Below the Red Line

HEYL ROYSTER

Workers' Compensation Update
"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *June 2020*

A Word From The Practice Chair

Welcome to Summer 2020! I am sure what you have experienced thus far this year is very different than you had planned in January. We know each of you have walked difficult paths since the beginning of the pandemic, both personally and professionally. Please accept our congratulations on getting to this point. As we turn to Summer, it is our hope you will be able to get out to enjoy some rest and relaxation, as we begin to move toward a more normal life and work setting.

Not too long ago, we shared the news that our Heyl Royster Claims Handling Seminar was being moved from Spring to the Fall (2020). The plan was to present a live in-person seminar, as we have done for many years, in the Chicago area, Central Illinois, and St. Louis, in the October or November timeframe. Unfortunately, due to COVID-19, that will not be possible this year. We do, however, have you covered. As we continue to plan for returning to our live seminar setting in 2021, Heyl Royster's Workers' Compensation Practice Group will present an important Webinar this Summer. The current situation has presented many issues which we in the workers' compensation world need to manage. We plan to work to isolate those issues for you and offer sound solutions. Please watch for announcements and a save the date reminder which will be coming shortly.

This month, Joe Rust (Chicago office) has put together an article that puts the microscope on the issue of the traveling employee. He goes into the definition of traveling employee, citing case law which you can use in your daily claims handling. If you have any follow-up questions on this important subject matter, please feel free to contact any of our workers' compensation attorneys in our office throughout the Midwest.

We have always done our best to send a consistent message that we are here for you. We are thankful this has often included visiting you in your workplace. We look forward to, and plan for the day, when we can return to that practice and meet with you face-to-face. We know things have changed for you, and we want to do our very best to present our legal defense and claims handling services in a manner that fits your business model moving forward. We have some ideas on this we would also like to share, and we look forward to those conversations, hopefully in person, when appropriate.

Stay safe and healthy during these Summer months. If there are any questions I can answer or assistance I can give, please feel free to contact me at any time.

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Can a Traveling Employee Injured During Lunch be Found Compensable?

By: Joseph Rust, Chicago Office

As we know, under the Illinois Workers' Compensation Act, injuries sustained by an employee traveling to and from work are generally not compensable. One exception to this rule has been carved out by Illinois courts when dealing with traveling employees. A "traveling employee" is an employee whose work duties require him to travel away from his employer's premises. *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 17. Generally, traveling employees are deemed to be in the course of their employment from the time the employee leaves home until he or she returns. *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶ 14.

Also recall, for a Workers' Compensation claim to be considered compensable under the Act, it must have occurred "arising out of" and "in the course of" his or her employment. 820 ILCS 305/2. However as one might expect, there are further exceptions to this rule. One such exception was recently addressed by the Workers' Compensation Division of the Illinois Appellate Court when dealing with a "traveling employee" out on lunch, in an unpublished decision, *Harris-Williams v. Illinois Workers' Compensation Comm'n,* 2019 IL App (5th) 190042WC-U.

In *Harris-Williams*, the petitioner was a bus driver for the respondent's public bus driving company. On February 9, 2016, petitioner worked a morning shift from 5:30 a.m. until 11:30 a.m., and then an afternoon shift from 1:30 until 5:00 p.m. This was a typical day for petitioner. She had a lunch break of one to two hours a day, at which time she was not paid, as she received an hourly wage rather than a salary. Petitioner testified on the date of the accident, she parked her personal vehicle at the respondent's employee-only parking lot, and from there took an employer provider shuttle bus to the employer's lot to pick up her bus and begin her shift. Petitioner completed her morning shift without incident and returned to the employer's bus lot between 11:30 a.m. and 12:00 p.m., as per usual. However, prior to starting her second shift, Petitioner was involved in a motor vehicle accident when she decided to stop for lunch. The car she was driving was struck from behind by another vehicle, and petitioner suffered injuries to her left shoulder, neck, and body as a whole.

