

IT'S ALL ABOUT THE FUNDAMENTALS: HONING YOUR INITIAL INVESTIGATION SKILLS TO ESTABLISH YOUR BEST CLAIM DEFENSES

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. INVESTIGATION WARM UP

An accident investigation is the report, analysis, and evaluation of an incident based on information gathered by a designated person. An accident investigation should be conducted for any incident **immediately** after the incident has occurred in order to obtain the most accurate information. From the employer's (and insurer's) perspective, an accident should be investigated to prevent or control a future reoccurrence of a similar incident. For the claims handler, an early investigation is critical to compensability determinations and other initial claim defenses and claim handling decisions.

Ideally, the claimant's immediate supervisor and/or other designated supervisory personnel should investigate the accident. The claims handler and/or defense counsel should follow up with supervisory personnel as soon after the accident as practical to ensure all questions have been answered, witnesses have been interviewed, and other physical evidence from the scene has been preserved.

The investigation should happen as close to the scene as safe and practicable. The greatest amount of evidence will likely exist in that location. If not safe or practicable to conduct the initial investigation there, future efforts should be made to get eyes on that scene in the course of the claim.

II. FORMING DEFENSE STRATEGY THROUGH INVESTIGATION

A. Get the "Big Picture" First

See for yourself what the scene of the incident looks like. It gives the best contextual framework for the rest of the investigation (distance, lighting, relative locations, condition of premises).

B. Interview the Most Knowledgeable Person

This can be an employee, the claimant, or even a passerby who has seen or been involved in the incident. Oftentimes, the supervisor has no firsthand knowledge of the accident even though he took the report, so don't stop at the interview with the report generator (and the claimant).

C. Record All Critical Information

Recording all information comprehensively and promptly in writing is critical to documenting claim defenses and handling decisions (and the bases of those decisions).

D. Drawings and Photos may be Helpful.

As conditions (work environments, machines, and ergonomics) can change quickly following accidents/incidents, photos/videos, diagrams, and drawings may be the only way to preserve the accident scene as it existed on the date of accident. There is no discovery in a workers' compensation claim, so do not let a perceived negative effect of this evidence preclude you from obtaining it.

E. Analyze the Incident

Document analysis in the report. It will never be more thorough and complete.

F. Evaluate the Incident

Evaluate seriousness to determine the priority for corrective actions to prevent reoccurrence.

G. Prevention

Take action to prevent reoccurrence of similar incidents. This may mean having a conversation with the insured's representatives including some suggestions for change. This can be a difficult conversation to have and may need to involve defense counsel, ergonomics specialists, risk consultants, or others. Suggestions for change may be sensitive and costly.

H. Education

Take measures to help the employer educate/notify employees of incidents to help heighten awareness and prevent reoccurring situations.

III. THE FULL COURT PRESS – DETERMINING THE WHO, WHAT, WHERE, WHEN AND HOW

A. Who was injured?

1. Employer-Employee Problems – Is the injured Worker an "Employee?"

In general, an "employee" is defined as any person under a contract of hire to another. The Arbitrator will consider many factors when determining if the claimant is an "employee" of the respondent:

- Right to control the manner in which work is done;
- method of payment;
- right to discharge;

- skill required in the work to be done; and
- furnishing of tools, materials, or equipment.

(a) *Area Transportation Co. v. Industrial Comm'n of Illinois*

In *Area Transportation Co. v. Industrial Comm'n*, 123 Ill. App. 3d 1096 (1st Dist. 1984), a driver-owner leased his vehicle to the respondent. The vehicle broke down on the highway while the driver-owner was delivering a load. He was injured in an automobile accident while seeking parts for the disabled truck. Despite the fact that the lease agreement provided that the plaintiff was an independent contractor and was to maintain his vehicle at his own expense, the court held that at the time in question he was in an employee-employer relationship with the respondent. The court held that the language of the contract was not necessarily controlling, that at the time of the injury the claimant was trying to make repairs to the vehicle in order to complete the delivery, and that this activity was to the immediate benefit of the respondent. There appears to be an inference that injuries sustained while maintaining his vehicle for the purpose of fulfilling his contracts could or might be distinguishable from injuries sustained while making repairs in order to complete a delivery.

(b) *Ware v. Industrial Comm'n*

In *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (1st Dist. 2000), the appellate court awarded benefits, finding an employment relationship existed, noting that the control over the petitioner by the respondent was persuasive in concluding that an employment relationship existed. The petitioner (Ware) was an over-the-road truck driver who owned his own tractor but was supplied tanker trailers by the respondent (Superior). The petitioner was required to have a pump on his tractor. In the process of trying to control a leak from the tanker while delivering product, he became entangled in the moving parts of the pump.

