Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals **March 2009**

A Word From The Practice Group Chair

Welcome to the new format for the firm's Workers' Compensation Newsletter. Beginning with this issue, we are publishing a smaller, topic-focused newsletter which will be distributed on a monthly basis. Our goal is to offer pertinent information to our clients in a timely fashion.

Each issue will focus on a specific topic relating to workers' compensation law, Commission happenings, claims handling tips, or recent appellate decisions. Our March issue focuses on appellate practice and explains how the appellate court functions in the workers' compensation setting. One of our featured sections highlights the recent luncheon recognizing the Appellate Court, Workers' Compensation Commission Division, where our firm appellate counsel, Brad Elward, served as luncheon coordinator and panel discussion moderator. Brad is the new editor of the newsletter effective this issue.

We look forward to providing you with information that you can use in your claims handling and keeping you abreast of significant changes in the Commission and workers' compensation law.

Kevin J. Luther
Chair, WC Practice Group
kluther@heylroyster.com

Our Practice Group Offers:

- EEOC, OSHA, and Department of Labor Representation
- Workers' Compensation Training for Supervisors
- In-House Seminars
- Employment and Harrassment Training and Testing
- Risk Management of Workers' Compensation Liability
- Appellate Court Representation

In This Issue

Appellate Practice

We selected this topic as a starting point for our new format for two reasons: 1) appeals are not commonplace and are often foreign to even the most experienced claims professionals and corporate counsel; and 2) appellate court decisions interpret the Workers' Compensation Act and therefore provide the foundation for understanding the issues we address in handling your claims.

The Workers' Compensation Appellate Process

Workers' compensation cases are tried before an arbitrator, who decides all contested issues and evaluates the credibility of all witnesses. The arbitrator issues a written decision based on the written arguments (proposed decisions) submitted by counsel. The case then proceeds to the Workers' Compensation Commission, where the arbitrator's rulings and findings are reviewed anew; under Illinois law, the Commission is deemed the trier-of-fact and no deference is given to the arbitrator's findings or assessments of credibility. The Commission review takes place before a panel of three Commissioners in either Springfield or Chicago, and is based on the Commission's review of the record and the parties' briefs and oral argument.

Once the Commission renders its decision, the case may be appealed to the circuit court. The circuit court acts not as a trier-of-fact, but as a reviewing court and thus does not reweigh or reevaluate the evidence. The circuit court's review is limited to whether the Commission's decision is against the manifest weight of the evidence or contrary to law. The circuit court must defer to the Commission on factual and discretionary issues; however, the court may analyze anew any questions of law.

The appeal process from the Commission to the circuit court is a complex process, which requires the filing of a surety bond as well as other documents within the short time span of twenty days. 820 ILCS 305/19(f). The appeal bond must be signed by the employer and supported by a surety. The surety guarantees payment of the award up to the amount of the bond in the event the employer does not pay the award. Most mistakes made in the appeal process occur at this stage. Section 19(f)'s procedures are strictly construed and must meticulously be followed or the court has no jurisdiction to review the case.

After the circuit court ruling, the case may proceed to a specially-created division of the Illinois Appellate Court called the Workers' Compensation Commission Division. This Court is made up of five justices, one justice from each of the five geographically-drawn appellate districts. The panel was created by the Supreme Court in 1984 to provide a more speedy resolution for workers' compensation appeals and to promote for the uniform application of the law throughout the state. The panel hears oral arguments every month except August, alternating between a Chicago and Springfield venue. The panel currently consists of the following justices:

Presiding Justice John T. McCullough,
Fourth District, Springfield
Justice Thomas E. Hoffman,
First District, Chicago
Justice Donald C. Hudson,
Second District, Elgin
Justice William E. Holdridge,
Third District, Ottawa
Justice James K. Donovan,
Fifth District, Mt. Vernon

Following an appellate court decision, an appeal to the Illinois Supreme Court is possible, but not likely. Per Supreme Court Rule 315(a), a party seeking to file a petition for leave to appeal to the Supreme Court must first obtain the written finding of at least two justices of the appellate court that the case involves a significant issue warranting Supreme Court consideration. Absent that special finding, the losing party may not file a Rule 315(a) petition, and the decision of the appellate court becomes final.

Two Significant Issues Concerning Appeals

The two most significant appellate-related issues employer's face concern: 1) the decision of whether to appeal, and 2) the proper execution of the appeal surety bond.

The first issue, whether to appeal, revolves around an analysis of the issues in the case and the applicable standard of review. Depending on the particular issue under examination, three standards of review are utilized by the appellate court. The most common standard, *manifest weight of the evidence*, applies to the Commission's fact-findings and credibility issues and affords considerable deference to the Commission; reversal occurs only where an opposite result is clearly apparent.

