

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

July 2010

A WORD FROM THE PRACTICE GROUP CHAIR



In this issue of *Below the Red Line*, we thought it would be interesting to review the latest workers' compensation statistics recently released by the Industrial Commission.

As you will see in the article which begins on page 2, there were fewer workers' compensation claims filed in Illinois in 2009 than in previous years. We are unsure exactly why this occurred, but it is probably the result of a number of factors: plant closings (or slow-downs) and high unemployment; safer work environments; better employment practices; and, last but not least, outstanding claims handling!

In the last section of this edition, three recent decisions of the Appellate Court, Workers' Compensation Commission Division, are discussed.

Best wishes and continue to enjoy the summer!

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THIS MONTH'S AUTHOR:

Kevin Luther has spent his entire legal career with Heyl Royster. He started in 1984 in the Peoria office, and then went to Rockford when the firm opened its office there in 1985. Kevin is currently in charge of the firm's workers' compensation practice group. He concentrates his practice in the areas of workers' compensation, employment law, and employer liability. In addition to arbitrating hundreds of workers' compensation claims and representing numerous employers before the Illinois Human Rights Commission, Kevin has also tried numerous liability cases to jury verdict.

FROM THE COMMISSION ...

Commissioner DeMunno is away due to an illness. In his absence, Arbitrator Carlson covered the July 8 oral arguments in Chicago. Arbitrator Fratianni is scheduled to cover the July 28 and 29 oral arguments set in Springfield.

As we reported in our last newsletter, Commissioner Daniel Donohoo was recently appointed to the Commission. He will hear reviews in Chicago, Collinsville, and Mt. Vernon. Effective June 14, 2010, he is now serving as the public member on Panel A; Commissioner Dauphin was reassigned to Panel B. The current Commissioner panel assignments are as follows:

Mitch Weisz, Chairman			
Commissioners by panel:	Panel A	Panel B	Panel C
Employee representatives:	Molly Mason	Barbara Sherman	David Gore
Public representatives:	Daniel Donohoo	Yolaine Dauphin	James DeMunno
Employer representatives:	Nancy Lindsay	Kevin Lamborn	Mario Basurto

The Commission also announced the following changes in arbitrator assignments, effective September 1, 2010:

- Arbitrator Erbacci will be assigned to take over the entire Waukegan call. According to the Commission press release, this is a first step in trying to reduce the number of split calls. Arbitrator Andros will remain in DeKalb and will take over Arbitrator Erbacci's duties in Wheaton.
- Arbitrator Lee will cover Woodstock and one-quarter of the Rockford call. Arbitrator Lammie will take over the Chicago call handled by Arbitrator Lee.
- Arbitrator Fratianni will temporarily move to Chicago to handle the status call, pro se, and other matters currently handled by Arbitrator Lammie.

Additionally, effective January 1, 2011, the Lawrenceville call, one of the smallest calls in the state, will be discontinued. Lawrenceville cases will be reassigned to Mattoon and Mt Vernon.

AN OVERVIEW OF CLAIMS ACROSS THE STATE

The Commission recently released its 2009 Illinois Workers' Compensation FY 2009 Annual Report. Perhaps the most interesting news from the report is that there were fewer new workers' compensation claims filed in 2009, versus the past four years. In FY 2009, 55,497 new claims were filed, which compares to 57,515 new claims in 2008, and 58,715 new claims in 2005. As one would expect, the bulk (some 40 percent or 21,705) of these new claims were filed in Chicago. Other notably large venues included Wheaton, with six percent, and Geneva, Joliet, Peoria, and Rockford, each with roughly five percent.

Of the total cases closed during 2009, 1,394 cases were disposed of by arbitration decisions, 1,008 were by Commission review decisions, and 127 workers' compensation cases were disposed of by the Appellate Court. Of the latter, 19 resulted in published Appellate Court decisions. According to the report, the majority of decisions resulted in no change in benefits:

Parties have the right to appeal arbitrators' decisions, but they may wish to consider the fact that, most of the time, the commissioners do agree with the arbitrators. Cases appealed by petitioners do not result in higher benefits 76 percent of the time, while cases appealed by respondents do not result in lower benefits 73 percent of the time.

Illinois Workers' Compensation Commission FY 2009 Annual Report, <http://www.iwcc.il.gov/annualreport09.pdf>.

The Commission also reported that turnaround time (the time from the date a claim is filed until the date until a Commission decision is rendered) is approximately 47 months. Of this time, it takes an average of 34 months to proceed through arbitration and another 13 months to complete the Commission review. These numbers are shorter – approximately 17 months – for cases filed involving 19(b) and 19(b-1) dispositions.

Consistent with prior years, the majority of workers' compensation injuries were sustained to the employee's back. The list on the next page highlights the most significant accident statistics by body part.

For non-fatal claims, injuries are spread rather evenly between industries, with government sector injuries comprising 6.7 percent of injuries and illness, manufacturing constituting 5.6 percent of injuries and illness, and mining constituting 5.2 percent. Construction and agriculture each account for approximately four percent of all non-fatal injuries and illnesses. The majority of non-fatal injuries

Part of Body Injured By Fiscal Year of Accident					
Body Part	FY 2009	FY 2008	FY 2007	FY 2006	FY 2005
<i>Head and neck</i>					
Head	1 %	2 %	3 %	2 %	3 %
Neck	3 %	4 %	4 %	4 %	4 %
<i>Trunk</i>					
Back	16 %	16 %	16 %	17 %	18 %
Shoulder	5 %	7 %	7 %	7 %	6 %
<i>Upper Ext.</i>					
Arm	9 %	10 %	10 %	10 %	10 %
Hand	10 %	11 %	12 %	13 %	13 %
Finger	4 %	5 %	5 %	5 %	5 %
<i>Lower Ext.</i>					
Foot	3 %	5 %	5 %	5 %	5 %
Knee	6 %	6 %	6 %	6 %	6 %
Leg	5 %	7 %	7 %	7 %	7 %
<i>Multiple Parts</i>	29 %	17 %	16 %	15 %	16 %

result from either a contact with equipment or objects (29 percent), overexertion (29 percent) or falls (16 percent).