The lease agreement between the petitioner and the respondent identified the petitioner as an independent contractor. The petitioner was paid a percentage of the revenue associated with each load. The respondent was to provide insurance for the petitioner and charge back the cost. The petitioner and the respondent split the cost of cleaning the tankers. The petitioner paid the costs of operating his truck and could hire others to operate his truck, but only with Superior's permission. While the lease agreement was in force, the petitioner could not perform trucking services for any other business. Either side could terminate the lease agreement upon the proper notice. The petitioner received no benefits from the respondent, and the respondent did not withhold taxes from payments to the petitioner. The petitioner received load instructions from the respondent, including timetables and, occasionally, suggested routes. The respondent prohibited passengers.

The *Ware* court found that Superior exercised substantial control over Ware, giving numerous examples. While Superior argued that such control was a requirement of federal regulations and was not its choice, the court was not impressed with what may have motivated Superior. The court also noted the equipment needed by the petitioner to perform his work. The tanker was

too expensive for a single driver to own, so Superior provided the tanker. The court stated that control may be inferred when the employer provides some of the equipment, particularly if it is of special size or value. Finally, the court considered the right to discharge as a separate right from the right to terminate the contractual relationship. The court concluded that Superior had certain rights of discharge beyond simply terminating the contract, which was strong evidence of an employment relationship.

2. Who are the Potential Witnesses?

Identify witnesses who may support the claimant's description of events and who may refute it. Do not avoid those persons who are adverse to your defenses. Get defense counsel involved to interview adverse witnesses. Gathering ALL evidence will allow for better and earlier decisions regarding compensability and other defenses at the outset of the claim.

B. What Body Part Was Injured?

The investigator should pin the claimant down on injured body parts. This can be accomplished with an open ended question followed by more narrow ones intended to commit the claimant to a statement about the injured parts. Oftentimes, claimants will allege injuries to body parts not originally reported as injured from the work accident. The arbitrator may regard this initial report, referred to as the one made "most contemporaneous with the injury," as the most reliable report of injury. A comprehensive medical and social history should be obtained and explored to identify pre-accident medical problems and potential outside sources for the claimed injuries.

C. Where Did the Accident Occur?

1. Jurisdictional Issues

The Illinois Workers' Compensation Commission has jurisdiction over all accidents in which:

- (a) The accident occurred in Illinois.**
- (b) The accident occurred outside the State of Illinois, but the contract for hire was made within the State of Illinois**

In *Mahoney v. Industrial Comm'n*, 218 Ill. 2d 358 (2006), the claimant was hired by United Airlines in 1969 in Illinois. He requested a voluntary transfer to Orlando in 1993 and continued to work for United Airlines. The claimant was injured while working in Florida in 1999 and 2001. He filed his claim for benefits in Illinois. The court held that the situs of the contract was the controlling factor in establishing jurisdiction. Accordingly, Illinois still had jurisdiction in the claim, despite the claimant's voluntary transfer out of state.

(c) "Principally Localized"

The injured workers' employment was "principally localized" within the State of Illinois, regardless of where the accident or the contract for hire occurred. *Patton v. Industrial Comm'n*, 147 Ill. App. 3d 738 (5th Dist. 1986), introduced the "employment relationship" test to determine jurisdiction over claims. The case involved a truck driver, domiciled in Illinois, injured in Indiana, and working exclusively out of a terminal in Missouri. The court instituted a balancing test because "[o]ver-the-road truck drivers constitute a unique class of employees whose activity, by its very nature, is transient. The fact that a truck driver may spend a significant amount of time in one State does not detract from the essentially transitory nature of the activity in which he engages. Although the quantity of time an employee spends in a single locale may be a factor in the determination of principal localization of employment, it is not controlling" *Patton*, 147 Ill. App. 3d at 745.

The court determined that Missouri, and not Illinois, had jurisdiction because (a) the facility from which the claimant received his assignments and was controlled was in Missouri, (b) the claimant's source of remuneration was Missouri, and (c) the claimant worked exclusively out of the Missouri terminal and returned there upon completion of his assignments.

2. When Did the Accident Occur?

The "when" will shed light on the second element of accident: the "**in the course of**" element of accident. These are all important considerations when assessing the "in the course of" element.

