Below the Red Line

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *February 2014*

A Word From The Practice Group Chair

Welcome to the February edition of *Below the Red Line*, Heyl Royster's workers' compensation update. Hopefully, this will be the last edition you read while the weather is still cold and snowy. It certainly has been a difficult winter, and we have been fielding more than the normal number of calls to discuss claims arising as a result of falls on ice and snow, and other weather-related accidents. In our feature article this month, Joe Guyette addresses the issue of managing unwitnessed accidents when the employee works from home or in other remote environments. One of the cases he addresses involved a slip and fall on ice and snow by an employee working from home. The issue of employees who telecommute or work remotely is increasingly common and presents unique challenges in defending. I hope you find Joe's article helpful.

We are busy planning for and looking forward to our annual firm seminar addressing cutting-edge workers' compensation issues. You should have received a save the date reminder indicating it will take place on May 15 in Bloomington, Illinois. Formal invitations will be forthcoming and we look forward to seeing you at that time.

Stay warm as we endure the last blasts of winter and look forward to spring. As always, please know we value our continued relationship with you.

Very truly yours,

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Joe concentrates his practice in the areas of workers' compensation defense, professional liability and employment matters.

In this issue . . .

IF AN EMPLOYEE IS INJURED, AND NOBODY IS AROUND, DID AN ACCIDENT OCCUR?

In college, on the first day of my Introduction to Philosophy class, the professor started by asking a question: "If a tree falls in the woods and nobody is there to hear it, did it make a noise?" Ultimately, just about everyone agreed that there was no way to be sure. Today, a similar question is being asked in workers' compensation cases, and the answers given to this point are equally inconclusive. Specifically, when an employee is injured and his closest co-worker or supervisor is miles away, does he have a compensable workers' compensation claim?

Working from home, or telecommuting, has become much more prevalent in recent years. Employers promote the practice because it allows them to reduce overhead and minimize office space. Likewise, employees enjoy the lack of a commute and familiar surroundings. Unfortunately, the resulting reduction in face-to-face contact with co-workers and supervisors can make it much more difficult for employers to investigate and evaluate a potential claim. In many instances, a supervisor may have never even seen a claimant's work environment, and may only have a basic understanding of the claimant's day-to-day activities.

The law regarding the compensability of telecommuting employees' injuries that occur in and around their homes is still developing. Recent Illinois case law, at this point, is inconsistent and lacks clear boundaries. Despite the limited case law and the inherent difficulties in investigating these claims, there are several strategies that can be employed to limit the compensability of these claims.

When a claimant's work place is his home

In Illinois, a compensable injury must both "arise out of" and be "in the course of" one's employment. The phrase "in the course of" employment refers to the time and place of an accident. In the context of an injury to a telecommuting employee in his home, this element can present a number of frustrating problems. First, if the employee does not have a specific location within his home that serves as a work area, virtually any accident that occurs in or around the home can meet this threshold. Second, if the employee does not have set or restricted work hours, an injury that occurs at any time of the day or night can also be found to be in the course of his employment.

The phrase "arising out of" the employment refers to some risk associated with the claimant's job that is not equally shared by the general public. A claim involving a telecommuting employee can present some challenges with regard to this element. In many cases, the employer may not know anything about the claimant's work environment. Trip hazards and poor ergonomics in a claimant's "work area" could be used to establish an increased risk, even if the employer had nothing to do with creating those conditions. Even if a claimant's work area is free from any trip hazards or ergonomic problems, the employer is not present to confirm that the claimant is doing his job in a safe manner. For example, the claimant could meet his burden for the "arising out of" element by establishing that he was attempting to move a heavy load of papers in one trip, rather than making several trips across his work area. In the case of a telecommuting employee, in addition to having no knowledge about a claimant's work area, an employer is not likely to have any control over how that area is organized or used.

