Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *May 2010*

A Word from the Practice Group Chair

Attorney Tom Crowley of our Rockford office is this month's author. Tom works closely with me representing employers in Northern Illinois and Chicago. I believe you will find his article on repetitive trauma claims to be interesting and useful. As Tom shows, these types of claims are still winnable in this state and we hope you can share in this success from time to time.

You should have received the invitation to our annual workers' compensation seminar which is scheduled for Thursday May 20, 2010 at 1:00 p.m. It will be held again in Bloomington, Illinois. Our speakers will address strategies for handling "hot topics" and issues that are currently presenting themselves to your companies. It is our goal to identify defenses and tactics that will lead to favorable resolution of your complex claims.

Additionally, I am pleased to announce that Commissioner Nancy Lindsay had agreed to be one of our seminar speakers this year. We look forward to her comments and insights regarding Illinois workers' compensation. Should you need any more information or require any assistance to attend our seminar, please let us know.

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25th Annual Claims Handling Seminars

Thursday, May 20, 2010 – Bloomington, Illinois

Workers' Compensation Seminar
Thursday, May 20, 2010
1:00 p.m. – 4:30 p.m.

Visit www.heylroyster.com for more information

Questions? Contact Calista Reed at 309.676.0400 or creed@heylroyster.com

This Month's Author:

Tom Crowley is resident in the firm's Rockford office. He concentrates his practice in workers' compensation and tort litigation. Tom has successfully arbitrated numerous claims before the Illinois Workers' Compensation Commission. He currently serves as Vice-Chair of the Winnebago County Bar Association Workers' Compensation Section.

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A PRIMER FOR DEFENDING REPETITIVE TRAUMA CLAIMS

Repetitive trauma claims constitute a significant percentage of workers' compensation filings each year and represent an even higher percentage of the disputed claims. Due to the ambiguities of when the injury occurred, repetitive trauma claims are especially difficult to defend. "Traditional" injury claims (featuring a specific time and place) typically revolve around the reasonableness and necessity of medical treatment, return to work, and permanency issues. In contrast, repetitive trauma claims almost universally involve litigation of all elements of the case, with each point necessitating significant investigation and legal work prior to arbitration. However, this unfortunate reality also presents numerous opportunities to defend repetitive trauma claims, such as accident mechanics, accident date, notice, and causation. As one would expect, details are very important in handling repetitive trauma claims and close scrutiny must be applied to every element of the claim. This month's issue touches upon the most common aspects of the repetitive trauma claim.

The Employment Relationship

Proof of an employer and employee relationship at the time of the accident is one of the elements of a claim under the Act. *Beletz v. Industrial Comm'n*, 42 Ill. 2d 188, 246 N.E.2d 262 (1969). While this statement appears obvious, at least one Appellate Court decision has held that, in repetitive trauma cases, the date of accident can fall outside the dates of employment. In *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1st Dist. 1999), although the claimant last worked for A.C. & S. on June 10, 1993, he nevertheless alleged an accident date of June 22, 1993. In upholding the Commission's award of compensation, the Appellate Court noted that the claimant had made an appointment to see a doctor regarding his condition while still employed, and further stated that the passage of only twelve days after his last date of employment was not exposing the employer to a stale claim. The Court was not concerned that there was no employment relationship on the alleged date of accident. Instead, the Court focused on the fact that the claimant's physician diagnosed his carpal tunnel condition on June 22, holding that the date of accidental injury in a repetitive-trauma case is the date on which the injury manifests itself. *See Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 505 N.E.2d 1026 (1987). In other words, the Court concluded that the manifestation/accident date can fall after the last date of employment.

In reaching its decision, the *A.C. & S.* Court noted that the employer's protection against stale claims lies in the claimant's burden to prove causal connection. The longer the delay between employment and the alleged manifestation date, the more difficult it is to prove causation. The court also pointed out that the claimant did not have prior notice of the injury and its relationship to his employment. Despite this holding, it may nonetheless be worthwhile to consider raising this issue as a defense if a claimant is alleging an accident date after the employment relationship ended. Neither the Appellate Court nor Illinois Supreme Court have revisited that issue since the *A.C. & S.* case, and no court has addressed the lack of employment relationship as a defense when the date of injury falls outside the employment relationship. Many claimants will allege the injury date as the last date of employment, arguing this date was their exposure to the work environment that led to the repetitive trauma claim.

