Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals *February 2021*

A Word From The Practice Chair

Typically, around this time of year, I am talking about how cold it is here in Illinois and how much I wish I was living further south. Well, along comes February 2021, and my friends in the south are feeling my pain for the first time in a long time. I am very sorry to hear about the impact of the brutally cold weather because we all realize our friends in the south are not built for this (nor are your homes). Snow on a beach is just wrong. I am happy to see things are warming up. That is important because you need to get ready for all those Spring breakers next month. I think we are all in agreement that all of us deserve a wonderful, beautiful, and long Spring. We have earned it!

February was a memorable month at the Commission due to the fact we saw an opening (on a limited basis) of trial settings. You might recall Illinois went into a shutdown in November 2020. Because the COVID numbers had improved, and because of the obvious need, the Commission instructed its Arbitrators to begin arbitrating cases in person again on a regular basis. One trial was allowed in the morning, and one trial slot allowed in the afternoon for the trial days at each venue. The sites were limited to places controlled by the State / Commission. We have not gone back to all of the normal docket sites because not all sites are owned, operated, and controlled by the State. We will update you as any additional changes are made. We anticipate the Commission will continue to slowly open up more as the COVID numbers continue to improve and with rollout of the vaccine. As it pertains to pro se settlements please understand we can still get those contracts approved. There are some required rules and protocols to follow because the approval process is virtual (and not in person) but it can be done. If you do have a pro se settlement you want finalized, then contact me and I will tell you how the Heyl Royster Team can get that done effectively and efficiently.

My partner Brad Antonacci drafted this month's article on Section 5(b) of the Act which deals with subrogation. We always want our clients, if the facts of the claim allow, to protect their workers' compensation lien interest and pursue a third party to collect those monies they are owed under this statute. Brad goes into detail about the *Burdess v. Cottrell* case and what impact the discovery process has on the employer who has intervened per Section 5(b) to protect its lien interest in the underlying civil claim, and what obligations the intervening employer has in the civil claim. This can become a tricky process, but the easy answer to this potential pitfall is to contact your Heyl Royster attorney and we can walk you through the process and procedures, and if you want, we are happy to intervene in the civil case on your employer's behalf and assert your subrogation rights.

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RECOUPING YOUR SECTION 5(b) LIEN: IS THE EMPLOYER SUBJECT TO DISCOVERY IN THE THIRD-PARTY CLAIM?

By: Brad Antonacci, Chicago Office

If an employee's work injury occurred due to the fault of a third-party, the employee has the opportunity to file a civil lawsuit to recover damages against that third-party. The employer, or the employer's insurance carrier, may also have a right to recover expenses related to the workers' compensation claim if there was an at fault third-party. This is known as a subrogation interest. Assuming the employer or its insurance carrier Petitions to Intervene in the third-party claim, they may not be subject to discovery, according to a recent decision discussed below.

To protect the Section 5(b) Lien, the employer may wish to file a Petition to Intervene in the civil claim. The question then becomes whether the employer is required to participate in discovery, including written discovery, if their Petition to Intervene has been granted. According to the recent case of *Burdess v. Cottrell, Inc.,* 2020 IL App (5th) 190279, a decision rendered on December 1, 2020, the employer does not have to answer discovery in a civil claim if they are solely in the case to protect their Section 5 (b) Lien against judgment.

In *Burdess*, petitioner/plaintiff filed a seven count complaint against multiple defendants seeking damages for employment-related injuries the plaintiff sustained when he fell from the deck of a vehicle transportation rig while working for Jack Cooper Transport Company, Inc. (Jack Cooper). Continental Indemnity Company (Continental) filed a Motion to Leave to File a Petition to Intervene to protect and secure their Section 5(b) Lien for the workers' compensation benefits they had paid on behalf of Jack Cooper as the employer of the plaintiff. Their Petition to Intervene was granted, without objection.

