Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *August 2009*

A Word from the Practice Group Chair

We hope that all of you are enjoying your summer. Our featured author this month is Attorney Jim Telthorst. Jim is one of our workers' compensation attorneys who handles various southern Illinois venues covered by our Edwardsville office. Jim is highlighting three recent court decisions, including one by the Illinois Supreme Court.

As many are aware, the current Chair of the Illinois Workers' Compensation Commission is Amy Masters. Bruce Bonds, the partner in charge of our firm's workers' compensation practice in our Urbana office, was recently appointed by Amy Masters to a committee that will be making recommendations for revisions and changes to the rules governing practice before the Workers' Compensation Commission. Many of you probably recall that Bruce was previously retained by combined employer and industry groups to assist the business community in the negotiations that culminated in the 2005 amendments to the Illinois Workers' Compensation Act. Bruce welcomes any suggestions you may have concerning proposed changes, and he can be reached at bbonds@heylroyster.com.

Bruce and our firm will keep you informed as this process unfolds.

We also want to inform you that the "17th Annual Work Injury Conference " has been scheduled for Thursday, October 29, 2009 at the *I Hotel and Conference Center* in Champaign, Illinois. The theme of this year's all-day conference is "*Work Injury in a Down Economy: Exploring Recession Ramifications on the Illinois Workers' Compensation System*." Workers' compensation attorney Toney Tomaso of our Urbana office will be a presenter at this conference. For registration information please visit www.safeworksillinois.com.

Have a great August!

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Our Practice Group Offers:

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

This Month's Author:

Jim Telthorst Jim Telthorst is a partner in the firm's Edwardsville office. He focuses his practice on the representation of employers, self-insureds, and insurance carriers in workers' compensation matters in both southern Illinois and eastern Missouri. He has arbitrated cases before both the Illinois Workers' Compensation Commission and the Missouri Division of Workers' Compensation.

A REVIEW OF RECENT APPELLATE COURT DECISIONS

Our August newsletter highlights three significant court decisions handed down this year which should be of interest to you.

Injured Worker Awarded Permanent Partial *and* Permanent Total Disability Benefits for Same Accident

In a case of first impression, the Illinois Supreme Court recently was faced with the question of whether an injured worker could receive compensation for both permanent partial disability under Section 8(e) *and* permanent total disability under Section 8(f) for injuries sustained in the same work accident. The Court answered in the affirmative in *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 909 N.E.2d 818 (2009).

In *Beelman*, the claimant was injured in an auto accident while driving his employer's truck. As a result of the accident, the petitioner suffered paralysis in both legs, paralysis of the left arm below the shoulder, and surgical amputation of right arm above the elbow. It was agreed that the accident arose out and in the course of employment, and that there was proper notice and causal connection. At the trial on permanency, the arbitrator awarded the petitioner lifetime weekly benefits under Section 8(f) of the Act for the loss of use of his legs pursuant to the statutory definition of "total and permanent disability" of Section 8(e)(18). *See* 820 ILCS 305/8(e)(18), 8(f). This Section provides that the loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof, or the permanent and complete loss of use thereof, constitutes total and permanent disability. Disability under Section 8(e)(18) is considered a legislative permanent and total disability classification rather than a disability-driven classification as with Section 8(f).

However, in addition to the award of total permanent disability benefits, the arbitrator also awarded 235 weeks of permanent, partial disability (PPD) for the loss of use of his left arm and 250 weeks of PPD for loss of use of his right arm pursuant to Section 8(e)(10) of the Act.

Beelman Trucking appealed the decision to the Workers' Compensation Commission, challenging the awards of PPD benefits under Section 8(e)(10), the award of expenses including some computer equipment, and the premium for liability insurance for a customized van. The Commission affirmed the arbitrator's decision, but modified it to add an *additional* 50 weeks of compensation for PPD again under Section 8(e)(10) for the amputation of the right arm.

The circuit court confirmed the Commission's decision and the employer appealed. The Appellate Court affirmed the Commission's decision in regard to the miscellaneous expenses, but reversed the award for PPD under Section 8(e)(10) on the grounds that the Commission had no authority to award *both* permanent partial and permanent total disability for the same work accident. Little analysis of the Section 8(e)(10)/(e)(18) interplay issue was provided in the appellate decision.

The Appellate Court certified the issue for further appeal, and the Illinois Supreme Court subsequently reinstated the Commission's decision finding that permanency was available under both statutory provisions. The Supreme Court arrived at its decision by analyzing what it felt to be the "plain language" of Sections 8(e)(18) and 8(f) in order to ascertain the intent of the legislature. First focusing on Section 8(e), the Court observed that the Section defines "total and permanent disability" as a complete loss of both hands, both arms, both feet, both legs, both eyes or the combination of any two thereof. In this instance, the Court correctly noted the claimant was entitled to lifetime weekly benefits under Section 8(f) merely from the loss of use of both legs per Section 8(e)(18).

