

BELOW THE RED LINE

HEYL...
ROYSTER

WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

A Newsletter for Employers and Claims Professionals

August 2019

A WORD FROM THE PRACTICE CHAIR

The last thrills of Summer are upon us. Labor Day is just around the corner and I do hope you and your family are able to squeeze every last drop of fun out of Summer 2019! I hope the transition back to school has been a smooth one for you and the kids. Mine are groaning over homework and why they need to sit in a classroom when it is so nice outside. Remember when life was just a bit more simple? Anyway, I digress. I have been asked, more times than I can count, "What is going on at the Commission? When are announcements coming as to the appointment/re-appointments?" Every inside piece of information I have gotten on this subject is vague or inaccurate. It is not that my sources are unreliable, but rather I am of the opinion no one really knows the answers to these very important questions. Like you, we are waiting patiently for Chairman Brennan to announce those changes or updates. The Advisory Panel has met and I do believe submitted their recommendations to the Chairman as to who they support for appointment/re-appointment. And, let's not forget, just around the corner we will have the mandatory shake-up of Arbitrators when they are reassigned to different venues or zones. Heyl Royster promises to provide updates as that information is disseminated from the Commission.

My partner, John Langfelder, has written this month's article and it deals with Section 4(d) of the Illinois Workers' Compensation Act and addresses a scary topic for our clients: Penalties for non-compliance with the Act if an employer fails to secure workers' compensation coverage properly.

We hope to never find any of our clients in this unfortunate situation, but if you are, we cannot stress enough the importance of contacting us so that we can help protect your interests moving forward. The potential pitfalls and penalties are steep and we want to be there to help guide and assist through this process. John Langfelder is no stranger to this section of the Act as he has been helping guide clients through this minefield with the goal of getting to the other side with a minimum of damage under the existing circumstances. This article can also be seen as a cautionary tale – a reminder to make sure your company does have workers' compensation coverage based upon your company's individual needs. The need to be vigilant as to this coverage is necessary to ensure that you do not open yourself up to the potential of significant penalties and long-reaching fallout for your business.



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Editor, Lynsey Welch

RISKY BUSINESS - CONSEQUENCES OF NON-COMPLIANCE

By: John Langfelder, Springfield Office

In early December 2018, the Illinois Workers' Compensation Commission assessed a penalty of \$469,500 against a Champaign County tree trimming company for failure to provide or maintain workers' compensation coverage for a business operation that was found to be extra-hazardous under Section 3 of the Workers' Compensation Act. 820 ILCS 305/3. The company was in the business of tree trimming and cleaning gutters, and hired day laborers to perform this work. The workers were required to perform work above ground, on ladders or with ropes, were provided little to no safety equipment, and given no training. One of the workers sustained serious injuries while operating a chain saw, which came in contact with a power line.

The company's maintenance of workers' compensation insurance coverage was sporadic and was not in force at the time of the worker's accident. Due to the failure of the employer to maintain coverage and pay benefits, the Injured Workers' Benefit Fund paid damages in the amount of \$68,148 after the arbitration decision was affirmed by the Commission. Notices of non-compliance sent by the Insurance Compliance Department were ignored by the employer and the compliance action was brought to hearing, resulting in a finding that the operation was an extra-hazardous business and automatically fell under the provisions of the Act. 820 ILCS 305/3.

It was also found that the employer knowingly and willfully failed to provide coverage as required by law for a period of 939 days and was fined the maximum penalty of \$500 per day for a total fine of \$469,500. With the Commission's decision and obligation to reimburse the IWBF, the employer was assessed \$537,648 in fines and penalties. It should be noted that debts of this nature are not dischargeable in bankruptcy nor do collection efforts cease when an employer goes out of business.

The above case is not an isolated incident. In the 2018 fiscal year (ending 6-30-18), the IWCC filed 386

compliance cases and collected \$2,076,084 in fines and penalties. In the 2019 fiscal year, there were fewer cases filed (170), but the fines and penalties collected remained nearly the same at \$1,990,610. Non-compliance fines and penalties can be resolved by the employer entering into a Payment Contract with the State outlining the agreed amount to be paid and schedule of payments. The contract will include the employer's promise to maintain workers' compensation coverage as required by the Act and to pay for any benefits that may be due to any employee injured during the period of non-compliance. Failure to do so once again subjects the employer to the enforcement provisions of the Act.