An *abuse of discretion* standard applies to discretionary rulings – such as leave to amend or evidentiary rulings – and asks "whether a reasonable person in the Commission's position would have reached the same conclusion." The final standard is *de novo*, which applies to legal questions. The *de novo* standard permits the appellate court to evaluate the Commission's legal conclusions anew and without any deference to the Commission's findings.

Even where the standard of review is not favorable, consideration is also given to whether the threat of an appeal might significantly advance the case toward final settlement. In some cases, the threat of an appeal, which can add another year or two onto the litigation, not to mention the threat of reversal, persuades the employee to compromise his award and settle the case at a slight discount. The threat of an appeal might also result in a compromised award, the reduction or elimination of appeal interest or penalties, or the close-out of otherwise open-ended medical benefits and elimination of the employee's section 19(h) ability to reopen the award in the event the disability increases. Both the standard of review and the potential effect on settlement and future cases must be considered.

The second significant issue faced by employers concerns the appeal bond. Illinois law requires that the employer (unless it is a municipality) file a surety bond signed by the actual employer and backed by a surety. 820 ILCS 305/19(f). Obtaining the surety bond is often a time-consuming process and can become problematic if the employer has gone out of business, has sold the business, or is insolvent. These problems are compounded by the 20-day filing period. There are no provisions extending the time to obtain a bond or excusing the employer's signature.

Surety bonds are typically procured from an independent insurance carrier, although some carriers have in-house surety departments. The bond amount is set at the amount of the outstanding award plus $100.00, with a bond ceiling set at $75,000. Thus, it is conceivable that there might be a $100 bond where there is TTD overpayment or an advance of PPD. Surety bonds procured from external bonding insurance companies, such as The Hartford or Old Republic Reinsurance, typically cost $20 per $1,000 of the bonded amount. Bonds are issued on an annual basis and must be renewed each year. At the conclusion of the appeal process and after payment of the underlying award and interest, the bond is released and any portion of the premiums remaining is refunded.

Consideration should be given to who will sign the bond, both as an employer and as a surety, as soon as the case nears Commission disposition. The bond signatory must be an individual with the authority to financially bind the employer. Although it would be easier, the person signing the bond cannot be the employer's counsel, unless the employer's written authorization is obtained within the 20-day period. Moreover, the employer's signing the appeal bond does not change the core relationship between the carrier and the employer (the carrier continues to step into the employer's shoes), nor does it obligate the employer to any additional burdens beyond those already conferred on the employer by the Act.

THE STATUS OF THE APPELLATE COURT

The Workers' Compensation Commission Division generally hears between 130-150 cases per year, although it reported an uptick in 2008 to 201 cases. Over the past few years the court has reduced the number of published decisions to less than ten percent, down from approximately fifteen percent during the 2003-2005 timeframe. The remaining cases are disposed of by orders or unpublished Rule 23 decisions. The reduction in published decisions is troubling, because the Supreme Court has been disinclined to accept workers' compensation cases on appeal. In recognition of its increasing role as the court of last resort, the appellate court anticipates publishing more decisions in 2009.

Concerning possible Supreme Court intervention, statistics show that a total of 26 cases have been certified by the appellate court since 2003. Of these 26 cases, the Supreme Court has allowed only eight appeals. What is even more significant is that since Rule 315(a) was amended in 2006 to require certification by two-justices (versus the previous requirement of one justice), only two cases have received the requisite number of certifying votes – the Supreme Court denied the petitions for leave to appeal in both cases. These statistics support the notion that the Supreme Court is becoming less interested in determining workers' compensation appeals and is deferring to the Workers' Compensation Commission Appellate Division's findings.

APPELLATE SEMINAR HIGHLIGHTS

Members of the Workers' Compensation Commission Division of the Appellate Court were featured at two events

held in February – Justice Holdridge spoke at an ISBA seminar on workers' compensation appeals and the entire panel was recognized and honored at an Appellate Lawyers' Association/ ISBA Workers' Compensation Section luncheon. Both events provided interesting insights into the court's perspective on particular issues associated with workers' compensation appeals. For example, one of the current hot issues is the level of deference that should be afforded to an arbitrator's findings of fact relating to witnesses' credibility. In ***S & H Floor Covering v. Workers' Compensation Comm'n***, 373 Ill. App. 3d 259, 870 N.E.2d 821 (4th Dist. 2007), a case handled by Heyl Royster, the court indicated that it may begin applying a level of deference to an arbitrator's credibility determinations in those cases where the Commission reverses the arbitrator's findings without providing an explanation for its actions. At the luncheon, however, the court indicated that it intends to hold true to the manifest weight standard when reviewing Commission fact-findings and to continue to give deference to the Commission's assessments of credibility. However, the court said that it would welcome legislative action putting the Workers' Compensation Act review procedures in line with those of the Illinois Administrative Code, which gives deference to an administrative law judge's (ALJ) credibility findings and requires the Commission, if it reverses the ALJ, to explain why the ALJ's findings should be disregarded.