At that point, the plaintiff issued written discovery to Continental, including interrogatories and a Request for Production. Continental objected to answering written discovery, arguing their role in the civil claim was limited solely to the purpose of ensuring that all orders of the court, after hearing or judgment, shall be made for the protection of the intervenor and their lien interest. They acknowledged that they were still subject to the subpoena power of the circuit court and produced an electronic file containing the materials relating to the plaintiff's workers' compensation claim, along with an itemization of workers' compensation benefits paid for which they were asserting a lien.

The plaintiffs filed a Motion to Compel Discovery and for Sanctions for Continental's failure to comply with their discovery request. The circuit court entered an Order granting Plaintiff's Motion to Compel and ordering Continental to fully respond to discovery within 14 days. Continental then partially responded to the plaintiff's discovery request, but plaintiff filed a Motion for Sanctions, contending that Continental's responses to the discovery requests were insufficient. In response, Continental reiterated that it was not subject to discovery due to its limited role as an intervenor. The circuit court entered an Order, after hearing, overruling Continental's objections and ordering Continental to pay plaintiff's attorney's fees related to the Motion for Sanctions, ordering Continental to fully answer discovery within 30 days and imposing sanctions in the amount of $150 for every day that it did not fully comply with the discovery request. In the meantime, the plaintiffs continued to issue discovery requests to Continental. Continental refused to comply with court orders to produce certain information. The circuit court held Continental in contempt of court and imposed a penalty for its noncompliance. Continental filed a timely notice of appeal.

The appellate court found that Continental intervened to protect its lien as authorized by the Workers' Compensation Act, which includes provisions regarding intervention in the circuit

court. The court noted Continental's intervention was governed by the Workers' Compensation Act. In addition to the Act and state Supreme Court rules, Illinois case law also establishes that intervenors under Section 5(b) of the Act are limited in their role. They are forbidden from participating as parties and from being subject to discovery in the underlying suit. The court cited to the case of *Sjoberg v. Joseph T. Ryerson & Son, Inc.,* 8 Ill. App. 2d 414, 417 (1st Dist. 1956) to support its position. The court also noted the plaintiffs cited to no authority establishing that a circuit court has the power to mandate an intervenor under Section 5(b) of the Workers' Compensation Act to participate as a party to litigation against its will or to subject it to discovery requirements incumbent on the parties. The court further acknowledged that an employer is entitled to recover, even without intervening in the third-party claim, and this further demonstrated that the employer is not intended to be a party in the underlying claim, under the Workers' Compensation Act.

The court concluded that Continental did not become a party to the underlying litigation by intervening to protect its lien under Section 5(b) of the Act. Because Continental was not a party to the underlying litigation, it was not subject to discovery. The court found that the circuit court's discovery orders and imposition of sanctions were improper, and reversed those orders. They also reversed the contempt of court order against Continental for violating the discovery orders.

Thus, the *Burdess* case stands for the proposition that an employer or its insurance carrier does not become a party to the underlying litigation by intervening to protect its lien under Section 5(b) of the Act. It also stands for the proposition that, because the employer/carrier is not a party of the underlying litigation, it is not subject to discovery mandates of the Illinois Supreme Court Rules 213 and 214.

When a third-party is potentially at-fault in causing an employee's otherwise work-related injury, Section 5(b) gives the employee, and in his absence, the employer, the right to bring a civil lawsuit. In the event the employee is able to recover damages from the third-party, section 5(b) allows the employer to be reimbursed for the benefits it paid, or that it will have to pay, under the Workers' Compensation Act, and the courts have consistently protected the employer's right to repayment. It is important for the employer and insurer to conduct a thorough and early investigation of any potential third-party claims and communicate with their attorney as soon as possible in order to develop the best strategy for defense of the workers' compensation claim.

The decision of whether to pursue a third-party claim or negotiate the employer's Section 5(b) lien should be based on careful consideration of the specific facts in each claim. If the employer has pursued his or her own third-party claim, one factor to consider in deciding whether to intervene in the third-party claim is knowing that the employer or its insurance carrier will not be subject to discovery. Given this, it might be prudent to intervene to further ensure that the parties in the third-party civil suit consider the employer's Section 5(b) lien. Our Heyl Royster Workers' Compensation attorneys are ready to discuss potential third-party issues that may affect your workers' compensation claims.

