Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *June 2019*

A Word From The Practice Chair

Well, it finally happened! Summer has arrived, and it was missed dearly. It was a short and unusual Spring, but Summer was worth the wait. I hope you are getting outside for barbecues, baseball and soon enough fireworks. And, before I forget, I want to wish you and your family a happy and safe Independence Day. Enjoy your Summer schedule, and I hope you get away for a little while to smell the roses.

My partner Jim Manning worked on this month's newsletter and provides us with a refresher on the Dual Capacity doctrine and how it applies to the Illinois Workers' Compensation Act. This issue may not come up on a regular basis, but it's always a good idea to remind ourselves of how this applies to those fact patterns so we are prepared to deal with it appropriately. It is always important to know if your employer, who would otherwise be immune from civil liability based upon the protections provided by the Act, deals with a scenario where they may be open to civil liability because they are also a third-party tortfeasor. Sound confusing? Well, Jim does a great job of explaining it and providing examples to drive his point home. As always, if questions arise, please feel free to contact me.

If you and your Team need a visit from Heyl Royster's workers' compensation team for any updates or refreshers, just contact me, and we can get something scheduled for this Summer or into the Fall.

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Dual Capacity Doctrine

By: Jim Manning, Peoria Office

In this month's issue, we look at a somewhat uncommon topic and offer a refresher on the dual capacity doctrine and its interplay with the exclusive remedy provision of Workers' Compensation Act (WCA). There have been no new developments in this area, but it's always a good reminder for employers who on occasion find themselves in a dual capacity with an employee.

In most situations, an injured worker is prohibited from suing to recover damages from the employer other than the compensation provided in the WCA. The WCA was designed to provide financial protection to injured workers who sustained injuries arising out of and in the course of their employment. As such, the WCA imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer. However, while an employer is usually protected by this exclusive remedy provision, the dual capacity doctrine can allow the employer to become liable to the employee for injuries sustained if the employer occupies, in addition to the capacity as an employer, a second capacity that places an obligation on the employer to protect its employees from injury which is independent of its capacity as an employer. In other words, the employer is wearing another hat besides that of employer and takes on a distinct separate legal persona or identity.

In *Kolacki v. Verink,* 384 Ill. App. 3d 674 (3d Dist. 2008), plaintiff was a veterinarian who worked at a stable, owned by her employer, that provided

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boarding and medical services to horses. While getting a horse ready to be sold, which was not a typical function of the stable, the plaintiff was kicked in the head by a horse. Plaintiff filed a workers' compensation claim against her employer, Silvercrest Veterinary Services, and also a civil action against her employer in its capacity as the owner of the stable where the plaintiff was injured.

The plaintiff alleged the dual capacity doctrine should apply because of the dual nature of the capacities of the defendant employer, the first being property owners where the stable was located and the second being business owners that operated a horse training, boarding, and selling business. The defendants argued that while they do own the property and conduct activities on the property, the stable does not sell horses, but provides boarding services for horses that are to be sold.

The *Kolacki* court gave four reasons as to why the dual capacity doctrine did not apply in this case. First, they decided that there was only one business being run at Silvercrest, which was the medical and boarding services for horses. Second, the horse in question that caused the injury, though being sold at the property, was not being sold by Silvercrest or its owners. Third, the court stated that as a general rule property ownership alone does not give rise to separate capacities under the dual capacity doctrine. Finally, the duties of the defendants as property owners were so intertwined with the duties of the defendants as employers and owners of a business that the capacities could not be separated. Based upon those findings, the defendant employer was not liable under the civil negligence claim brought pursuant to the dual capacity doctrine.

Alternatively, an earlier case in Illinois saw the dual capacity doctrine applied based upon a finding that there was a separate duty imposed by the employer's actions apart from its capacity as an employer. In *Dalton v. Community General Hospital*, 275 Ill. App. 3d 73 (3d Dist. 1995), after the hospital employee filed a workers' compensation claim for carpal tunnel syndrome arising out of her work for the hospital as a respiratory care technician, the employee's doctor referred her to a surgeon who chose to perform surgery on the employee at the employer hospital. After the surgery, the employee filed a medical malpractice action against the surgeon, his clinic, and the hospital where she was employed. The court determined that the employer hospital's first capacity was that of an employer while the second was that of a medical provider for the surgery. As a medical provider, the employer hospital owed the same duty to the employee as every other patient, not specifically to this particular patient, meaning that there was a separate and distinct legal duty imposed on the hospital in its second capacity as medical provider. The court ruled that hospital's legal duty in providing medical care was unrelated to those obligations flowing from its role as plaintiff's employer, so the dual capacity doctrine applied. This allowed for the plaintiff to collect both workers' compensation benefits from the hospital and damages arising out of the medical malpractice attributed to the hospital.