While there is nothing in the Illinois Workers' Compensation Act specifically addressing the compensability of injuries to employees working from home, the framework for an injury that occurs in an employee's kitchen is the same framework for evaluating an injury that occurs on a manufacturing line. In evaluating prior decisions from Illinois and other states, we find they have generally been interpreted in favor of claimants.

Legal precedent from outside Illinois

Many states have addressed the compensability of injuries to telecommuting employees. Several of these states employ the same general standard of compensability used in Illinois. Specifically, a compensable injury must both "arise out of" and be "in the course of" the claimant's employment. While these non-Illinois cases are not precedent in Illinois, they nonetheless provide some guidance on the factors to be used by Illinois courts in evaluating telecommuting cases.

JOB TASKS CO-MINGLE WITH PERSONAL TASKS

One of the concerns an employer might face with a telecommuting employee is when job responsibilities are co-mingled with personal tasks around the house. That issue was addressed by the Utah Court of Appeals in *AE Clevite, Inc. v. Labor Commission* 2000 UT App. 35. In that case, the claimant was a sales manager for an auto parts manufacturer who worked from home with permission of his employer. He often accepted mail and deliveries at his home related to his work. On a winter day, the claimant went outside to spread salt on his driveway in preparation for the walk down to his mailbox. The claimant slipped on ice and was rendered a quadriplegic as a result of his accident. The appellate court's decision suggests the claimant used the same mailbox for both his personal mail and work-related deliveries. As a result, the claimant would have had to make the same walk to the end of the driveway, even if there were no work-related deliveries by the mail carrier.

The employer argued the injuries were not suffered in the course of the claimant's employment because the employer never "requested, directed, encouraged, or reasonably expected [the claimant] to salt his driveway." 2000 UT App. at

¶19. Further, the employer argued that the claimant's injury did not take place in an employer-controlled area.

The appellate court upheld the award of benefits, concluding that the act of salting the driveway was "an attempt to remove a hurdle that could have prevented the delivery of expected business packages." *Id.* at ¶10. According to the court, the salting of the driveway was "reasonably incidental" to the claimant's job, making this a compensable accident.

In *AE Clevite*, the claimant was awarded benefits even though there was nothing to suggest the claimant's actions would have been any different if his employment had been completely taken out of the equation. Just like any other homeowner, the claimant would have made a trip to retrieve his mail from the box at the end of his driveway. Further, it is reasonable to infer that the claimant would have salted his driveway to remove ice and snow, even if it was not his practice to work from home. In fact, if the employee had simply salted his driveway in preparation for a morning trip to work, his claim would have been denied pursuant to the "coming and going" rule.

Accident from personal comfort

Another problem faced by employers with regard to telecommuting employees involves the type of injury that can occur at home, even without any involvement from the employer. The Minnesota Workers' Compensation Court of Appeals considered that type of injury in *Munson v. Wilmar/Interline Brands,* No. WC08-205 (Minn W.C. Ct. App. 2008). In that case, the claimant worked as a sales representative for an employer that required him to maintain a home office. The claimant was working on a Saturday morning to complete a month end sales reports. While working on the report, he took a break, and went downstairs to his kitchen to get a cup of coffee. As he descended the stairs, the claimant fell and fractured a vertebra in his thoracic spine.

The appellate court applied the "personal comfort" doctrine to find the claimant's accident was compensable. The court indicated that the claimant was working to complete a report shortly before he took his break, as required by his employer. Further, the court noted that the claimant did not engage in any unreasonably dangerous or risky behavior in walking down the stairs to get a cup of coffee. The court concluded that the claimant's actions were no different than an employee who leaves his office desk to get a cup of coffee from his workplace's cafeteria.

Once again, the employer is facing a compensable accident that occurred while its employee was doing something that would be likely to occur even if he had no association with the employer. The appellate court did not indicate that the stairwell where the claimant fell was solely used for access to his home office. Likewise, it is reasonable to infer that the claimant would have been walking to his kitchen to get a cup of coffee that same morning, even if he had not previously been working on his report. While the employer in this case required the claimant to have a home office, there is no indication that the employer had any input on the location of that office or location of the coffeemaker.

