Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *March 2011*

A WORD FROM THE PRACTICE GROUP CHAIR

Change. We have to consider it opportunity.

The Workers' Compensation Commission has recently implemented venue consolidations and arbitrator reassignments that have given employers new opportunities to control their workers' compensation destiny at several workers' compensation venues. In this newsletter, we identify those changes. One significant venue change is the consolidation of the Belleville and Collinsville venues into a single workers' compensation venue assigned exclusively to Arbitrator Neva Neal. To take advantage of this change, we will now have Attorney Dan Simmons as our lead supervising attorney for that venue. Dan will take immediate responsibility of that venue for your Collinsville workers' compensation claims.

Another change that may be "in the winds" is workers' compensation legislative reform. As you know, Bruce Bonds of our Urbana office serves as a technical legal advisor for industry groups. He has outlined possible legislative changes that have at this time taken the form of introduced legislation.

Finally, our appellate workers' compensation specialist and editor of this newsletter, Brad Elward, discusses two appellate court decisions that we wanted you to know about.

We will continue to keep you updated. We plan on discussing all of these changes in more detail at our Bloomington Seminar, which is scheduled for Thursday, May 19, 2011.

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May Seminar

Plans are being finalized for our 26th Annual Claims Handling Seminar. The event will be held on Thursday, May 19, 2011, in Bloomington at the Doubletree Hotel, 10 Brickyard Drive, from 1:30 p.m. to 4:30 p.m., with a reception following. As has been our tradition over the years, we will have two sections, one focusing on workers' compensation and the second on property and casualty.

The agendas and invitations will be sent shortly. In the meantime, if you have any questions surrounding the seminars, please contact Calista Reed at creed@heylroyster.com.

Please join us!

This Month's Author:

Kevin Luther has spent his entire legal career with Heyl Royster. He started in 1984 in the Peoria office, and then went to Rockford when the firm opened its office there in 1985. Kevin is currently in charge of the firm's workers' compensation practice group and is a member of the firm's board of directors. He concentrates his practice in the areas of workers' compensation, employment law, and employer liability. In addition to arbitrating hundreds of workers' compensation claims and representing numerous employers before the Illinois Human Rights Commission, Kevin has also tried numerous liability cases to jury verdict.

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Recent Commission News

There have been several changes at the Commission over the past month, including a restructuring of the arbitration call locations, reassignment of certain arbitrators, new rules governing the approval of *pro se* contracts, and a shuffling of the Commission review panels.

Arbitration Calls Restructured

As we reported in our e-mail blast of February 1, 2011, Chairman Weisz recently announced several arbitrator reassignments that will affect the handling of your files. Moreover, several of the long-standing arbitration calls have been closed and consolidated with other calls. Effective April 1, 2011, the following arbitration calls have been merged:

- The Belleville call will be closed and consolidated in Collinsville
- The Carlinville call will be closed and consolidated in Springfield
- The Clinton call will be closed and consolidated in Decatur
- All Rockford cases will be heard by Arbitrator Akemann
- The Waukegan call will be moved to the second Friday of each month, with the next seven days as trial days. (except for November where the call will remain on the 1st Friday of the month due to Veteran's Day and Thanksgiving holidays)
- The Whittington call will be closed and consolidated in Herrin
- The Winchester call will be closed and consolidated in Quincy

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click on "Resources"

In addition, the following arbitrator reassignments take place on April 1, 2011.

Arbitrator	Territory
Akemann	Rockford
Andros	Kankakee, Wheaton
Erbacci	Waukegan
Falcioni	Joliet
Fratianni	Joliet, Ottawa
Giordano	Peoria
Holland	Danville, Galesburg, Rock Falls, Rock Island
Kinnaman	Geneva
Lee	DeKalb, Woodstock
Mathis	Bloomington, Mattoon
Nalefski	Herrin
Neal	Collinsville
O'Malley	Wheaton
Tobin	Decatur, Mt. Vernon, Urbana
White	Quincy, Springfield

Any partially tried case will stay with the original arbitrator.

Changes In *Pro Se* Contracts

Chairman Weisz also announced changes to the procedures for *pro se* settlement contract approvals. Effective March 1, 2011, no *pro se* settlement contracts will be approved until the case has been assigned a case number and setting. The case number and setting must be entered on the face on the contract prior to approval.

Downstate parties are required to mail copies of the proposed settlement contract to the Illinois Workers' Compensation Commission in Chicago with a self-addressed, stamped envelope. The Commission staff will enter the case number and setting, and return a copy to the sending party.

After the number has been assigned, we will then appear with the Petitioner to present the contract to the local arbitrator for approval. We anticipate that this procedural change will substantially increase the time necessary to

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achieve *pro se* settlement contract approvals in venues other than Chicago.

New Commission Panels Set

Last month we reported that Thomas Tyrell had been appointed to serve as Commissioner as one of the three employee representatives and as a replacement for Commissioner Sherman, who resigned in October.