More recently, the dual capacity doctrine was addressed in an interesting case involving a wrongful death claim against an employer where the deceased employee was traveling in aircraft piloted by his co-worker. In *Garland v. Morgan Stanley,* 2013 IL App (1st) 112121, the employee's widow filed a wrongful death action against her husband's employer, Morgan Stanley, arising from the crash of a private plane that resulted in the death of her husband, a financial advisor at Morgan Stanley, and her husband's co-worker who was piloting the aircraft at the time of the crash, while returning from a visit with a potential client. The employee's widow alleged, in part, that Morgan Stanley should be held

liable under the dual capacity doctrine because it acted in a dual capacity in that it provided financial services to its clients, and in a separate capacity engaged in arranging and facilitating travel and transportation for its employees, including the decedent. Based upon the facts presented, the court held that there was no dual capacity as the duties of the employer and the co-worker pilot, in traveling to meet prospective clients, and their business as financial advisors were so intertwined that the conduct in the second role could not be deemed to generate obligations unrelated to those flowing from the defendant's first role as agent or employer. The mere fact that the employer or its agent pilots an aircraft, drives a car or performs such other functions which otherwise impose a duty to exercise due care does not serve to create a second legal persona independent from and unrelated to his status as an employer.

These cases reflect both the complexity as well as the limited applications of the dual capacity doctrine in practice. Should you ever be presented with a claim involving a potential dual capacity issue, please don't hesitate to contact us.

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Jim has practiced in all areas of civil litigation, commercial litigation, workers' compensation, real estate litigation (including the defense of realtors in E&O claims), and construction litigation. Jim published materials and spoke on behalf of Lorman Education Services addressing amendments to the Illinois Workers' Compensation Act and the impact of measures by the Illinois legislature to reform workers' compensation in Illinois. He also has spoken at Heyl Royster's annual seminar to the insurance industry on workers' compensation issues. Jim was part of a panel presentation at the Annual Conference of the Illinois Association of School Boards where he spoke to school board members on how to effectively control workers' compensation and related employment costs.

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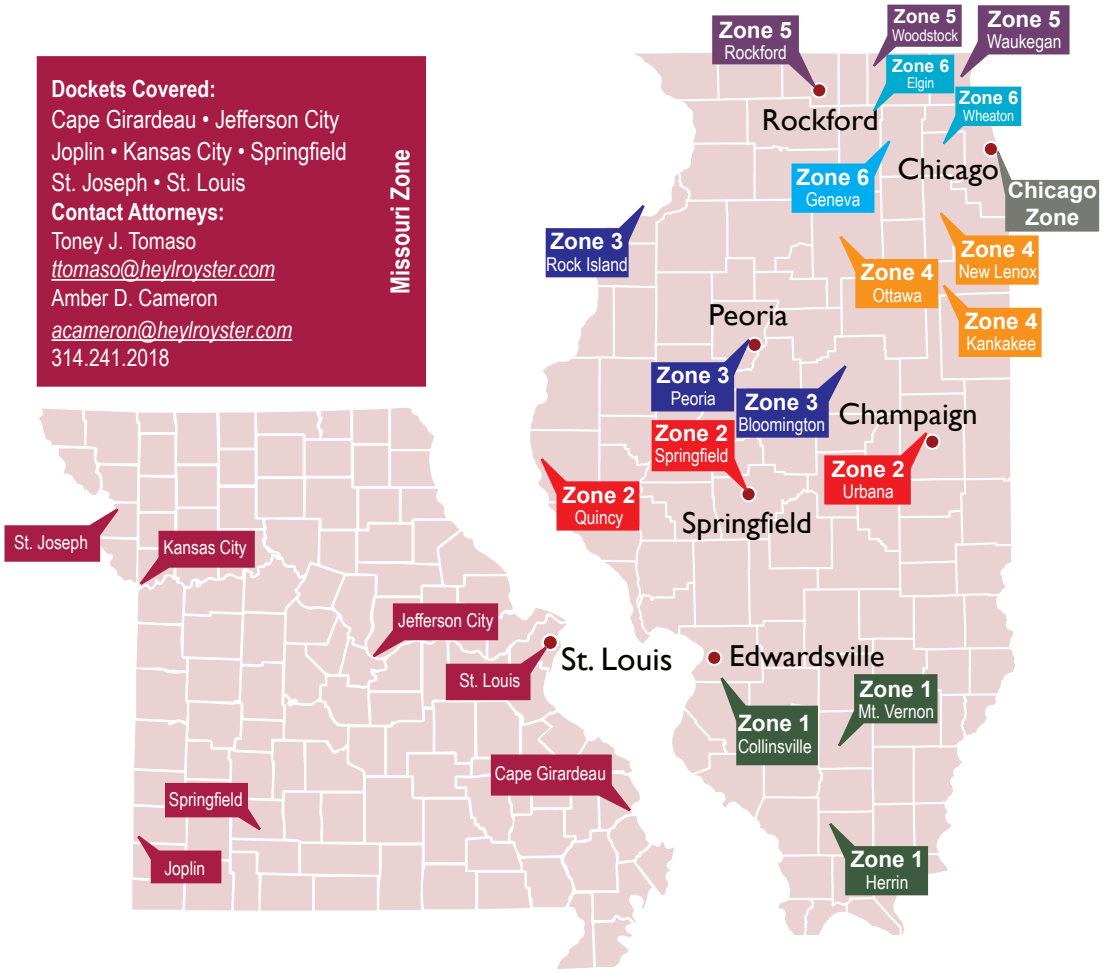

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