The Court next focused on Section 8(f) and noted the legislature specifically provided for two situations where lifetime weekly benefits should be paid: (1) "complete disability", more commonly known as "permanent and total" disability, when a worker is rendered wholly incapable of work; and (2) "total and permanent disability" as defined under Section 8(e)(18). According to the Court, the General Assembly, by making this distinction between statutory benefits under Sections 8(f) and 18(e)(10), contemplated that workers whose injuries would place them under the coverage of Section 8(e)(18) may yet *still* be capable of finding future employment in spite of their injuries. In this situation, the Court theorized that the claimant still might have been employable if he only had to contend with the loss of his legs. However, the claimant's disability was more profound due to the fact that he sustained injury to both arms as well. The Court further that reasoned, since Section 8(f) provided for two situations where lifetime weekly benefits should be paid, the General Assembly was in essence stating that "permanent and total" disability where a worker is rendered wholly incapable of work *is different* from "total and permanent disability" under Section 8(e)(18).

In other words, under *Beelman* an employer's exposure could even be *greater* than lifetime weekly permanent, total disability benefits under Section 8(f) of the Act. Given this decision, we strongly recommend that reserves should be reviewed and possibly adjusted upward in any existing or future

case where the injuries are such that the injured employee could be covered by Section 8(e)(18) and also by other portions of the Act.

Hopefully *Beelman* will be applied only to those situations where the injuries sustained by a worker would place him under the coverage of Section 8(e)(18). We do not believe that *Beelman* should be applied across the board to those situations where an injured worker would be deemed permanently and totally disabled under Section 8(f) or under the so-called "odd-lot" category. Nevertheless, going forward we expect efforts by the petitioners' bar to expand the *Beelman* ruling into other areas.

Injury to Employee From Stray Bullet Deemed "Arising Out Of" and "In the Course Of" Employment

In *Restaurant Development Group v. Hee Suk Oh*, (No. 1-08-2143WC) 2009 WL 1706557 (1st Dist., June 16, 2009), the Appellate Court affirmed the Commission's award of benefits to an employee paralyzed from the waist down by a bullet that had strayed into the employer's premises. At the time of the shooting, the petitioner worked as a bartender in a restaurant located in the Bucktown area of Chicago, Illinois. The restaurant was located at a "T" intersection, such that traffic on one of the streets would dead-end facing into the front of the restaurant. The restaurant was a ground level business abutting a sidewalk and was fronted with floor-to-ceiling glass windows. The petitioner was on duty and standing near the bar inside of the restaurant on a Saturday night around midnight, when she was struck by the stray bullet that passed through the floor-to-ceiling glass window in the front of the restaurant.

According to the evidence, rival members of two gangs were involved in a car chase on the street that dead-ended in the front of the respondent's restaurant. The bullet was fired from a gun used by a gang member riding in the back car, which was fired at the people riding in the lead car involved in the chase.

Additional evidence offered at arbitration indicated that the respondent's restaurant was located in one of the higher crime districts in Chicago. This same area allegedly had much higher than average gang-related activity, a higher rate for violent crime in general, and a higher rate of gun-related crime in particular than in Cook County or in the State of Illinois as a whole. A police officer also testified that the majority of shootings in this district occurred after 8:00 p.m. and on weekends.

The arbitrator found that the petitioner's injuries arose out of her employment because she was exposed to a risk greater than the public at large. The arbitrator's award was affirmed both by the Commission and the circuit court on appeal.

The Appellate Court held that the petitioner's employment exposed her to a risk greater than the public at large. The Court noted that the Commission had found the following evidence of record to be significant: the petitioner worked in a high-crime district; she was required to work late into evening on weekends when higher incidents of these type of crimes occurred; the restaurant had floor-to-ceiling glass windows; the restaurant was located near a "T" intersection; and the criminals happened to live near the restaurant. The Court further took great pains to note that this was not a situation where the claimant's exposure was simply a matter of positional risk. Rather, it concluded that the manifest weight of the evidence supported the Commission's conclusion that the petitioner was exposed to a risk greater than the public at large.

This case demonstrates the Commission's continuing tendency to expand the coverage of the Workers' Compensation Act to as many employees as possible. Nevertheless, this case is still difficult to reconcile against the Positional Risk Doctrine, discussed and rejected in *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 578 N.E.2d 921 (1991), where the petitioner, who was injured while working at a desk on his employer's premises, was struck by a truck that crashed into the side of the building after leaving a nearby highway. The parallels between these two cases raise a question as to why a bullet straying into the employer's premises would be treated any differently than a truck that does the same thing. We will continue to watch this case and report back in the future for any possible review by the Illinois Supreme Court.