After reasonable notice and hearing, penalties for non-compliance can be severe and can include criminal penalties and work-stop orders. 820 ILCS 305/4(d)). Under certain circumstances, a self-insured employer could be disqualified to operate as a self-insurer and be required to insure their entire liability for workers' compensation with an insurance carrier. Should a civil action be filed, a non-compliant employer cannot raise defenses such as assumption of risk, negligence, or that the injury was caused by co-worker. In addition, proof of injury is *prima facie* evidence of negligence on the part of the employer.

For obvious reasons, receipt of a Notice of Non-Compliance should not be ignored and steps to comply should be taken immediately to avoid unnecessary penalty assessments and minimize potential exposure.

Construction and tree trimming operations are generally the main subjects of non-compliance notices due to the nature of the work. 820 ILCS 305/3. In many cases, these non-compliance actions are triggered by the filing of a claim by an injured worker. In such a situation, the worker may not be receiving benefits due to no workers' compensation coverage being carried by the employer at the time, or due to the worker being considered an independent contractor. While a good faith dispute as to the status of a worker (employee or independent contractor) may avoid criminal penalties, it does not preclude fines for non-compliance if the worker is found to be an employee. In the event there is a finding at hearing

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that the worker is an employee, the fine can be \$500 per day for each day the employer was without insurance and not in compliance with the Act.

These time periods can be lengthy and costly if the employer is under the mistaken belief that there is no employee-employer relationship. Method of payment, not taking out taxes, requiring a worker to carry their own health insurance, and provide their own tools are factors to consider in the analysis, but control of the work will always be the key and determinative factor. While an independent contractor agreement is helpful, it must be properly drafted and accurately reflect the relationship between the employer and worker to prevail at hearing and avoid penalties for non-compliance. The penalty allowed is \$500/day with a minimum assessment of \$10,000.

(For further information on determining if the worker is an independent contractor, please see our December 2018 WC Newsletter article "Revisiting the Concept of Independent Contractors.")

Based on cases handled, there are various reasons an employer may be without workers' compensation insurance. Some examples are: (1) a lapse in policy coverage with a failure to promptly reinstate; (2) the inability to renew coverage due to the cost or delay in payments by customers for services rendered; and (3) the belief (valid or not) that their workers are independent contractors and coverage is not required. Whatever the reason, receipt of a Notice of Non-Compliance is not something to be ignored and requires prompt action and response.

Time is always of the essence. There are specific deadlines for responses and actions set forth in the Act, which the State will adhere to if there is no response from the employer. In certain situations where the employer is not in compliance, a citation may be issued, which allows the employer to come into compliance within ten (10) days. If the employer obtains workers' compensation insurance within the 10 days allowed, the fine would be no less than \$500 but will not exceed \$2,500. Failure to comply within the ten days then subjects the employer to the \$500 fine per day.

Notices of noncompliance can take an employer by surprise and can be intimidating as the potential fines and penalties for failure to respond are in bold, conspicuous print at the top of the notice. Immediate action and responsiveness are key. Most employers start with contacting the State's investigator to acknowledge receipt of the notice. If applicable, suggested steps to be taken include: (1) reinstating or obtaining insurance coverage within 10 days of receipt of notice; (2) if a compensable claim has been made by a worker, make every effort to make sure benefits are paid or being paid; (3) contact an attorney who handles workers' compensation defense for a legal consultation.

Non-compliance letters or correspondence relating to non-compliance should not be ignored or put off as each passing day adds to potential fines, penalties and liabilities. Immediate action and responsiveness helps to minimize any financial obligation resulting from non-compliance and can avoid the more severe penalties allowed by the Act.