Risks that would be controlled if at work

In some instances, a telecommuting employee may suffer an injury that is the result of a risk that might not even exist if the employee was working in a facility controlled by the employer. In *Sandberg v. JC Penney Co. Inc.*, 243 Or. App. 342 (Ct. App. 2011), the Oregon Court of Appeals considered in a case where the claimant was employed as a custom decorator, and the claimant's time was split between visiting clients, her home office, and approximately one day per week at the location controlled by her employer. Her job required her to keep a large inventory of fabric samples, books and pricing guides, which she stored in the detached garage at her home.

On the day of the accident, the claimant was preparing to move some samples from her garage into her van. As she walked out the back door, she noticed that she was about to step on her dog, and attempted to shift her weight to her other foot. As that occurred, she lost her balance and fell, sustaining a number of injuries. The claim was initially denied, but the appellate court awarded benefits. The court concluded that the claimant "was walking around to her garage for the sole purpose of performing a work task." As a result, she suffered a compensable injury, even though the employer had no control over the claimant's work area or her dog. The court held that, because the employer did not provide space for the claimant to work at its facility, her home and garage became her workplace. Ultimately, because the claimant suffered an accident in her workplace, while performing tasks benefiting her employer, she was entitled to workers' compensation benefits.

In this case, it is reasonable to conclude that the employer would not even consider allowing the claimant to bring her dog to its facility. Further, the claimant is just as likely to trip on her dog while cooking dinner as she was moving materials for work. Despite all this, the appellate court found that there was an increased risk associated with the "tripping hazard" at the claimant's "workplace."

Illinois precedent

There have been a handful of cases in Illinois addressing the compensability of injuries to telecommuting employees. Unfortunately, the reasoning used in deciding these cases has been somewhat inconsistent, and there is no discernible trend to suggest that claims by telecommuting employees are becoming easier or more difficult to establish.

In *Curran v. Kronos*, No. 05 I.W.C.C. 0634 (Aug. 18, 2005), a telecommuting employee was injured on her way home from a consulting job. The claimant was employed as a computer

consultant, and was working on a project for the Chicago Public School system. The claimant often worked from home, and there was no testimony to suggest that her employer had any objections to this arrangement.

At approximately 3:00 p.m., the claimant arrived at the elevated train station at the Merchandise Mart in Chicago. As she left that station to walk home, an assailant pushed her from behind and took an expensive briefcase that was holding her laptop computer. As a result of the accident, the claimant was diagnosed with post-concussion syndrome and headaches.

The arbitrator found the claimant's injuries "arose out of" her employment, and the Commission affirmed without modification. The arbitrator found that the claimant was a traveling employee, and that her home constituted a workplace. As a result, the claimant was "in the course of" her employment even after she had left her consulting client and was headed home.

The arbitrator also found that the claimant's employment presented a risk that was not shared by the general public. Specifically, the arbitrator noted that the "sole increased risk particular to petitioner in that she carried a large, expensive briefcase, which was the target of the assault." This briefcase was not furnished by the employer, but was purchased by the claimant because she needed a large bag to carry her laptop computer. Based on the claimant's need to carry the briefcase and computer to and from work locations, she was "at an increased risk for assaults designed to steal the briefcase or bag when compared to the general public."

In this case, the arbitrator ruled that the claimant's injuries were compensable because she was carrying an expensive bag that happened to contain a computer she used for work. The arbitrator did not provide much reasoning to explain how the claimant's circumstances differed from any other member of the public, carrying a laptop bag or expensive purse around downtown Chicago.

Although this injury did not occur in the claimant's home, she was walking to her home when she was assaulted. There is no testimony to suggest that the claimant's home was her primary workplace, or that her employer had actually directed her to work from home. Depending on how this case is interpreted, it could represent a significant expansion in how telecommuting employees are classified. Without any baseline for the amount of time spent working from home or any indication that the employer required the claimant to work from home, nearly any management level employee or professional could be considered a telecommuting employee.

