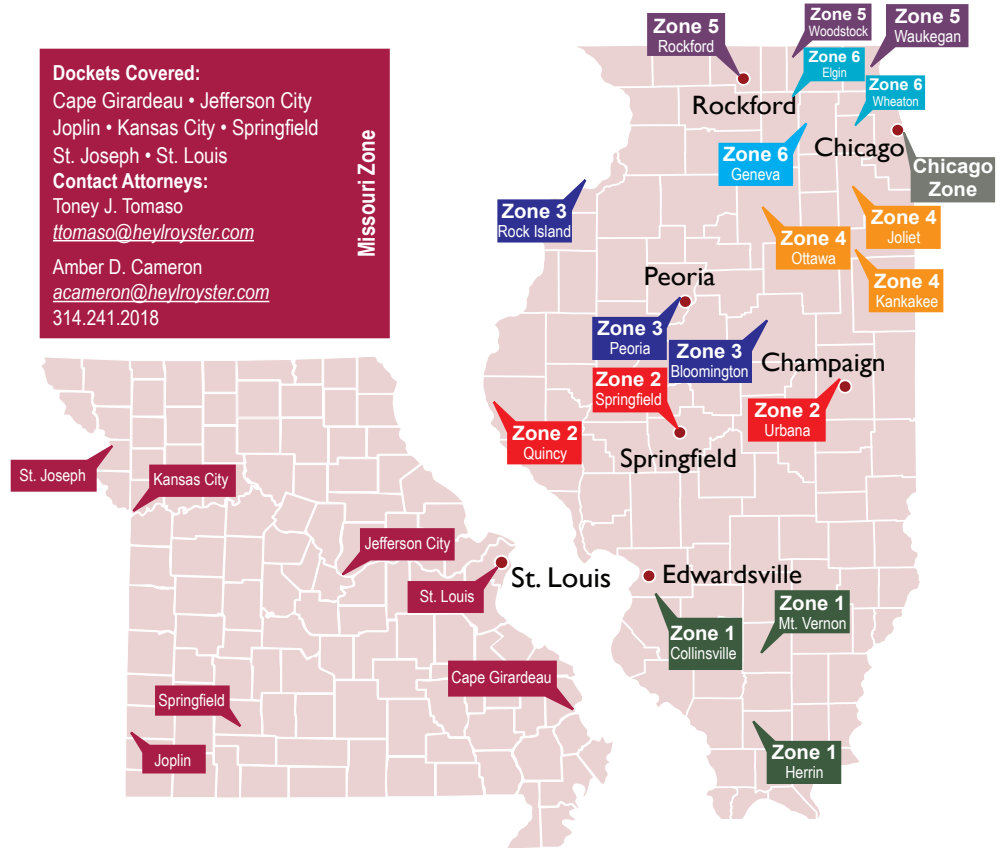
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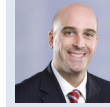
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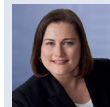
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