We can see the issues this case presents. As shown above, a traveling employee is generally deemed to be in the course of their employment from time she leaves home until she returns. Further, if an injury occurs to a traveling employee during that time period, one would presume under the definitions and prior holdings it would be considered to have arisen out of and in the course of employment with petitioner's employer. This is the very argument petitioner maintained. She argued that a bus driver is "the very epitome of a traveling employee," and the injury occurred during a work day. She also testified the accident occurred after she picked up lunch and was heading in the direction of the bus lot to start her second shift. The employer maintained that even for traveling employees, the travel must be for work to be considered compensable.

The arbitrator held that the petitioner failed to establish that her injuries arose out of and in the course of her employment, finding that the evidence established that she was not performing any acts at the instruction of employer, nor did she have a common law or statutory duty to perform the act of going to lunch. The arbitrator further determined that the petitioner's act of deviating from her course of employment to go to lunch was not reasonably

expected as incidental to her assigned duties, because going to a restaurant for lunch was not incidental to her job duties.

The arbitrator noted that, generally speaking, an employee's deviation for personal reasons from an expected route related to employment takes the employee out of the course of his or her employment. *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 24. The arbitrator determined that the claimant was injured in an accident during lunch, off the employer's premises, which was a purely personal deviation from the course of her employment. Therefore, the arbitrator concluded the petitioner failed to prove she sustained an accident that arose out of and in the course of her employment. The Commission affirmed and adopted the decision of the arbitrator, which the circuit court then affirmed on review. The petitioner then appealed the decision to the appellate court.

The Appellate Court ultimately agreed and found that at the time of the injury, petitioner was not a traveling employee. "The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." *The Venture-Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 16. An exception applies for traveling employees, whose injuries are compensable if the employee was injured while engaging in conduct that was reasonable and foreseeable, *i.e.*, conduct that "'might normally be anticipated or foreseen by the employer." *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶ 20. Whether a claimant is a traveling employee, and whether the employee's conduct is reasonable and foreseeable, are questions of fact. It's easy to see how under this guideline, a petitioner will argue it is not only reasonable but also foreseeable they will travel out to lunch on their lunch break. Petitioner argued whether she was in her own personal vehicle or driving her employer's bus during her shift was irrelevant, as it was reasonably expected she would get lunch during her lunch hour and it was in a similar route she made during her shifts.

This is not unlike normal deviations a traveling employee might take during the course of their shift. It is often not unreasonable to expect an employee might need to deviate from the route that would otherwise be the most direct, whether in order to run an errand, or do something else that would be considered more personal than business.

Take for instance, *Cox v. Illinois Workers' Compensation Comm'n*. In that case a traveling employee was found to be injured during the course of his employment although he was traveling for personal reasons. The traveling employee was a construction worker utilizing a company truck who was involved in an auto accident after he stopped at his local bank for personal reasons on his way home from work. *Cox* reached all the way up to the Illinois Supreme Court, which ultimately found that the claimant's deviation from the least circuitous route to his home in order to go to the bank for personal reasons was insubstantial. The court characterized the deviation as "slight." *Cox v. Illinois Workers' Comp. Comm'n*, 406 Ill. App. 3d 541 (1st Dist. 2010).

One can see the expansion of the traveling employee doctrine the court in *Harris-Williams* could have made. The court could have found the employee in *Harris-Williams* was similarly on a slight personal deviation, but otherwise was inconsequential to her traveling work day. This would have led to larger implications for defense of traveling employee claims to possibly include many claims for workers simply on their lunch break. It is not unreasonable or unforeseeable to believe an employee will travel for lunch.

These cases demonstrate how critical the initial investigation into the injury can be when dealing with traveling employees injured in Illinois. As described above, these matters can have substantially different outcomes although factually similar. Relevant inquiries should include: whether the employee was utilizing a company vehicle; whether the employee was traveling on a normal everyday route; whether the employee was traveling as authorized for the benefit of the employer; whether travel occurred during working hours; and many more. It is hopeful the recent decision in *Harris-Williams*, demonstrates that Illinois is on a path to limit the expansion of traveling employee claims.

