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WORKERS' COMPENSATION UPDATE
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A NEWSLETTER FOR EMPLOYERS & CLAIMS PROFESSIONALS

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WORKERS' COMPENSATION PUBLICATION TEAM

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A WORD FROM THE PRACTICE CHAIR

Welcome to the Holiday Season, everyone! I do hope you had a blessed Thanksgiving celebration with family and friends. This time of year is always a great time to reflect on all we are thankful for in our respective worlds. On behalf of the Heyl Royster Workers' Compensation Team, I want you to know how thankful we are for you, our friends who have trusted us to take care of your workers' compensation needs. It is our priority to build on that relationship to make sure your expectations are not only met but exceeded by our Team here at Heyl Royster.

This month's article is written by two of Heyl Royster's newest attorneys in our Chicago office. Britanny Jocius and Leah Nolan have provided an article devoted to COVID-19 claims and what has been happening in the trenches. It is important to note that this article discusses and analyzes the first two Arbitration Decisions for COVID cases. As you know, these final Arbitration decisions have no precedential value, but they do offer us important guidance. It is crucial for us to know and realize what the Arbitrators are asking for as it relates to evidence, and what they relied upon when coming to their final Decisions. We are monitoring these matters as they might be appealed to the Commission. We know based upon metrics shared with us by Chairman Brennan that in the last year approximately 20% of all workers' compensation cases filed in Illinois are COVID-19 claims. That is significant because it will undoubtedly impact us all. And, it is best to be ready and prepared to assert the proper defenses and establish the necessary evidence to defeat these claims to the best of our ability.

Take time to enjoy this Holiday Season. As we wrap up another great year please do not hesitate to contact me or any of the other Heyl Royster workers' compensation attorneys for any claims or matters you need help with within 2021 and beyond.

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FEATURE ARTICLE

REBUTTING THE PRESUMPTION: COVID-19 EXPOSURE CLAIMS

by Britanny Jocius & Leah Nolan

The Illinois Workers' Compensation Commission received 8,229 First Reports of Injury for COVID-19 claims between March 15, 2020, and December 31, 2020. The majority of these claims, which include 68.5% of the total IWCC COVID-19 claims, stem from the health care sector. After health care workers, 8.4% of COVID-19 claims filed with the IWCC stem from transportation workers followed by public administration at 6.3%, and retail trade at 6.1%. On October 21, 2021, and November 19, 2021, the Illinois Workers' Compensation Commission issued its first arbitration decisions on COVID-19 exposure claims. The recent COVID-19 decisions, *Edgar Lucero v. Focal Point, LLC,* 20 WC 018985 (Oct. 19, 2001) (Amarilio, Arb.) and *Tonia M. Dalton v. Saline Care Nursing & Rehabilitation Center,* 21 WC 008010, 13 (Nov. 2, 2021) (Cantrell, Arb.) have been highly anticipated.

I. The COVID-19 Rebuttable Presumption

On June 5, 2020, the Illinois Legislature amended the Occupational Disease Act (the "Act") to provide benefits for certain classes of workers who may have contracted COVID-19 at the workplace. *See* 820 ILCS 310(1)(g). The amendment contained in paragraph (1)(g) creates a rebuttable presumption in favor of compensability for certain "first responders and front-line workers" who contract COVID-19. The amendment enacted on June 5, 2020, applies retroactively to cases filed by workers who were diagnosed with COVID-19 between March 9, 2020, and June 30, 2021. For cases occurring on or before June 15, 2020, a worker must provide either confirmation by a licensed medical practitioner or a positive laboratory test. For cases occurring on or after June 15, 2020, a positive laboratory test is required.

Front-line workers include those employed by "essential businesses and operations. . . whose work requires them to encounter members of the general public or to work in locations with more than 15 employees." Specifically, the COVID-19 presumption provides that exposure and contraction are presumed to have arisen from the work environment and the occupational disease is presumed to be causally connected to the hazards or exposures of employment. Thus, the presumption creates a *prima facie* case that the injury arose out of and in the course of employment. If not rebutted, the worker wins and is entitled to benefits afforded under the Act. If rebutted, the employee loses the benefits of the presumption and must prove their case in the same manner as required under the Act.

To rebut the presumption, the employer need only introduce "some evidence" that the employee's occupation was not the cause of the injury or disease. *Dalton*, 21 WC 008010 at 14. An employer may rebut the presumption by satisfying any one of the following three factors: (1) by showing that the employer was "engaging in and applying to the fullest extent possible or enforcing to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices" based on guidance from the Centers for Disease Control and Prevention or the Illinois Department of Public Health or that the employer was using "a combination of administrative controls, engineering controls, or personal protective equipment to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days" prior to the injury; (2) by presenting some evidence that the claimant contracted the virus somewhere else; or (3) by showing that the claimant worked from home or was off of work in the 14 days prior to diagnosis. *Id.* at 14. Once rebutted, the employee will have to establish, by a preponderance of the evidence, the COVID-19 disease was contracted at work.