Termination of Employee Based Upon Opinion of IME Doctor Could Expose Employer to Retaliatory Discharge Claim

In *Grabs v. Safeway, Inc.*, (No. 1-08-3007) 2009 WL 1709570 (1st Dist., June 17, 2009), the Appellate Court addressed the question of whether an employer may terminate an employee under the employer's attendance policy for failing to return to work based solely upon the opinion of the employer's Section 12 independent medical examination (IME) physician. This decision stemmed from an appeal of a summary judgment ruling in two retaliatory discharge claims pending in the circuit court simultaneous with the employees' workers' compensation claims.

Both petitioners were employed by the respondent and were injured in separate work accidents. Employee Fred Grabs was injured on March 4, 2005 and filed a workers' compen-

sation claim that was initially accepted. Grabs' medical bills and TTD benefits were paid for a time. Grabs then saw his personal physician on March 16, 2006, who recommended that he continue to remain off work. Grabs was then sent by the employer to another physician for an IME on March 25, 2006. The IME physician determined that Mr. Grabs' injuries were not work-related and that he could immediately return work without restrictions. Grabs decided to follow the advice of his own physician and chose to remain off of work.

The other petitioner, Rudolph Francek, sustained injuries in two separate work-related accidents in May of 2005 and January of 2006. Francek filed four workers' compensation claims, the last two which he asserted led to his discharge by the employer. The employer denied these last two claims and requested that Francek submit to an independent medical examination. As in the other case, the IME physician determined that Francek's injury was not work-related and released him to return to work without restrictions. As with claimant Grabs, Francek was examined by his personal physician, who recommended that he remain off work. Francek chose to follow the advice of his personal physician and remained off work.

The respondent had a no-fault attendance policy in which an employee could be terminated for job abandonment if the employee did not report to work or call in his absences for three consecutive days. Based on the IME physicians' medical opinions, the respondent changed the status of both employees from a work-related injury to one that required the employees to either return to work or call in their absences. The employer advised their union of the change in status of the two employees, but failed to give personal notice of this change to either employee or their attorneys. After the employees failed to return to work or call in their absences for three successive days, the respondent terminated both employees.

After ruling on the claimants' Section 19(b) petitions, the Workers' Compensation Commission found that the petitioners in each instance were entitled to receive TTD benefits based upon the opinions of their respective treating physicians; moreover, the Commission rejected the contrary opinions of the respective IME physicians that each worker could return to full-duty work.

Concurrent with the workers' compensation proceedings, each employee had filed separate circuit court actions against the respondent (that were eventually consolidated) alleging they were discharged in retaliation for pursuing their rights under the Workers' Compensation Act. After the Commission issued its aforementioned decisions, the circuit court entered summary judgment in favor of both employees. The court found that the employer was guilty of retaliatory discharge as a matter of law because each employee was discharged as the result of the respondent changing their classification under its attendance policy in response to the IME physicians' reports. In making this determination, the circuit court applied a *per se* rule of retaliatory discharge to find that the petitioners' terminations were directly and proximately caused by the employer's denial of their right to follow their treating physicians' orders while their workers' compensation claims were pending before the Commission.

The Appellate Court, after conducting a thorough analysis of the tort of retaliatory discharge, reiterated the law that a claimant seeking to state a cause of action of retaliatory discharge must show that: (1) they were employees of the respondent before the time of the injury; (2) they exercised some right granted by the Workers' Compensation Act; and (3) their discharge was causally-related to the exercise of their rights under the Act. The Court noted that the element of causation is not met if the employer has a valid, non-pretextual basis for discharging the employee. The Court further emphasized the general rule in Illinois is that an at-will employee may be discharged by the employer at anytime for any reason. The action of retaliatory discharge is a limited exception that must be proven through its respective elements.

The *Grabs* Court specifically found that the employer had improperly relied upon the opinions of the respective IME physician in its decision to change the employment status of each employee. However, the Court further found that the employees nevertheless had the burden of establishing all elements of their causes of action in order to seek recovery under the tort of retaliatory discharge. Although the Appellate Court ultimately decided it was wrong for the employer to terminate the employees under its attendance policy based solely upon the IME opinions, it refused to rule that such action would *per se* cause the employer to be liable for retaliatory discharge and remanded the cases.

The employer in this instance failed to communicate directly to each employee that their classification status under the attendance policy was changed. Thus, neither employee was on notice that they were required to call in their absences on a daily basis. Although the Appellate Court rejected application of a *per se* rule that the employer under such circumstances committed retaliatory discharge, it is clear that an employer who terminates an employee under similar circumstances places itself at significant risk. An employer would be wise to contact knowledgeable legal counsel before taking any disciplinary action or terminating an employee who is off work as a result of injuries sustained in a work accident.

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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.