This chart reflects the Workers' Compensation Commission hearing panels, effective April 1, 2011.

Mitch Weisz, Chairman			
Commissioners by Panel	**Panel A**	**Panel B**	**Panel C**
Employee representatives:	Thomas Tyrrell	Molly Mason	David Gore
Public representatives:	Daniel Donohoo	Yolaine Dauphin	James DeMunno
Employer representatives:	Kevin Lamborn	Nancy Lindsay	Mario Basurto

Legislative Update

As many of you are aware, the Illinois General Assembly came close to, but was ultimately unsuccessful in, enacting modifications to the Workers' Compensation Act this past January. At this time, new legislation is pending in both houses. House Bill 2883 and Senate Bill 1349 are substantially identical. They contain provisions by which "an injury" would only be compensable if the accident was the "primary factor" in causing both the resulting medical condition and the disability. "Primary factor" is defined as the "major contributory factor, in relation to other factors causing both the resulting medical condition and the disability."

The proposals delete language allowing an employee to secure his/her own physician and provides that the employer shall choose all necessary medical, surgical and hospital services reasonably required to treat an injured employee except where there has been a finding by the Commission that the employer's choice of medical care threatened the life, health or recovery of the employee.

Both bills also provide for a waiver of employee privacy for the employer to obtain necessary information directly from treating physicians. In essence, this would be a legislative abrogation of the "*Petrillo* Doctrine" as it applies to workers' compensation. In addition, the proposals would limit wage differential awards on a going forward basis to the full retirement age as defined by Social Security. It would further provide for review of such awards based on the material increase in earnings rather than physical impairment without any time limitations.

Also related to medical, the proposed legislation would require the application of AMA "Guides to the Evaluation of Permanent Impairment" in determining the level of disability under the Act. There would be a rebuttable presumption that no benefits would be paid if at the time of the accidental injury the employee is intoxicated. Intoxication is defined as 0.08 percent or more by weight of alcohol in the employee's blood or urine.

Medical providers would be required under the proposals to cooperate with utilization review, and where an employer denies payment based on a Utilization Review Accreditation Committee (URAC) compliant utilization review, there will be created rebuttable presumption that the extent and scope of medical treatment is excessive and unnecessary.

The proposal provides for a new medical fee schedule effective January 1, 2012, in providing that reimbursements will be made at 160 percent of Medicare. The 29 geo-zips would be eliminated.

Two other bills have been filed, which address specific matters. HB1342 reverses the Supreme Court's 2010 decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010), and HB 1590 allows the State Average Weekly Wage to decrease if statewide wages decrease on average during the prior 12-month period.

We will continue to monitor these bills and keep you advised of any developments and how any new legislation may affect your claims.

Recent Cases Of Interest

Two recent Appellate Court cases may be relevant to your claims handling. One decision involves the concept of increased risk, which is part of the "arising out of" analysis used in determining the compensability of an alleged work-related accident. The second decision addresses the application of the Collateral Source Doctrine to workers'

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compensation cases concerning an employer's liability for medical services.

Frequency of Encountering General Risks Now Matters

The Appellate Court considered the compensability of an employee's accident while traversing the streets of Chicago in *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, No. 1-09-2546WC, 2011 WL 693240 (1st Dist., February 22, 2011). There, the Commission found that the claimant had sustained a compensable accident when "she tripped or lost her footing" on the "dip" in a driveway and fell. The claimant was employed as an accounting clerk and part of her work duties including making deposits at a bank on Michigan Avenue. She testified that she regularly traveled to the bank two to three times per week, depending on the volume of checks received, and that at the time of her accident, she was walking to the bank to deposit checks in her employer's account.

The claimant testified that she had just crossed Erie Street in the middle of the block and that she stumbled while walking up an inclined driveway that had a "dip" of about six inches. The claimant acknowledged that she did not fall as a result of any debris or defect in the pavement, nor did she trip on the high curb.

Although the arbitrator denied the claim, the Commission, in a two-to-one decision, reversed and found the accident compensable. In support of its decision, the majority relied on the fact that the claimant was injured while performing a required task in the middle of a work day. Alternatively, it found that the claimant was exposed to an increased risk because it was "proven that she was regularly required to traverse the streets in order to make bank deposits on behalf of [her employer] and, therefore, was exposed to the risk of the dip in the driveway with greater frequency than were members of the general public." *Metropolitan Water Reclamation District of Greater Chicago*, 2011 WL 693240, at *2.

Despite the circuit court's reversal and reinstatement of the arbitrator's decision, the Appellate Court affirmed the Commission majority, focusing on what it deemed the "street risk" doctrine. Before reaching that doctrine, the Court stated that it was "undisputed that the claimant's injuries were sustained in the course of her employment" because, "[a]t the time that she fell, [she] was walking to the bank to make deposits on behalf of [her employer], which was a task required by her position." *Metropolitan Water Reclamation District of Greater Chicago*, 2011 WL 693240, at *3.