II. Analysis of the COVID-19 Claims

While we have yet to see a case come out of the Commission determining permanency for a COVID-19 exposure claim, *Lucero* and *Dalton* are instructive for future COVID-19 claims. Both *Lucero* and *Dalton* emphasized the difficulty of rebutting the presumption of a compensable claim in any meaningful way.

The arbitrator in *Lucero* ultimately found that an employer who presents evidence of policies in compliance with CDC and IDPH COVID guidelines, will likely not escape liability unless those policies are implemented and enforced to near perfection. Importantly, in making his decision, the arbitrator in *Lucero* focused heavily on the fact that there were contradictions between the employer's policies and the parties' testimonies on whether those policies were followed. If an employee can establish that he was not exposed to COVID-19 elsewhere, and that the employer failed to follow its own policies to some degree, the employer will likely be held liable.

Likewise, in *Dalton*, the arbitrator expressed the cruciality of near perfect compliance and implementation of procedures that follow CDC and IDPH guidance. The presentation of "some" evidence is necessary to rebut the claim hinged on the testimony of the only Respondent witness. Respondent was wholly unable to show any evidence that rebutted Petitioner's claims by satisfying one of the three factors outlined in the Act. Respondent completely failed to ensure proper compliance with CDC and IDPH guidance and could not show that Petitioner had worked from home or was exposed to anyone outside of work with COVID-19. However, Respondent's perfunctory application of health and safety measures was nearly impossible to combat as basic sanitation was ignored during Petitioner's shifts.

Pursuant to *Dalton* and *Lucero*, the proper avenue for bringing a COVID-19 claim is under the

Occupational Disease Act. In both cases, the employees' claimed injuries were due to COVID-19 exposure. The employers based their defense on rebutting the COVID-19 presumption and by disputing and negating the employee's claimed exposure on the employer's premises. The arbitrators decided these cases by assessing (1) whether the employee's alleged exposure "arose out of and in the course of his employment," and (2) whether the employee's condition of ill-being was "causally related" to the alleged exposure.

A. Arising out of and in the course of employment

The Act provides benefits for employees who establish that they have contracted an occupational disease while working. *Id.; see* 820 ILCS 310(1)(b)(2). An "occupational disease" is a disease arising out of and in the course of employment which has become aggravated and rendered disabling as a result of the exposure during employment. *Id. at (1)(d)*. Such aggravation must arise out of a risk "peculiar to or increased by employment and not common to the general public." *Id.* The arbitrators in *Lucero* and *Dalton* focused on the actions the employer took to curb the spread of COVID-19 in its facilities. The arbitrators also assessed whether the employer could show best efforts were made to curb the spread and whether the employee contracted the virus from an outside source.

In *Dalton*, the employee was a Certified Nursing Assistant working at a long-term care nursing home facility. As such, she met the definition of "first responder or front-line worker" as outlined by the Act. The arbitrator held that the nursing home failed to produce sufficient evidence to rebut the claim. First, the employee had not spent any time working from home. Second, she had not seen any of her friends or family because she had been working the midnight shift and slept during the day. She only visited the gas station and grocery store for short periods of time, all while wearing a mask. Additionally, she lived with her fiancé, who tested negative for the virus. Even more decisive was the fact that she had worked the same midnight shift as the co-worker who tested positive for COVID-19 three days before the employee tested positive. Additionally, 50% of the nursing home residents had tested positive for the virus.

The final proverbial nail in the coffin for the employer was that they failed to present any evidence that the nursing home "was engaged in or applied to the fullest extent possible or enforced to the best of its ability industry-specific workplace sanitation, social distancing, and health and safety practices to reduce the transmission of COVID-19 to all employees for at least 14 consecutive days prior to [November 6, 2020]." *Dalton* at 14. The employer's only witness, the nursing home Director of Operations, testified she coordinated COVID policies and procedures for all of the employer's facilities but she could not testify as to whether the policies were actually routinely applied in the nursing home where the employee worked. She admitted she mostly worked from home and that when she did visit the facility, she only met with the Administrator and managerial staff and did not recall if she visited the home at all between March and November 2020. *Id* at 8. The arbitrator also found no evidence to show that the policies and procedures were compatible with CDC and IDPH guidance.

