Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *March 2020*

A Word From The Practice Chair

As we all are facing this unprecedented time, I am reminded of a phrase which I think we have all heard before and need to remind ourselves again …. "This too shall pass." It is not going to be easy getting from where we are today to where we need to be. Here in the State of Illinois Governor Pritzker has issued a shelter order and has asked all "non-essential" employees to stay home. As I draft this introduction to our March newsletter I am sitting at my dining room table which is now my makeshift office. My wife and children are home with me and we are all experiencing this new world. Although the work of an attorney has been characterized as essential and thus I am allowed to go into the office when I need to do so, I have made the decision to protect those around me and to stay home. Fortunately, my firm has the technical capacity to allow me to work with no interruptions. I have access to all I need and I can do my job just as if I was sitting at my desk. All of our Heyl Royster attorneys have this capacity and are using it right now. So, again, just to be clear, it is business as usual here at Heyl Royster. As I have asked before, and will ask again, what can we do for you today? How can we help?

The workers' compensation team here at Heyl Royster is keeping our clients informed on the impact of COVID-19 as it relates to moving our files forward and how the various State agencies are handling the changes which seem to come fast and furiously. That is why you are seeing so many E-Blasts from our office. We want to keep you informed.

As we explained recently, Chairman Michael Brennan (IWCC) has shut down all docket calls and trial calls through the end of this month (with the chance of extending this arrangement into April 2020). There are emergency hearing sites and Arbitrators available to us, but the Chairman has requested that attorneys act reasonably to work matters out amongst ourselves in order to limit the need for emergency hearings. This does not mean we forego defenses and simply throw in the towel regarding defenses we have the right to assert under the Act. We still will defend our claims, and in doing so, we will act reasonably in the interests of our clients. That will never change, even in today's environment.

We have had a great deal of calls, e-mails, and general inquiries as to possible COVID-19 claims in a workers' compensation (occupational disease exposure) setting. We have sped up our newsletter timeframe where we normally publish our issue at the end of every month. So this month's newsletter is coming to you early. We do this to keep our clients and friends informed. Because the COVID-19, situation is so new, there is no way to educate ourselves as to the case law on point because there is none. So, we look to similar fact patterns from the past in order to help determine and plan for the best path going forward. Reggie Lys is one of our associates in the Chicago office. Reggie has put together an extremely helpful article with prior cases that address occupational exposures and the standards the courts have followed as it relates to burden of proof and necessary evidence to establish

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a claim. Just because one of your employees come down with COVID-19, does not necessarily mean that employee will have a viable claim against you, his employer, even if that employee was an essential worker and continued working during this time. The employee will always have the burden of proof to establish the exposure came about at work. We need to focus on the facts and look into whether or not the employee had other potential places and opportunities for other exposures beyond those at work. So, as these claims come in, and I suspect they will, do the digging and fact finding so we can look into other exposure points and determine if an accident and/or medical causation defense is viable.

I expect that we will all get through this and come out the other side better people for it. But, please realize you do not have to do it alone. We are here to help you get through this challenging time. If you have questions, even if they are hypothetical, please contact me or any of the Heyl Royster team members. Let our experience and levels of preparation help guide you today in your claims handling tomorrow. Until then please believe me when I tell you we are thinking about you and praying for your safety and good health. Take care of yourself and let us know how we can help you.

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DEFENDING CLAIMS IN THE AGE OF COVID-19

By: Reginald Lys, Chicago Office

The spread of COVID-19 has affected all aspects of our society, and understandably raises concerns for employers worried about workers' compensation claims related to the virus. It is important to remember that although COVID-19 is a novel virus, a COVID-19 claim, at its core, is similar to any other exposure claims involving infectious diseases. Understanding the viable defenses to any infectious disease claim under the Occupational Diseases Act (the Act) puts us in a better position to defend against potential COVID-19 claims.

What a claimant must prove to be awarded benefits:

Under the Act, an occupational disease is a disease arising out of and in the course of employment. All of the circumstances surrounding the claim must be taken into account to determine whether there is a connection between the job and the occupational disease. The disease does not have to be anticipated. However, after contraction, it must be apparent that the origin or aggravation of the illness was the consequence of a risk connected with employment. 820 ILCS 310/1(d).

The claimant has to prove that their employment was a cause of their illness; direct proof of contact with the disease is not needed to prove a causal connection. When the disease is not commonly associated with the claimant's work, the claimant must prove that their employment materially increased their risk of contracting the disease. Essentially, the claimant must prove that their job creates significantly more opportunities to be exposed to the disease than their activities outside of work.