- Personal comfort
- Coming and going
- Lunch
- Deviation
- Recreation

3. How did the Accident Occur?

An accidental injury must arise out of and in the course of employment to be compensable. Finding out the "how" is probably the best way to evaluate the **arising out of** component of accident. The court evaluates risk using the following terms and assesses compensability accordingly.

- Personal/idiopathic risk – generally not compensable;
- Neutral risk – qualitative and/or quantitative increased risk gives rise to compensability;
- Incidental risk – injury arises out of employment without further analysis.

IV. THE BEST DEFENSE IS A GOOD OFFENSE – EARLY PREPARATION FOR LITIGATION

- Incident/Accident Report should be completed as well as signed and dated by claimant

- Obtain claimant's signature on the medical authorization form
- Obtain Witness Statements where applicable
- Photos where applicable
- Complete the Illinois Form 45 - Employers First Report of Injury or Illness form
- Complete Supervisor's Investigation Report Form
- Provide the claims administrator with any information that you feel might be pertinent to investigation into the claim.

V. PRE-LITIGATION "GAME" INTERVIEWS - TAKING A GOOD STATEMENT

A. Review File Materials Available and Prepare an Outline, and Be Ready to Deviate From It

- Outline the basic areas to be covered and any key points
- Listen to the claimant's/witness' answer before asking the next question on the outline
- Follow up on "unintended" answers

B. Starting the Statement

- Explain the process to the individual providing the statement and what topics you plan to cover
- Confirm the date and time of the statement, that it is being recorded with their permission, that if they don't understand a question that is being asked of them, they let you know and you will rephrase it
- Confirm that they can hear you
- Ask that they allow you to finish your question before they respond with an answer so that the transcribed statement will be clear

C. Obtain Background Information

- Full name, date of birth, social security number, driver's license number, telephone number, address and whether they have any plans to move in the next 12 months
- Where they are currently employed, how long they have been employed there and generally what they do
- Whether they are married and if so, spouse's name

D. Information Re: the Accident/Incident

- Use open ended questions to begin with to obtain information about the accident, witnesses, premises and injury. Once that information is obtained, follow up with specific questions that can be used later at a deposition if good "nuggets" of information are provided. A single question and answer are all that is needed to impeach a witness later on.

E. Medical Treatment/Injuries

- Establish what the claimed injuries are and when he/she first realized the injury
- Confirm specific areas of the body that are allegedly injured
- Confirm when they treated and the names and locations of providers

F. Lost Time

- Confirm whether any wage loss claim is being made
- Details surrounding the claimed loss, such as whether he missed time from work, was paid hourly, the claimed loss amount

G. Current Status of Claimant

- Confirm whether or not they are still treating
- Do they have any pending medical appointments scheduled?
- Current description of injury/pain
- Whether they are currently taking any medications
- Is the claimant Medicare eligible – by age, health condition, SSDI status?

H. Closing Out the Statement

- Confirm the individual heard the questions and understood them
- Confirm that he understood his statement was recorded and was done with his permission
- Depending on who is providing the statement and how it went, ask if there is any additional information that he may not have been asked about that he believes is relevant and he would want to offer.

VI. WATCHING FILM – DEVELOPING DEFENSES THROUGH SOCIAL MEDIA

The prevalence of social media use indicates that searches of a claimant's online presence should be utilized. Almost two-thirds of American adults, 65 percent, use social media.¹ Further, there are no apparent differences based on gender or education. 89 percent of internet users age 18-29 use social media, and 82 percent of those aged 30-49 do so. Even in the 50-64 age group, 65 percent of internet users have social media presence. Given these percentages, there is a good chance of gathering at least some information about your claimant so check early and check often!

¹ Andrew Perrin, *Social Media Usage: 2005-2015*, Oct. 8, 2015, <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>, (last accessed May 3, 2016).

When done right, social media investigation can be a helpful tool in developing claim defenses. Care should be given to the methods used to obtain the information depending on the quality of information gathered and potential for use at trial. The evidence should always be preserved by immediately printing it, preserving the date on which the information was "posted" and also "collected." Additionally, the claim investigator may consider having an independent person (third party) quickly repeat the process if the evidence is such that it may be offered at trial and foundational testimony may be necessary. When claimants hire counsel, the availability of this type of evidence can quickly diminish or disappear altogether, depending on whether the claimant privatizes his online profile to completely eliminate public access to his profiles, posts, or tweets at the advice of counsel. Claimants' attorneys are generally becoming more savvy in this area, counseling their clients to reduce or eliminate their public online status but, it remains to be seen as to how many claimants are actually heeding that advice as we routinely find claimants involved in various social media activities.