The attorneys in the workers' compensation practice group at Heyl Royster have extensive experience investigating and defending workers' compensation claims in Illinois. If you need assistance or advice relating to any aspect of a workers' compensation claim, do not hesitate to reach out to one of our attorneys.

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Joseph focuses his practice in several areas of litigation including professional liability, commercial litigation, business/corporate law, general civil litigation, and construction law. He has extensive experience in legal research and analysis on issues including workers' compensation defense and professional malpractice, as well as experience overseeing the litigation process from pre-answer motions through trial and appeal.

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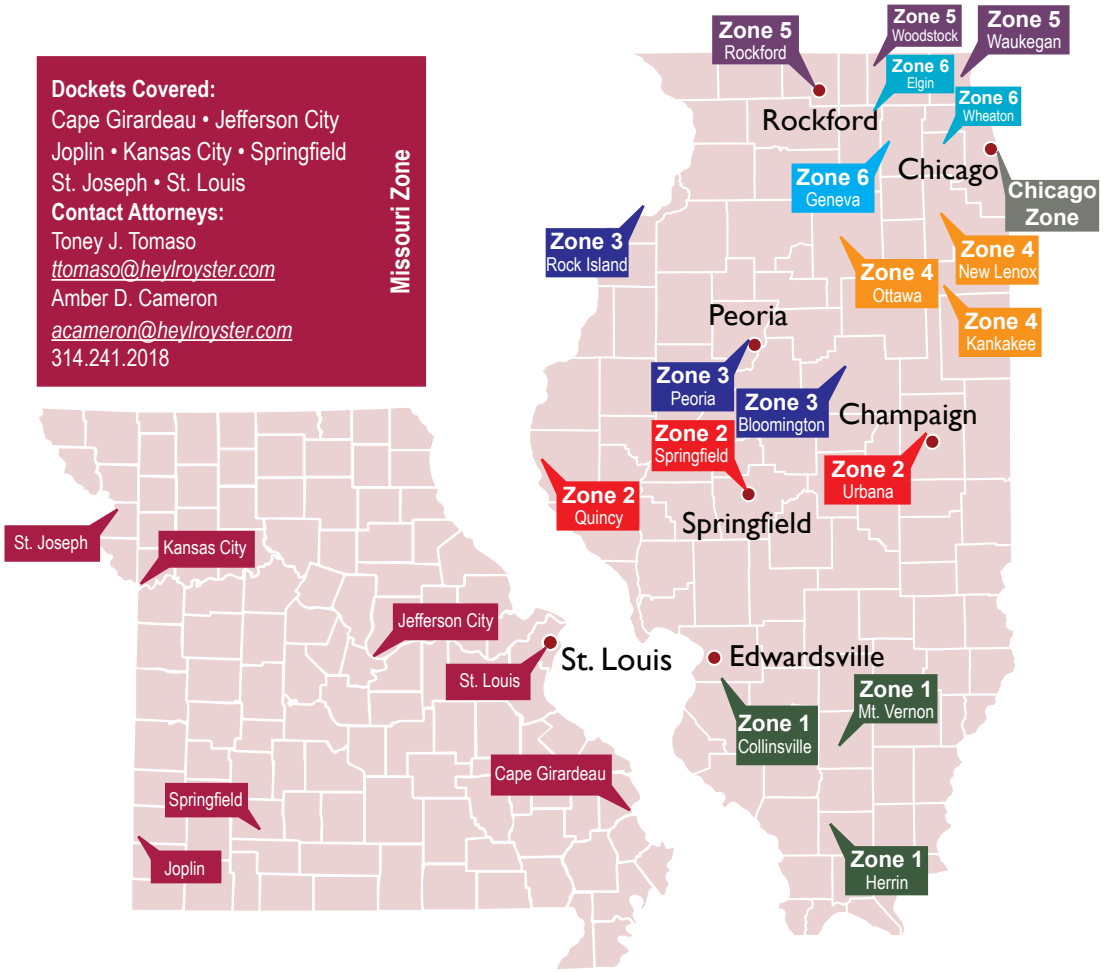

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