THE ACCIDENT AND NOTICE REQUIREMENT

Accident Dates in Repetitive Trauma Claims

An employee suffering from a repetitive trauma injury must point to a date within the limitations period which both the injury and its causal link to the employee's work became plainly apparent to a reasonable person. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 614 N.E.2d 177 (3d Dist. 1993). In *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 862 N.E.2d 918 (2007), the Supreme Court found that the manifestation date was the date the claimant was formally diagnosed by a physician, and reversed the Commission and the Appellate Court. In that case, the claimant testified during arbitration that as of September or October of 1997 she experienced pain in her hands and believed the pain was work-related. The claimant continued to work through the intermittent pain and was diagnosed with carpal tunnel syndrome through EMG testing on September 8, 2000. She filed an application for benefits on September 12, 2001, and listed the date of accident as September 8, 2000, the date she was diagnosed with carpal tunnel syndrome by a medical professional. The Commission found she failed to file her application within the three-year limitation period, fixing her date of accident as sometime in September or October 1997, and that decision was affirmed by the Appellate Court.

On review, the Supreme Court reversed, finding that the key date was not the date on which the injury and its causal

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relationship became apparent to a reasonable physician, but when it became plainly apparent to a reasonable employee. The Court stated the Commission, in evaluating an accident or manifestation date, should consider many factors, such as the employee's medical treatment, the severity of the injury, and how the injury affects the employee's performance. Although this ruling seems to broaden the holding in *Belwood* and arguably provides claimants with the ability to manipulate different dates of accident to avoid a limitations or notice defense, it is still possible, based on a given fact situation, to use these factors to the employer's advantage. In such cases, the employer's accident investigation should focus on the onset of symptoms and any treatment, and also when the worker or a supervisor noticed the condition affecting the performance of his job. Supervisory evaluations and records or reports of output or performance can be used to determine when and if a repetitive trauma injury may be affecting a worker's job performance.

Notice in Repetitive Trauma Claims

In addition to establishing an accident or manifestation date, the claimant must also provide notice of the accident within 45 days of the accident date. 820 ILCS 305/6(c). In a repetitive trauma case, the accident date and date from which notice must be given is the date the injury "manifests itself." *Peoria County Belwood Nursing Home v. Industrial Comm'n,* 115 Ill. 2d 524, 505 N.E.2d 1026 (1987). As mentioned above, the phrase "manifests itself" signifies the date on which both the fact of the injury and the causal relationship between the injury and the claimant's employment become plainly apparent to a reasonable person. *Belwood*, 115 Ill. 2d at 531.

Section 6(c)(2) of the Act states that no defect or inaccuracy of notice is a bar to proceedings unless the employer proves that he is unduly prejudiced by such defect or inaccuracy. 820 ILCS 305/6(c)(2). However, the requirement of undue prejudice is *only* pertinent where there has been some notice given in the first place. *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 873 N.E.2d 388 (4th Dist. 2007). In *White*, the claimant stopped working for the employer on or about July 17, 2000, but did not file his application for adjustment of claim until October 29, 2002. The Commission denied the claim, finding that he had failed to give his employer notice within 45 days of the accident date. The decision was affirmed by the Appellate Court, which held that the employer need not show any prejudice because it received no notice whatsoever of the petitioner's injury allegation.

Many times, the first notice the employer receives about a repetitive trauma injury allegation is either the Application for Adjustment of Claim, or a letter from the claimant's attorney. In these cases, close attention must be paid to the alleged date of accident and the sufficiency of the notice given. The purpose of the notice requirement is to enable the employer to investigate the employee's alleged industrial accident. Employers can show undue prejudice if the lack notice or insufficiency of information prevents them from investigating the alleged injury.