Addressing the "arising out of" the employment requirement, the Appellate Court went on to find that the claimant indeed faced an increased risk when she encountered the "dip" in the driveway. The Court classified the risk as a neutral one, which necessitated an examination of the degree of risk encountered by the claimant. According to the Court's analysis, "where the evidence establishes that the claimant's job requires that she be on the street to perform the duties of her employment, the risks of the street become a risk of the employment, and an injury sustained while performing that duty has a causal relation to her employment." *Metropolitan Water Reclamation District of Greater Chicago*, 2011 WL 693240, at *2-3. This so-called "street doctrine" created a presumption that the claimant was, therefore, exposed to a greater risk than had she not been employed in such a capacity.

Speaking of this risk, the Appellate Court observed:

> The undisputed evidence establishes that the claimant was required to traverse the public streets and sidewalks to make bank deposits on behalf of [her employer]. As such, the hazards and risks inherent in the use of the street became the risks of her employment. A six-inch "dip" in a commercial driveway is a street hazard, and, though the risk of tripping and falling on such a hazard is a risk faced by the public at large, it was a risk to which the claimant, by virtue to her employment, was exposed to [at] a greater degree than the general public. *Metropolitan Water Reclamation District of Greater Chicago*, 2011 WL 693240, at *4.

In the alternative, the Appellate Court held that the claimant had demonstrated that her fall was compensable even without the presumption because through her work duties, she was exposed to the risk presented by the "dip"

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in the driveway "with greater frequency than members of the general public."

Justice Holdridge concurred with the overall ruling, but wrote separately to state that he did not believe it necessary to resort to the so-called "street doctrine" because there was ample evidence in the record to support a finding of compensability based on the claimant's work duties and her frequency of encountering the risk.

Metropolitan Water Reclamation seems to expand an employer's liability for what are otherwise considered "risks encountered by the general public" so long as it can be established that the claimant encountered those non-compensable risks more frequently than members of the general public and that increased frequency can be attributed to the claimant's work duties. Needless to say, this ruling will bring into the compensability fold many more cases which have previously been viewed as non-compensable claims based solely on the frequency with which they are encountered.

For Pre-February 2006 Claims, The Collateral Source Rule is Not Applicable to Recover Medical benefits

In *Tower Automotive v. Illinois Workers' Compensation Comm'n*, No. 1-09-3161WC, 2011 WL 341234 (1st Dist., January 31, 2011), the Appellate Court held that the Collateral Source Rule applied in civil actions did not apply to workers' compensation claims filed before February 1, 2006. In *Tower Automotive*, the claimant's wife's group health insurance carrier paid $52,671.82 of the claimant's medical charges, the claimant paid $1,183.27, and the medical service providers wrote off the $111,298.35 balance of their charges. Commission awarded the claimant the total amounts that he was billed for medical services, not the amount that the providers were paid. The Appellate Court reversed and held that the maximum the employer was require to reimburse the claimant for medical expenses was the amount that was *actually* paid to the service providers. Thus, the employer was not required to pay the additional amounts billed, but later written off, by the medical provider.

According to the Court, by paying or reimbursing an injured employee for the amount actually paid to the medical service providers, the plain language of the statute is satisfied. The Court observed, however, that its ruling would nevertheless be limited in scope, because it affected only those claims for accidental injuries that occurred prior to February 1, 2006. After that date, the amended Section 8(a) applies, which provides that employers are obligated to provide and pay "the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, … ." 820 ILCS 305/8(a) (effective February 1, 2006).

Justice Stewart dissented, arguing that the majority's decision essentially left the medical providers footing the bill of what was otherwise an industrial accident. Stewart said, "[i]n determining that the collateral source rule does not apply to workers' compensation cases, the majority allows employers to reap the benefit of bargains to which they were not parties, and thereby shift the burden of caring for the casualties of industry to others." *Tower Automotive*, 2011 WL 341234, at *11. He also said that the ruling "provides an incentive for employers to deny claims in anticipation of receiving the benefit of a reduced charge negotiated by a third party." *Id*.

As we mentioned, this decision interprets Section 8(a) only as applicable to cases involving accidents prior to February 1, 2006. Nonetheless, we mention this case because we know full well that there are still many old claims still lingering in litigation. The medical portions of those claims should be reviewed in light of *Tower Automotive*.

Should you have any questions concerning these topics or any other workers' compensation matters, please feel free to contact any of our workers' compensation attorneys.

Heyl, Royster, Voelker & Allen
presents our

26th Annual Claims Handling Seminar

Concurrent Sessions:

Workers' Compensation

or

Casualty & Property

Thursday, May 19, 2011
1:00 p.m. – 4:30 p.m.
Doubletree Hotel
Bloomington, Illinois

An agenda will be available soon

Invitations will be mailed at a later date

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