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John has defended clients in civil matters through trial and at mediations in Central Illinois and has defended clients and employers in workers' compensation cases at the arbitration level and in appeals before the Illinois Workers' Compensation Commission and Illinois circuit courts. Prior to becoming an attorney, John was a Liability Specialist with Country Companies Insurance (now, Country Insurance & Financial Services) for more than 20 years. In that capacity, John handled personal injury claims of all types, making daily decisions on coverage issues, liability and comparative fault, and settlement value, negotiating directly with claimants and attorneys to resolve these claims. John continues to effectively use the knowledge, experience and negotiating skills he gained in his claims and legal career in the defense of clients.

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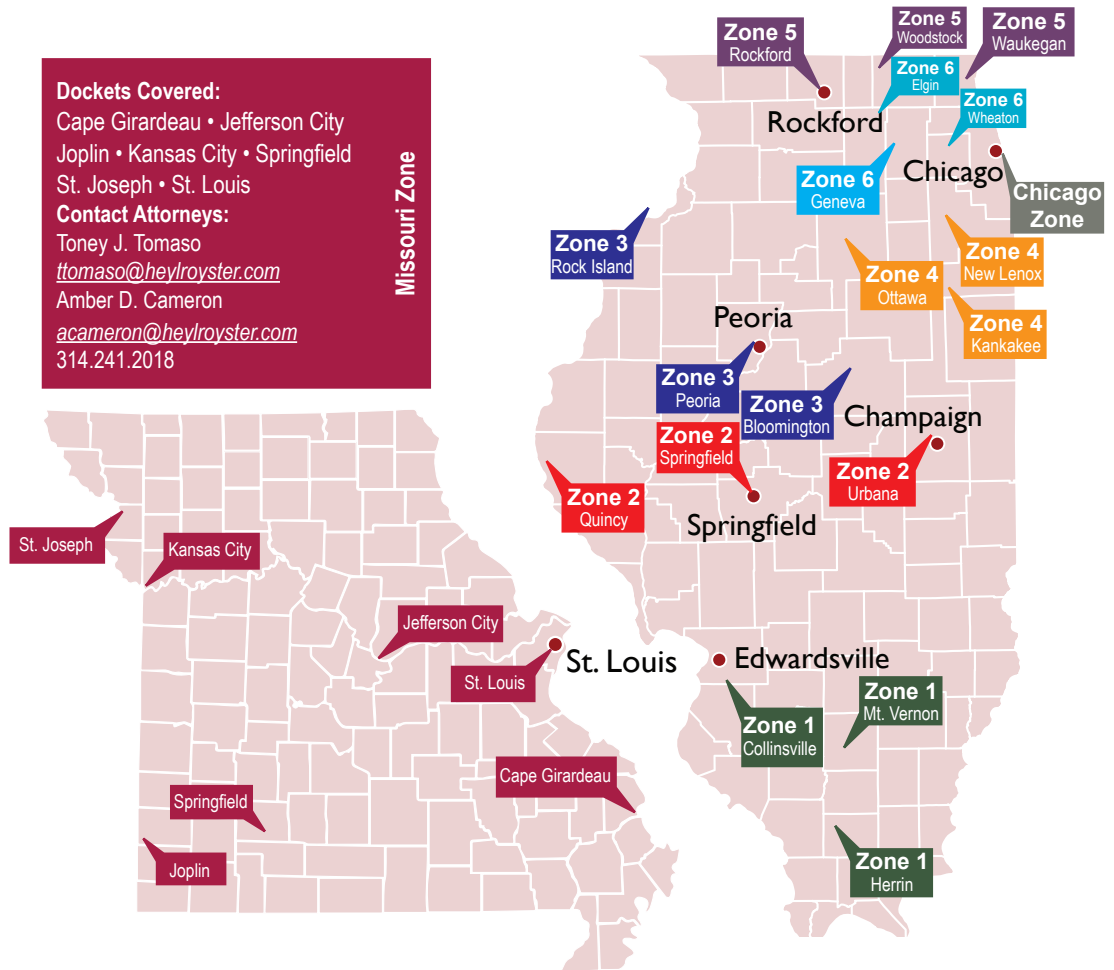
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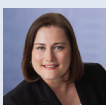
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