Causal Connection

An employee seeking benefits for a repetitive trauma injury must meet the same standard of proof as an employee who suffers a sudden and unexpected injury. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 862 N.E.2d 918 (2006). The injury must "arise out of" and occur "in the course of" employment. "In the course of" employment refers to the time, place and circumstances under which the accident occurred. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 656 N.E.2d 1084 (1995). To "arise out" of the employment, its origin must be in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 541 N.E.2d 665 (1989). In addition, an injury "arises out of" the employment if the claimant was exposed to a risk of harm beyond that to which the general public is exposed. *Brady v. Louis Ruffolo & Sons Const. Co.*, 143 Ill. 2d 542, 578 N.E.2d 921 (1991).

In most cases, a claimant obtains a medical opinion asserting that his condition is causally related to his employment. When defending these claims, it is very important to have an accurate job description of the employee's work activities that form the basis for the medical opinion. Many treating physicians will rely on what the claimant tells them his job duties are, without any independent knowledge of the actual job, including the amount of repetitions done, the force needed, or grip strength used to perform the employee's job. When the physician gives the basis for his causation opinion, any discrepancy in the work

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activities described by the petitioner and the actual job description can be used to diminish the credibility of the physician issuing the causation opinion.

It is often helpful to have not only a detailed written job description, but also a video or DVD made of the claimant's job as well. These are very powerful tools to use in discrediting a treating physician's opinions, and are very useful as well when provided to an IME physician for review. The IME physician should be asked to comment not only on the job description and recordings, but also on the discrepancies between the job description and the claimant's own description of his job duties. When preparing these videos, be sure to reproduce the claimant's work environment and tasks as accurately as possible. For example, if there are multiple facilities, be sure to record the job being performed where the individual claimant worked. The goal is not only to depict the work performed, but to remove any potential discrepancy that might provide ammunition to the claimant's counsel to distinguish the tasks being performed from those of the claimant. Another option is to use a job site analysis by someone who specializes in that work and can break down the job duties, number of movements, and the time involved in each movement.

Practice Pointer

> The claimant's supervisor or an employer's representative with the knowledge of the job activities may be needed to testify at arbitration to refute the claimant's testimony regarding his job duties. Such testimony by a supervisor will be needed also to lay the foundation for the admission of a video or written job description. By the same token, if the defense is relying upon the testimony of an IME physician, a sufficient foundation must be laid with respect to the nature and extent of the petitioner's job duties.

Compensation has been denied by the Commission even though the treating physician offers a causal connection opinion, but lacks accurate information of the claimant's actual job duties. In *Hollen v. Lake County Health Depart.*, 05 Ill. W.C. 37523, 08 I.W.C.C. 1414, 2008 WL 5538454 (Dec. 10, 2008), the Commission unanimously affirmed the arbitrator's decision denying benefits when one of the treating physicians offered a causal connection opinion, but had no indication that he had viewed a job description or had any understanding of the claimant's actual work duties. The employer's IME physician not only had a written job description, but that job description differed from the claimant's report as well as the testimony of the employer and the claimant herself at arbitration. Likewise, in *Holyfield v. Hart, Schaffner & Marx*, 06 Ill. 2d. W.C. 46841, 09 I.W.C.C. 0122, 2009 WL 686395 (Feb. 5, 2009), the Commission unanimously affirmed the arbitrator's denial of benefits under similar facts. The arbitrator noted the treating physician's opinion was "conjecture and is not based on a sound understanding of the physical demands of the petitioner's former job duties." *Holyfield*, at * 4. These Commission cases show that repetitive trauma cases can be successfully defended when the treating physician offers a causation opinion but lacks knowledge of the petitioner's job duties.

CONCLUSION

There are many facets to consider when defending a repetitive trauma claim. These include, but are not limited to, thorough investigation of the alleged accident date, mechanism of accident, and the notice given to the employer. In many cases, simply raising the issue of accident and notice as a defense can lead to compromised settlements and a faster resolution to protracted litigation. In all repetitive trauma cases, the amount and type of repetitive motions should be carefully documented and provided to any IME physician and the defense attorney for use in a treating physician's deposition. For example, in carpal tunnel claims it is critical to document the claimant's work duties and specific requirements concerning force, and grip strength needed to perform the job.

Heyl Royster attorneys understand the likelihood of success on these issues before specific arbitrators across the State and can offer advice on the handling of repetitive trauma claims. Should you have any questions concerning a repetitive trauma claim, please contact any of our workers' compensation attorneys.

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