Brad Antonacci, *Chicago Office*

With extensive experience defending hundreds of employers before the Illinois Workers' Compensation Commission, Brad has arbitrated many workers' compensation claims as well as argued numerous reviews before the Workers' Compensation Commission during his career. He has also argued appeals of Workers' Compensation Commission decisions before the circuit court. Brad has spoken on and authored articles regarding employment layoffs and temporary total disability benefits. Brad has also spoken on updates to Workers' Compensation case law.

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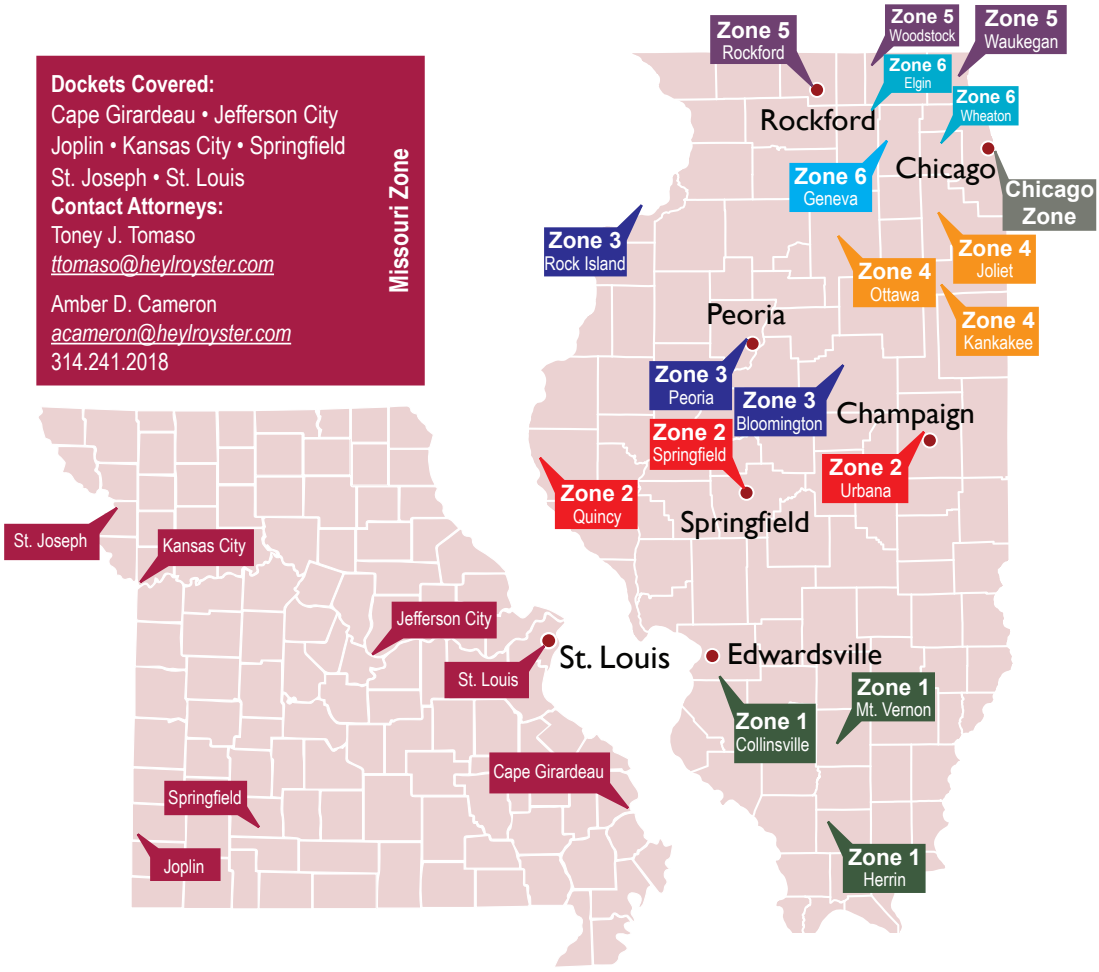

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