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Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *June 2011*

A WORD FROM THE PRACTICE GROUP CHAIR

Our authors this month are workers' compensation partners Craig Young and Brad Elward, both of our Peoria office. Craig has been handling workers' compensation claims for employers his entire legal career, which is now over 25 years. Brad Elward is our workers' compensation appellate court specialist and represents employers before the Appellate and Supreme Court in workers' compensation matters that are arbitrated by our office as well as referrals after trials conducted by other law firms.

A look at the calendar tells us that we may have new workers' compensation legislation here in Illinois any day. As promised we will provide you with our analysis of all legislative changes when they are finalized.

Finally, we would like to thank you for attending our 26th annual workers' compensation program on May 19. If any of you would like in-house programs after the new legislation is passed, please let us know.

Kevin J. Luther
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26th Annual Claims Handling Seminar

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This Month's Authors:

Craig Young practices and has a leadership role in the firm's workers' compensation and employment law practice groups. Craig began his career at Heyl Royster as a summer clerk while in law school and became an associate in the firm's Peoria office in 1985. He has spent his entire career with Heyl Royster and became a partner in 1993. He is recognized as a leading workers' compensation defense lawyer in the State of Illinois as a result of a survey of Illinois attorneys conducted by the *Chicago Daily Law Record*, and has handled all aspects of Illinois workers' compensation litigation including arbitrations, reviews, and appeals. He has developed expertise in the application of workers' compensation to certain industries including hospitals, trucking companies, municipalities, large manufacturers, school districts, and universities.

In addition to his expertise in litigated cases, Craig has developed a reputation for counseling employers regarding overall management of the workers' compensation risk. Through seminars and presentations to local and national industry groups, in-house meetings, regular claims review analysis, and day-to-day legal counsel, Craig assists his clients in looking beyond each individual case in an effort to reduce overall workers' compensation expense.

Brad Elward of our Peoria Office handles all of the firms' workers' compensation appeals and speaks frequently on workers' compensation appellate issues. He was a contributing author to the current Illinois Association of Defense Trial Counsel *Quarterly Monograph*, *The Conflict of the Positional Risk Doctrine in Illinois: Its Rejection and Adoption*, which appeared in the publication's Volume 20, Number 4, Fourth Quarter 2010. Brad will be happy to forward copies of the *Monograph* upon request.

A SUMMARY OF RECENT APPELLATE COURT ACTIVITY

The past two months have seen a flurry of decisions issued by the Appellate Court, Workers' Compensation Commission Division, on a variety of topics affecting your claims' handling practice. Whether this simply reflects a flood of significant cases before the Court or a conscious effort to issue decisions prior to the anticipated passage of workers' compensation reform, we cannot say. In this issue, we highlight some of the more significant cases and offer some advice on how each might impact your files. As you will see, this recent crop of cases has a slight pro-employer flare; we hope this is a foreshadowing of good things to come.

Multiple Claims Can be Appealed in Single Judicial Review

In *Baldwin v. Illinois Workers' Compensation Comm'n*, No. 4-10-0375WC, 2011 WL 1780471 (4th Dist., April 28, 2011), the Appellate Court held that a party may file a single Section 19(f) judicial review from two separate Commission decisions. In *Baldwin*, the claimant filed two applications for adjustment of claim, which were consolidated for hearing before the arbitrator. Two arbitration decisions were rendered denying the claims and both matters were reviewed by the claimant to the Commission. In separate unanimous decisions, the Commission upheld the arbitrator's rulings. On judicial review to the circuit court, the employer argued that the claimant had failed to comply with section 19(f) by filing only one judicial review, even though the review papers identified both Commission decisions.

The Appellate Court upheld the circuit court's refusal to dismiss the judicial review, finding that at most, the claimant had failed to strictly comply with the Act. "None of the requirements of the statute had been completely omitted and, at worst, the requirements had been imperfectly complied with by the filing of a single request for summons." *Baldwin*, 2011 WL 1780471 at *4. Given some of the prior Appellate Court decisions very strictly construing the technical requirements for a respondent seeking review to the circuit court, one wonders if the decision in this case would have been different had the reviewing party been the employer. While this case certainly should apply equally to respondents seeking review of two separate decisions, prudence dictates that two separate circuit court reviews be filed when appropriate, and later consolidated before the court.