An example of this is *Sperling v. Industrial Comm'n*, where an operation room nurse alleged that she contracted hepatitis B while working at the hospital. *Sperling v Industrial Comm'n,* 129 Ill. 2d 416 (1989). The claimant testified that she pricked herself at least once a week in the operating room, however, there was no evidence that her work involved any exposure to hepatitis B. The evidence established that hepatitis B could be contracted in a hospital. However, without any evidence of hepatitis B in the workplace, she was unable to prove that her work materially increased her chances of contracting it. As a result, the court found that she did not prove direct or increased risk of contracting the disease.

Defenses raised by employers, as well as evidence submitted at trial, are important to dispute claims. Two excellent examples of this are *Smith v. Methodist Medical Center,* 2010 Ill. Wrk. Comp. LEXIS 1245, 10 IWCC 1098, and *Omron Electronics v. Illinois Workers' Compensation Comm'n,* 2014 IL App (1st) 130766WC, ¶ 36. In *Smith,* the claimant was a unit secretary at a hospital whom claimed that she contracted MRSA by handling charts from a unit in which patients had MRSA. However, the strain of MRSA contracted was a strain of MRSA found in the community, not the strain of MRSA associated with hospitals. Importantly, at trial, it was shown that the claimant was at a large social gathering before contracting MRSA, which was key to the Respondent's defense. No benefits were awarded to the claimant as the Commission held that she did not prove that her employment was a cause of her illness.

However, in *Omron,* the claimant was able to prove a connection between her husband's employment and his ultimate death. The claimant alleged her husband died from a Neisseria meningitis infection acquired during a business trip to Brazil. Shortly after returning from a business trip in Brazil, her husband began exhibiting Neisseria meningitis symptoms and quickly died from the infection. In that case, the claimant was able to prove a connection between her husband's work and his infection by producing evidence that established that a person was 2-5 times more likely to contract Neisseria meningitis in Brazil than in the United States, that her husband displayed Neisseria meningitis within two days of returning from Brazil, and that was within the typical incubation period for Neisseria meningitis. Respondent did not counter with any evidence that suggested that the claimant's husband came into contact with the disease in the United States.

The critical difference between *Omron* and *Smith* was the employer's ability to dispute claimant's alleged increased risk of contracting the disease when compared to their activity outside of work. What the two cases above show is that it is crucial, when dealing with any potential COVID-19 claims, to develop evidence of the claimant's actions outside of work. For a claim to be successful, claimant must prove either direct proof of contact with COVID-19 or that their job significantly increased their potential of being exposed to COVID-19 as compared to their activities outside of work. The mere possibility of contracting the disease at work would not be enough to prove their claim.

Firming up a defense for a COVID-19 claim:

Current medical evidence suggests that there is a 14-day incubation period for COVID-19. The claimant's activities outside of work, during this time, are significant in setting up a successful defense. It's important for employers, claims handlers, and legal counsel to investigate other possible evidence of exposure based on the claimant's activities outside of work. This evidence would then be utilized to show that that exposure created a similar or greater risk of getting the disease. Without it, a chain of

events suggesting a causal connection between the claimant's employment and illness goes undisputed.

Specifically, was the claimant participating in large group gatherings or traveling to locations with outbreaks of COVID-19 before the incubation period? This information could be obtain through a social media search, witness statements from co-workers, and medical records. Social media posts, especially those with location tags, can also be evidence of the claimant's social activity or recent travel history. Additionally, the claimant's reported history in their medical records will be an important source of evidence. Because of the nature of transmission of COVID-19, their medical history will likely include responses regarding their recent social activity and travel history.

Another opportunity to investigate the claimant's activity during the potential incubation period is during the initial witness statement taken of the claimant. It is essential to inquire about the claimant's travel and social activity. Specifically, where were they traveling to/from, did they travel by airplane or cruise ship?

In addition to investigating the claimant's social and travel history, employers should take all the precautions possible to reduce the risk of their employees' potential exposure to COVID-19 at the workplace. Implementing and enforcing policies that reduce the risk of spreading the infection at work strengthen the persuasiveness of evidence that the claimant's risk factors for contracting COVID-19 outside of work were the likely cause of infection.

- Encourage your employees to follow good hygiene and encourage them to wash their hands frequently
- Employees who feel sick for any reason should be encouraged to stay home and self-isolate
- Employees that come into work with symptoms should be sent home
- Any employee that has tested positive for COVID-19 or believes they were exposed should not be allowed to return to work before the 14 day quarantine period is completed
- In general, physical contact should be reduced in the workplace as much as possible.