In *Dalton*, evidence also revealed that the employer failed to provide adequate health and safety practices, proper sanitation, and that employees frequently did not have the proper PPE. The Director could not testify to the quality or use of PPE in the nursing home, because she mostly worked from home. Employees could not access PPE and other health and safety supplies because they were in a locked location and every time an employee needed PPE, the Director of Nursing had to unlock the supplies. Both the employee and the coworker from whom the employee contracted the virus testified that PPE and other supplies were stored in a bathroom in the middle of the COVID-19 hallway. The bathroom was used as a nursing station and as a bathroom for residents. While employees could put a mask on to walk down the hallway, the bathroom contained the jumpsuits they were required to wear and there was no evidence that these jumpsuits were ever washed. Further, the nursing home frequently ran out of gloves, soap, and hand sanitizer, and that oversized gloves would fall off. Employees also had to punch holes in the masks they were provided because the masks were defective. Additionally, high touch areas were not sanitized every two hours as required because the housekeeping services ended at 9pm. The only evidence the

employer offered regarding PPE was that the facility spent $60,000 on PPE from March to December 2020. The Arbitrator found Dalton's COVID-19 diagnosis was more probable than not traceable to the employer's nursing home.

Lucero is slightly distinguishable from *Dalton*. In *Lucero*, while the employer was able to show "some" evidence sufficient to rebut the COVID presumption, the employer was still found liable due to the preponderance of evidence showing the employee contracted COVID-19 in the course and scope of his employment. The employee operated a laser saw at a lighting manufacturer. Since the employee qualified as an "essential" worker pursuant to the Act, he continued to work through Governor Pritzker's Executive Order which shut down all non-essential businesses. The evidence presented at trial revealed that the employee's workstation was located less than three feet from a heavily accessed door which led to a large employee parking lot. Additionally, employee time-clocks were located directly by the employee's work station.

In addressing other potential sources of exposure, the employee presented evidence that he lived at home with only his wife while his adult children lived on the second floor of his two-flat home. The second floor had its own door so the children did not enter into the employee's first floor apartment to access their flat on the second floor. Moreover, no one living in the two-flat home contracted COVID-19 during the relevant time period. The employee testified that his wife did the grocery shopping while he limited his activities to sleeping at home, getting gas, and driving to and from work. The employee also presented evidence that a co-worker contracted COVID-19 after March 21, 2020 and before the employee's diagnosis of COVID-19.

The employer presented extensive evidence showing it had policies which complied with CDC and IDPH COVID-19 guidelines. The employer maintained two shifts during the day. The first shift ended at 2:30 p.m. and the second shift began at 2:30 p.m. However, the employer failed to present any evidence that there were modifications to the shift schedules to allow for decontamination or deep cleaning. Ultimately, the arbitrator's decision rested on the arbitrator's findings of credibility. The arbitrator noted that the employee's testimony regarding the implementation and enforcement of the employer's policies contradicted much of the employer's evidence. In the end, the arbitrator found that the employee's testimony was more credible than the employer's testimony.

The arbitrator determined that while "some" evidence existed that was sufficient to rebut the COVID presumption, the preponderance of evidence confirmed that the employee contracted COVID-19 in the course and scope of his employment.

B. Causation

To establish causation, a claimant must prove that some act or phase of her employment was a causative factor in the ensuing injury. An injury arises out of a claimant's employment where it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." The arbitrator in *Lucero* concluded that the employee's ill-being was causally related because the employee's contraction arose out of the course and scope of his employment, and no medical evidence was submitted to show that the employee's condition of ill-being resulted from any other source. *Id.* at 38. Even more importantly, neither *Lucero* nor *Dalton* required testimony from a doctor to a reasonable degree of medical certainty and instead used chain of events to prove causation.

C. Damages

In *Dalton*, the arbitrator awarded temporary total disability benefits and subrogation interests. The employee was also awarded any ongoing medical treatment until she reached MMI, including, but not limited to, a sleep study recommended by her doctor. Additionally, in *Lucero*, the arbitrator awarded the employee temporary total disability benefits. Damages in both cases were determined under 19(b), and because neither Petitioner was at MMI, there were no awards of permanency. There have yet to be any decisions rendered by the Commission determining an award of permanency for COVID-19 exposure.

D. The Importance of *Lucero* and *Dalton*

Although the two arbitration decisions are not controlling precedent, they serve as a guidepost on what an employer should do to ensure maximum protection from COVID-19 claims. The cases are both fact-specific and fact-intensive. The

primary difficulty an employer faces in rebutting the COVID-19 presumption is that the CDC and IDPH guidelines are extensive and ever changing. As the arbitrator in *Lucero* noted, "[t] here is no prececent as to what exactly qualifies as an employer engaging in safety protocols to the best of their ability, or what that might look like at any given time throughout the pandemic, as the guidance from government health officials was fluid throughout." *Lucero,* 20 WC 018985 at 29. No checklist exists with which the employer can comply in order to ensure it was engaging and applying to the fullest extent with guidance from the CDC and the IDPH.