For fatal injuries, construction leads the list with 26 percent of all fatalities (up from 16 percent in 2006), while transportation comes in at 14 percent followed by agriculture at 12 percent. Some 31 percent of all fatalities are caused by transportation accidents, with falls (19 percent) and exposure to harmful substances (18 percent) contributing. Interestingly, fatalities from work-place assault or violence constitutes 16 percent of all fatal events.

RECENT APPELLATE DECISIONS

The Appellate Court, Workers' Compensation Commission Division, issued three decisions over the past month. Two addressed jurisdictional issues surrounding judicial reviews from the Commission to the circuit court. One decision addressed the proper calculation of wage differential award under section 8(d)(1) of the Act.

A Receipt Showing Payment Must Be Tendered To The Circuit Court

In *Esquivel v. Illinois Workers' Compensation Comm'n*, No. 2-09-0122WC, 2010 WL 2222788 (2d Dist., June 3, 2010), the majority upheld the dismissal of an employee's appeal for failing to comply with the provisions of Section 19(f), which govern appeals from the circuit court in workers' compensation cases. See 820 ILCS 305/19(f)(1). The claimant had appealed the Commission's decision to the circuit court, but failed to demonstrate that he had timely exhibited to the clerk documentation showing proof of payment of the probable cost of the record on appeal, as required by Section 19(f)(1) of the Act. Section 19(f)(1) requires the party seeking review to tender a receipt as proof of payment of the probable cost of the record or an affidavit of his attorney stating that the same had been paid to the Commission. All other documents required by Section

19(f)(1) were timely filed. The probable cost of preparing the record is \$35.00.

In a split decision, the majority upheld the circuit court's order dismissing the appeal for lack of jurisdiction. According to the majority, the record failed to contain any documentation indicating that the claimant exhibited proof of payment to the clerk within the statutory 20-day period for filing his judicial review. "In fact, it was not until ... approximately 6½ months after the expiration of the statutory period, that claimant sought to file an affidavit from his attorney setting forth that payment of the probable cost of the record had been made to the Commission." Because of this, the majority found that "the clerk of the circuit court issued the summons before claimant exhibited documentation establishing payment of the probable cost of the record," thus applying a strict compliance standard. The majority had rejected this contention, however, finding it too speculative.

Two justices dissented, arguing that there was some evidence in the record that someone from the clerks' office had noted "affidavit" on the file-stamped copy of the request for summons. The dissent further noted that the Commission had nevertheless prepared and submitted the transcript by the designated return date, evincing that a key purpose of the statute – ensuring timely preparation of the record – had been met. The majority had rejected this contention, finding it too speculative.

A Workers' Compensation Carrier Cannot Sign An Appeal Bond For An "Out Of Business" Employer Without An Assignment Of Authority from The Employer

In *Vallis Wynngroff Business Forms, Inc. v. Illinois Workers' Compensation Comm'n*, No. 1-09-0991WC, 2010 WL 2465436 (1st Dist., June 15, 2010), the Appellate Court upheld the circuit court's dismissal of the employer's appeal, where the workers' compensation insurance carrier had signed the Section 19(f)(1) bond on behalf of an employer who had gone out of business and could not be located. In that case, because the employer could not be located, a representative of the carrier signed the bond for the employer and attached an affidavit explaining the circumstance and stating that the carrier would be responsible for paying the award. The circuit court granted the employee's motion to

dismiss and that decision was upheld 5-0 by the Appellate Court. According to the court, Section 19(f)(1) expressly requires that the bond be signed by the party against whom the award was entered. According to the law, that party is the employer, not the insurance carrier.

During oral argument, at least two of the justices pressed counsel as to why a clause could not be inserted into the workers' compensation insurance policy authorizing the carrier to sign the bond on behalf of the employer. Whether it is feasible to add policy language of this type is beyond the scope of this article, but from a practical standpoint addition of policy language could potentially alleviate several problems which occasionally occur during the circuit court review process: the difficulties in obtaining an employer's signature where the employer has gone out of business and cannot be located, and the situation where the employer is in fact the injured party/petitioner and thus is reluctant to sign an appeal bond.

Overtime Cannot Be Included When Calculating A Wage Differential

Concerning the wage differential decision, in *Copperweld Tubing Products, Co. v. Workers' Compensation Comm'n*, No. 1-09-1422WC, 2010 WL 2521020 (1st Dist., June 22, 2010), the Appellate Court addressed a wage differential situation and found that Section 10 of the Act, which governs the calculation of average weekly wage generally, applies equally to the determination of wage differential awards.

There, the question was whether overtime wages, which were included in a co-worker's wage, could be considered when setting the base comparative wage for the differential calculation. A comparative employee earned approximately \$78,000, but some of that amount was paid as overtime. The Commission had included the overtime in the base wage against which the new wage was compared, thus producing an inflated wage differential. The court unanimously reversed and remanded the case for a calculation of the proper wage without reference to the co-worker's overtime. The court also instructed the Commission that it could, in the alternative, use the wage schedule contained in the claimant's collective bargaining agreement.

If you have any concerning this month's topics, or workers' compensation law in general, please feel free to call us.

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