The court also noted that, due to the increasing number of cases involving manifest weight issues, it was considering requesting waiver of oral argument in more cases. The court also commented that it appreciated the perspective and clarity that experienced appellate practitioners bring to a case on appeal.

WHAT HEYL ROYSTER OFFERS OUR CLIENTS

Our Heyl Royster workers' compensation appellate practice has thrived over the past decade. Currently, we have twelve cases pending before the Workers' Compensation Commission Division, and we anticipate that most, if not all, of these cases will be orally argued during the 2009 calendar year.

All workers' compensation appeals at the circuit court and appellate court level are handled from the firm's Peoria office. Our appellate concentration allows us to offer a wide range of services involving representation at the Commission, circuit court, appellate and Supreme Court level, as well as offering a second opinion concerning the appealability of cases handled by other firms. We have argued over 100 cases in front of the appellate court over the past decade and have significant experience in perfecting judicial reviews in order to preserve our clients' appeal rights. Our appellate workers' compensation experience is second to none in the State. We stand available and will not hesitate to handle complex appeals as well as manifest weight issues before the appellate court, whether these cases are tried by Heyl Royster or handled by another firm.

We invite you to contact us for assistance with your appellate needs at any point in the appeal process, at any geographic location in Illinois. Also, feel free to comment on our new format or suggest topics of interest.

Brad Elward practices in the Peoria office and handles all of the firm's workers compensation appeals before the circuit and appellate courts. Brad is a member of the Illinois Workers' Compensation Lawyers' Association, a Director of the Illinois Appellate Lawyers' Association, and a columnist on appellate practice for the Illinois Association of Defense Trial Counsel. He writes and speaks frequently on appellate issues as they affect workers' compensation cases.

Brad A. Elward
Editor
belward@heylroyster.com

HEYL ROYSTER'S 24TH ANNUAL CLAIMS HANDLING SEMINAR

Thursday afternoon, May 21, 2009

Doubletree Hotel Bloomington, Illinois

E-mail kluther@heylroyster.com
with any suggestions for topics

For More Information

If you have questions about this newsletter, please contact:

Kevin J. Luther
Heyl, Royster, Voelker & Allen
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
Rockford, Illinois 61105
(815) 963-4454
Fax (815) 963-0399
E-mail: kluther@heylroyster.com

Please feel free to contact any of our workers' compensation lawyers in the following offices:

Peoria, Illinois 61602
Chase Bldg., Suite 600
124 S.W. Adams Street
(309) 676-0400
Fax (309) 676-3374
Bradford B. Ingram - bingram@heylroyster.com
Craig S. Young - cyoung@heylroyster.com
James M. Voelker - jvoelker@heylroyster.com
James J. Manning - jmanning@heylroyster.com
Stacie K. Linder - slinder@heylroyster.com

Springfield, Illinois 62705
National City Center, Suite 575
1 N. Old State Capitol Plaza
P.O. Box 1687
(217) 522-8822
Fax (217) 523-3902
Gary L. Borah - gborah@heylroyster.com
Daniel R. Simmons - dsimmons@heylroyster.com
Sarah L. Pratt - spratt@heylroyster.com
John O. Langfelder - jlangfelder@heylroyster.com

Urbana, Illinois 61803
102 East Main Street, Suite 300
P.O. Box 129
(217) 344-0060
Fax (217) 344-9295
Bruce L. Bonds - bbonds@heylroyster.com
John D. Flodstrom - jflodstrom@heylroyster.com
Bradford J. Peterson - bpeterson@heylroyster.com
Toney J. Tomaso - ttomaso@heylroyster.com
Joseph K. Guyette - jguyette@heylroyster.com

Rockford, Illinois 61105
Second Floor
National City Bank Building
120 West State Street
P.O. Box 1288
(815) 963-4454
Fax (815) 963-0399
Kevin J. Luther - kluther@heylroyster.com
Brad A. Antonacci - bantonacci@heylroyster.com
Thomas P. Crowley - tcrowley@heylroyster.com
Lynsey A. Welch - lwelch@heylroyster.com
Dana J. Hughes - dhughes@heylroyster.com
Bhavika D. Amin - bamin@heylroyster.com

Edwardsville, Illinois 62025
Mark Twain Plaza III, Suite 100
105 West Vandalia Street
P.O. Box 467
(618) 656-4646
Fax (618) 656-7940
James A. Telthorst - jtelthorst@heylroyster.com

Appellate Statewide:

Brad A. Elward - belward@heylroyster.com
Peoria Office

www.heylroyster.com

The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.