We are learning new information about COVID-19 every day; it is essential to pay attention to the daily updates provided by the federal and local governments, and update your policies accordingly. Although COVID-19 presents an unprecedented situation for us all, the cases above provide valuable examples of what steps to take in defending a claim based on alleged exposure to COVID-19.

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Prior to joining Heyl Royster in 2019, Reginald served as a judicial law clerk at the Circuit Court of Cook County in Chicago, Illinois for the Honorable E. Kenneth Wright Jr. He also served as a law clerk at the National Labor Relations Board in Chicago, Illinois. Reginald has vast experience in pre-trial preparation and is skilled in the area of labor negotiation preparation and collective bargaining agreements in Illinois.

Reginald received his J.D. from Chicago-Kent College of Law with a Labor and Employment Law certificate and a B.A. in Philosophy from the University of Massachusetts. He is licensed to practice law in Illinois.

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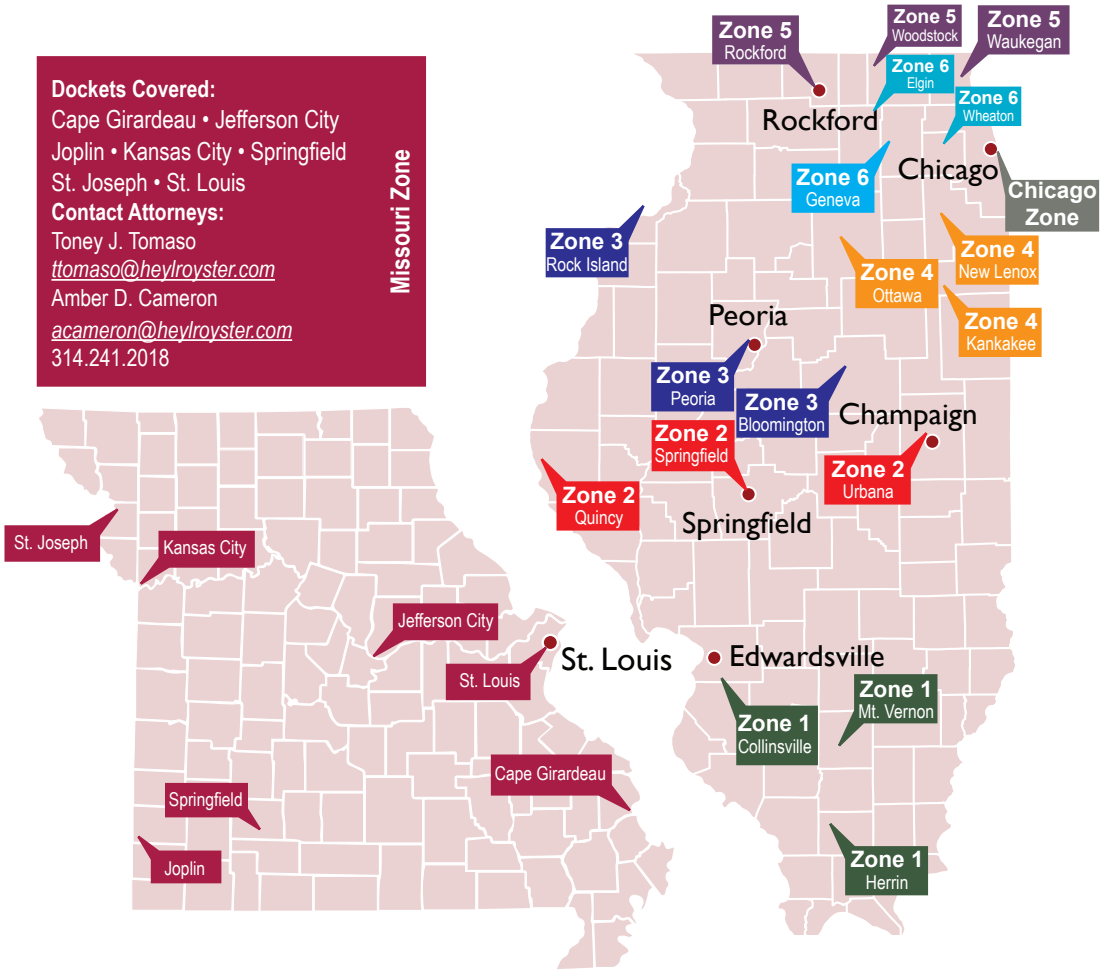

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