Compensability of Falls

On reaching the merits of the case, *Baldwin* also affirmed the Commission's denial of the two claims alleging injuries resulting from a slip and fall accident at work. Concerning the first alleged accident, the claimant fell in October 2006 as she was descending a metal staircase. She testified that she did not know what caused her to slip, saw no defects in the stairs, and saw no liquid substance thereon. However, she theorized that "moisture 'might' have built up on her shoes from walking through a freezer." The Appellate Court adopted the Commission's findings and rejected the theory that the claimant may have fallen from moisture, noting that, at best, it was conjecture. The court noted that the claimant did not know what caused her to fall and that simply walking up or down stairs, without more, does not expose an employee to a risk greater than that faced by the general public.

The *Baldwin* court also affirmed the Commission's denial of benefits associated with the second alleged accident, finding that the claimant's fall down stairs in November 2006 resulted from an idiopathic condition – leg cramps – and as such, was not compensable. The court said her fall stemmed from purely personal reasons and was not related in any way to her employment. These two decisions highlight the fact that not all falls at work are compensable. Whenever there is good evidence to suggest that a fall occurred because of

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a personal condition peculiar to the petitioner, denial should be considered. Also, when there is strong evidence that the fall did not result from any defect, it often is possible to construct an argument that the risk faced by the employee was no greater than the risk faced by the general public.

Multiple Benefits for Injuries to the Same Body Part?

The claimant in *Baumgardner v. Illinois Workers' Compensation Comm'n*, No. 1-10-0727WC, 2011 WL 1485602 (1st Dist., April 11, 2011), worked as a laborer performing heavy work and sustained a series of separate injuries to his right knee – April 1996, December 1996, April 1997, and May 1998. The claimant's physician opined that the injuries of December 1996 and April 1997 aggravated and exacerbated the original injury from April 1996. The claimant filed three applications for adjustment of claim, which were tried together, resulting in a single arbitration decision covering all three of the consolidated claims. The arbitrator found the claims compensable and awarded a wage differential under Section 8(d)(1), but denied the claimant's request for a percentage of the leg under Section 8(e)(12), which the employer had advocated versus the wage differential.

Both parties appealed to the Commission, which affirmed the award of a wage differential and also rejected the claim for a scheduled award under Section 8(e)(12). The Commission determined that the claimant was not entitled to a separate permanency award for the initial injury, versus his total condition at the time of arbitration. The Appellate Court affirmed, holding that, "The Act clearly contemplates a single determination as to the permanency of a claimant's condition as a result of an employment accident." The Court further said that, "because the claimant suffered multiple injuries to the same body part as a result of successive accidents and those claims were tried together, the Commission properly evaluated the totality of the evidence as it related to the claimant's overall condition of ill-being at the time of the hearing and entered a single award that encompassed the full extent of the disability resulting from both the April 1996 and May 1998 injuries."

A similar result was reached in *City of Chicago v. Illinois Workers' Compensation Comm'n*, No. 1-09-2320WC, 2011 WL 1485606 (1st Dist., April 11, 2011), where the claimant filed separate claims for two back injuries, which proceeded to trial at a consolidated hearing. The Court held that the claimant could only obtain one recovery for permanent disability under Section 8(d) of the Act. In that case, the Commission had found that the claimant sustained two separate conditions, and had awarded both an 8(d)(1) wage differential and man as a whole under 8(d)(2), Nevertheless, the Appellate Court found as a matter of law that the claimant had proved only one condition of ill-being and was not entitled to a Section 8(d)(1) and Section 8(d)(2) award. The Court, relying in part on *Baumgardner*, stated, "Where a claimant has sustained two separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing." *City of Chicago*, 2011 WL 1485606, at * 5.