Not only should the employer show that they had general policies and procedures within the CDC and IDPH guidelines, they should also show that those procedures were implemented and followed to the letter during the 14 days prior to any injured worker's diagnosis of COVID-19. Moreover, it appears medical testimony will not be required to establish causation. It is likely that in many COVID-19 cases, causation will be based on circumstantial evidence such as a chain of events showing the claimant's ability to perform duties before an accident and a decreased ability to perform them afterward. *Pulliam Masonry v. Industrial Comm'n,* 77 Ill. 2d 469, 397 N.E. 2d 834 (1979).

Therefore, employers must take utmost care in ensuring they have documented their efforts to comply with the CDC and IDPH guidelines. COVID-19 policies, shift logs, social distancing mechanisms, mask mandates, invoices for PPE, etc., serve as evidence in overcoming the COVID-19 rebuttable presumption. The burden then shifts to the employee to prove by a preponderance of evidence they contracted COVID-19 at work. The more evidence the employer presents regarding compliance, the heavier the burden becomes on the employee. HR

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Britanny joined Heyl Royster's Chicago office as a summer associate in 2020 and joined the firm full-time in the fall of 2021. Britanny earned her J.D. from DePaul College of Law in Chicago, Illinois, and her B.S. from Loyola University Chicago where she majored in Environmental Science.

Britanny focuses her practice defending clients in civil litigation, including Casualty/Tort Litigation, Contract Disputes, Construction, Toxic Torts & Asbestos, and Workers' Compensation.

Leah Nolan
Leah joined Heyl Royster as a summer associate between her second and third years of law school. She began her full-time career as an associate in 2021 after graduating *summa cum laude* at Northern Illinois University College of Law. Leah was on the COVID-19 Legal Response Clinic where she provided free legal advice and referrals to community members faced with the unique legal challenges of the COVID-19 pandemic.

Leah focuses her practice on defending clients in casualty/tort litigation, construction, product liability, toxic torts/asbestos, and workers' compensation.

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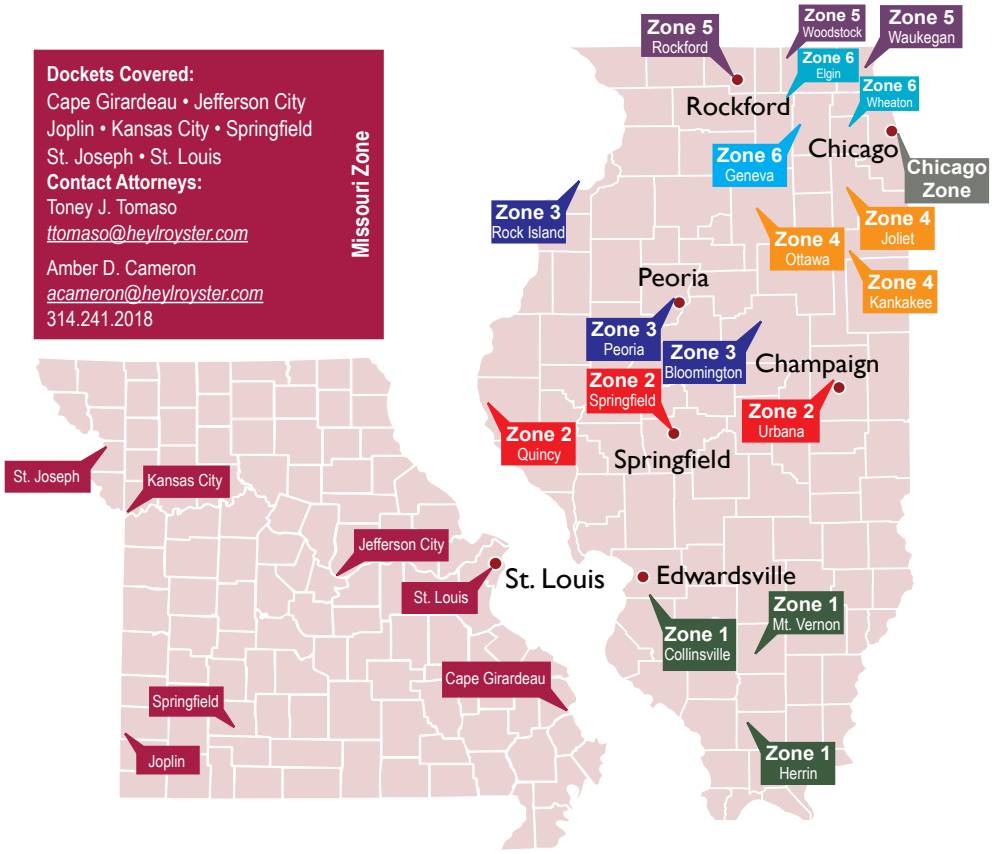

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