Social media evidence has the potential to reduce overall claim exposure in a number of ways. Pre- and post-accident content can provide information to develop defenses to overall claim compensability. For example, a suspected "weekend warrior" project may have been posted, supporting an accident defense. Indemnity exposure (TTD, TPD, maintenance, permanency) may be reduced or eliminated depending on a claimant's post-accident activity status. That information may be used to guide surveillance efforts, sent to an IME physician for comment on the claimant's abilities, or used to develop cross examination or as leverage in settlement negotiations. Social media investigation should be incorporated into overall initial investigation tactics given its potential.



Dana J. Hughes

- Partner

Born and raised in Rockford, Dana joined the firm's Rockford office as an associate in 2006. There, she defended the rights of employers in workers' compensation claims before arbitrators and commissioners at the Illinois Workers' Compensation Commission and protected their interests in state courts in third party claims. She was an active member in the Winnebago County Bar Association, serving on its Board of Directors and Diversity Committee, and as past Chair of the association's Workers' Compensation Section. Dana also served as an arbitrator for the Seventeenth Judicial Circuit's Court-Annexed Arbitration System.

In April of 2015, Dana relocated to the firm's Peoria office to join its workers' compensation group, where she continues to concentrate her practice in the representation of employers throughout the central part of the state. She became a partner in 2016. Dana is a member of the Peoria County Bar Association, Illinois Association of Defense Trial Counsel and Defense Research Institute.

Dana is an annual contributor to the firm's claims handling seminar and the firm's monthly publication devoted to workers' compensation issues, *Below the Red Line*. She has contributed to in-house newsletters for clients and has presented before the ISBA's Insurance Law Section. She has been a guest speaker to local community college and high school students on topics such as leadership and the practice of law. In 2015, Dana co-authored an extensive survey of Illinois Workers' Compensation Law published in the *Southern Illinois University Law Journal*.

While in law school, Dana was a student representative to the Illinois State Bar Association. She served as a judicial law clerk in the Fifteenth Judicial Circuit. She was member of the NIU Law Review, where her writing was published in the *Northern Illinois University Law Review* and *Kane County Bar Journal*. Dana was also recipient of the Women's Bar Foundation's scholarship, which is awarded to one female law student from each of Illinois' law schools.

Publications

- "A Primer on Recent Cases Impacting Workers' Compensation Defense," *Illinois Defense Counsel Quarterly Monograph* (2016)
- "Survey of Illinois Law: Workers' Compensation—Understanding Interest and Enforcement Issues in Workers' Compensation Cases Following an Award of Benefits," *Southern Illinois Bar Journal* (2015)
- "Appellate Court Further Restricts Employer's Ability to Terminate Temporary Total Disability Where Employee Was Discharged for Cause," *Illinois Defense Counsel Quarterly* (2015)
- "Survey of Illinois Law: Workers' Compensation," *Southern Illinois University Law Journal* (2014)

Public Speaking

- "Defending Your Company Before and After a Lawsuit or Claim is Filed" Mid-West Truck & Trailer Show (2017)
- "Stress in the Workplace" Heyl Royster Employers' Day Seminar (2016)
- "Temporary Transitional Employment" Heyl Royster's 31st Annual Claims Handling Seminar (2016)
- "Illinois Workers' Compensation – Back to Basics" Mid-West Truck & Trailer Show, Peoria (2016)
- "Undocumented Workers: Benefits Without Borders" Heyl Royster's 30th Annual Claims Handling Seminar (2015)
- "Social Media: A New Litigation Tool?" Winnebago County Bar Association's Trial Section (2012)
- "Uninsured & Underinsured Motorist Coverage" ISBA Insurance Law Section (2011)

Professional Recognition

- Named to Law Bulletin Publishing Company's 2015 and 2016 list of Illinois *Emerging Lawyers*. Only two percent of Illinois lawyers under the age of 40 or who have been licensed to practice for 10 years or less earn this distinction.

Professional Associations

- Peoria County Bar Association
- Winnebago County Bar Association (Board of Directors, 2009-2012)
- Illinois State Bar Association
- Illinois Association of Defense Trial Counsel
- Defense Research Institute

Court Admissions

- State Courts of Illinois
- United States District Court, Northern District of Illinois

Education

- Juris Doctor (*cum laude*), Northern Illinois University College of Law, 2006
- Bachelor of Arts-Sociology, Northern Illinois University, 2003