Interestingly, the Appellate Court, in responding to one of the claimant's arguments on appeal, acknowledged that it may well be correct that the claimant would have been entitled to two separate awards had the cases not been consolidated and instead been tried separately. It further noted that the evidence suggested that the claimant had returned to work following the first accident and that it appeared he may have made a full recovery from that injury prior to the second accident. This might prompt petitioner's attorney to seek two separate trials in similar situations which obviously should be opposed.

It should also be remembered that both of these cases address situations where the ultimate award was a wage dif-

ferential award under Section 8(d)(1). Presumably, under this situation, the Appellate Court was able to arrive more readily at the conclusion that the Section 8(d(1) award encompassed all of the permanency. A different result may have occurred if there had been two separate man as a whole awards. It should also be noted there is nothing about these decisions which would limit a finding of an award for loss of use of two separate body parts arising from the same injury.

What Constitutes a True Referral Under Section 8(a)'s "Two-Physician" Rule?

In a rather disappointing case that seems to promote doctor shopping, the Appellate Court held that a claimant's attorney-dictated referrals were in fact "physician referrals" under Section 8(a) of the Act. As we know, Section 8(a) obligates an employer to pay for the claimant's choice of two physicians and all referrals therefrom. 820 ILCS 305/8(a). In *Absolute Cleaning/SVMBL v. Illinois Workers' Compensation Comm'n*, No. 4-10-0313WC, 2011 WL 1781310 (4th Dist., April 28, 2011), the Appellate Court, despite no indication in the records of any referrals from the selected physician, upheld the Commission's decision that three subsequent physicians were within the chain of referrals. According to the employer, there was substantial evidence that the genesis of the referrals, which were later testified to by the physicians during their depositions, was the claimant's own attorney. Relying on its prior decision in *Elmhurst-Chicago Stone Co. v. Illinois Industrial Comm'n*, 269 Ill. App. 3d 902, 907, 646 N.E.2d 961 (2d Dist. 1995), the Appellate Court reiterated the law that "the genesis of the referral has no bearing on the issue so long as the claimant's treating doctor ultimately made the referral." From *Absolute Cleaning*, it is now apparent that this "referral" can come much later, and even be more in the nature of a "back-referral." It is suggested that when strong evidence exists that the only referral comes from the attorney this decision from the Appellate Court be considered a factual decision and not definitive as to all cases. As attorney referral to physicians becomes more prevalent, it is important to exercise any option available to challenge such referrals. This is not only because of the cost of paying for the medical treatment, but also because these referrals often result in excessive treatment, and almost always result in favorable causation opinions for the employee.

Economic Lay-offs – Movement to Cease Benefits or "Business as Usual?"

Absolute Cleaning/SVMBL also involved the question of whether an employer's TTD obligation continues after the date a claimant is terminated due to economic conditions. In this case, the claimant, who was still on restrictions, was released due to hard economic times. The employer argued that her inability to work was not the result of her work-injury, because she was working light-duty, but rather was solely due to the economic conditions. The Appellate Court, without any discussion of the issue from a legal standpoint, affirmed the Commission's finding that the claimant was unable to work because of her condition. The Court pointed to the fact that the claimant did not work at two of the mines where various work contracts were terminated, and that no other employees at her location were terminated for economic reasons. While the Court took no opportunity to discuss this issue in any larger sense, it does appear that the rulings were made on the limited facts of the case. Challenging TTD in these situations should continue. The Court's finding highlights the importance of garnering evidence that other employees at the same location were terminated for economic reasons.

A Separate Evidentiary Hearing to Establish Value of the Employer's Lien Is Not Required If the Amounts Have Been Determined in the Companion Workers' Compensation Case.

In *Johnson v. Tikuye*, No. 1-10-0114, 2011 WL 1501564 (1st Dist., April 18, 2011), the Appellate Court held that it was error for the circuit court to conduct a separate evidentiary hearing to determine the value of the third-party defendant employer's workers' compensation lien where the amount of the lien had already been determined in the companion workers' compensation case. In this case, the plaintiff was injured when *Tikuye* backed over a curb and struck a light pole. The claimant filed a workers' compensation action and was awarded a total of $123,147.53, which included $75,038.64 for medical payments, $34,338.95 for TTD, and $13,769.94 for permanency benefits. He then filed a claim against the driver of the car. As part of the binding arbitration in the circuit court case, the workers' compen-

sation insurance carrier intervened, seeking recovery of its workers' compensation lien in the amount of $123,147.53. The arbitrator, in the circuit court case, awarded the plaintiff $118,700, reduced by the plaintiff's comparative fault to $94,960.

The circuit court then refused to accept the determinations from the workers' compensation proceeding and held its own evidentiary hearing on the amount of the workers' compensation lien, at which time the plaintiff and his attorney argued for less serious injuries. The Appellate Court held that section 5(b) of the Act was clear and that the workers' compensation lien should be enforced as determined by the prior arbitration; no new evidentiary hearing was required. The Act grants the employer a lien on the recovery equal to the amount of the benefits paid or owed, less various adjustments for attorneys' fees and costs. Nothing provides for a reduction imposed on that lien by a subsequent tribunal.

While this case makes it clear a workers' compensation lien will always be enforced up to its full amount when an award has already has been entered in the workers' compensation case, a more difficult scenario is presented when the third party claim is tried or arbitrated *prior* to an award in the workers' compensation case. In that scenario, there may be a need for an evidentiary hearing before the circuit court as to the value of the workers' compensation case, and thus the ultimate amount of the workers' compensation lien.

AWW and School Districts

The Appellate Court, following its late 2010 decision in *Washington Dist. 50 Schools v. Illinois Workers' Compensation Comm'n*, 394 Ill. App. 3d 1087, 917 N.E.2d 586 (3d Dist. 2010), issued a decision in *Elgin Bd. of Educ. School Dist. U-46 v. Illinois Workers' Compensation Comm'n*, No. 1-09-3446WC, 2011 WL 1587346 (1st Dist., April 25, 2011), finding that the average weekly wage for a school teacher, who worked 39 of the 52 weeks during the year, should be calculated using the 39 weeks, rather the 52 weeks. In that case, the teacher elected to accept payments over a 52-week period. The appellate court nevertheless divided her annual salary by 39, the number of weeks she actually worked for the school district. The appellate court rejected the argument made by the district that the teacher's wage was governed by a one-year contract, which defined a year's work and a year's pay as the full amount of her salary over 52-weeks. Sidestepping the issue, the appellate court said that, "Our ability to directly address respondent's position is hampered by the fact that the claimant's contract has not been made part of the record. In the absence of the contract, we are left with claimant's unrebutted testimony that she was only required to work 40 weeks during the school year." *Elgin*, 2011 WL 1587346 at * 7.

Section 8(j) Credits

Elgin also addressed the issue of the employer's entitlement to a Section 8(j) credit, where the employer had paid the claimant her full wage using accumulated sick time. According to the employer, it gave the claimant the option of using her sick time in order to receive full pay in lieu of receiving TTD. Once the accumulated sick time was used up, the claimant went on TTD payments. According to the record, earned sick pay impacted the claimant's retirement benefits, which meant that depleting that fund would ultimately lower her retirement benefits. The Commission denied the employer's request for a Section 8(j) credit because under prior law (*Tee-Pak, Inc. v. Illinois Industrial Comm'n*, 141 Ill. App. 3d 520, 490 N.E.2d 170 (4th Dist. 1986), an employer cannot obtain credit for payments which would have been made regardless of the work accident.

The Appellate Court reversed the Commission, relying on language in Section 8(j) that "credits the employer with any payments made by the employer as compensation payments." *Elgin*, 2011 WL 1587346 * 8; see, *e.g.*, 820 ILCS 305/8(j). The Court distinguished *Tee-Pak* on the grounds that in that case, there was evidence that the employer intended for the employee to receive both TTD benefits and salary payments for the same period. It noted that there was no such evidence in the *Elgin* case. Despite the Appellate Court's attempted distinction, this case nevertheless seems at odds with *Tee-Pak*, since the benefits paid to the claimant would have been payable in Elgin regardless of the work accident.

As always, if you have any questions concerning any of these cases and how they might impact one of your claims or concerning workers' compensation law in general, please contact one of our workers' compensation attorneys.

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