Perhaps even more concerning is the absence of a clearly identifiable risk encountered by the claimant. It was established that the employer did not furnish the claimant with the expensive bag, and there is nothing in the arbitrator's decision to suggest that the employer required the claimant to take her computer to her home. The only link between the claimed accident and the employer is that the expensive bag, the assumed target of the assault, happened to be holding the claimant's computer. Using this reasoning, any assault could form the basis of a compensable claim where the victim happens to be carrying papers, a computer or anything else that might possibly be used for work.

Other telecommuting cases from Illinois take a more narrow view regarding compensability, but they fail to establish any bright line rule for denying a claim. In *Nolen v. Perry County Counseling Center*, No. 09 I.W.C.C. 0748 (July 20, 2009), the Commission considered another case where a telecommuting employee was injured on the way to her home. There, the claimant was employed as a case manager, assessing and assisting individuals with brain injuries. Her job duties included visiting these individuals in their homes and at medical facilities. The evidence established that the claimant went to her employer's office most days, but was allowed to travel directly from her home to a customer's home and could also do some of her work from home. Further, the claimant testified that her employer had provided her with a laptop computer specifically so that she could work from home.

On the day of the accident, the claimant began working from home because the weather forecast included snow, but decided to go to her employer's office in the afternoon to print out some assessments. The claimant left her employer's office before the end of the workday, to continue to work on case notes at her home. While traveling from her employer's office to her home, another car crossed a median and hit her car head-on. The claimant suffered multiple fractures and missed several months of work to recover.

The arbitrator found that the claimant's home was a workplace, and that she was traveling between two work locations at the time of the accident. As a result, the claimant was awarded benefits. The Commission reversed, finding that "there is no evidence that she was performing a work-related errand or task when the accident occurred," despite her testimony that she was returning home to complete case notes. In rejecting the claim, the Commission noted that while the claimant "sometimes visited customers' homes, she did not introduce clear evidence concerning the frequency of these visits nor was she going to or from a customer's home at the time of the accident."

Where the Commission awarded benefits in the *Curran* case without any evidence about how often the claimant worked from home, the Commission denied benefits in the *Nolan* case because the claimant's work outside of the office was not sufficiently frequent. Excluding the expensive bag in the *Curran* case, the employment situations in these two matters are nearly identical. Both claimants were traveling home when their accidents occurred. Both claimants were carrying work materials with them when they were injured. Both claimants were intending to continue their work when

they arrived home. Somehow, the Commission found that only one of these claimants sustained a compensable accident.

There are a number of other Illinois cases which present more typical accidents involving telecommuting employees. Where a claimant suffers an injury which would clearly be compensable if it occurred in an employer's facility, that accident is likely to be compensable even if it occurred in the claimant's home. In *Risner v. Sports Art Fitness*, No. 13 I.W.C.C. 0044 (Jan 17, 2013) the Workers' Compensation Commission considered the case of a regional sales manager whose home was his primary workplace. In that case, the claimant slipped on a patch of ice outside of the back door of his house on his way to make a follow-up sales visit with a client. There was no dispute that the sales visit was related to the claimant's employment or that his planned trip was for any purpose other than the sales visit. The arbitrator found that the claimant was a traveling employee, who was leaving one workplace to head to another. As a result, his injuries were compensable and benefits were awarded.

In *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App.3d 191 (1st Dist. 2009), the Appellate Court, First District considered the case of a claimant who had entered into a "telework agreement" which allowed the petitioner to work from home and communicate with his employer through the computer, telephone and fax machine. The claimant was injured as he walked down the stairs in his apartment complex carrying demonstration equipment, a computer and supplies, which weighed approximately 75 pounds. Neither the arbitrator, Commission or Appellate Court addressed the compensability of this case, because the employer accepted the compensability of the injuries. Based on the agreement he had signed with his employer, there is no dispute that the claimant was a telecommuting employee. As a result, his injury occurred while the claimant was on his way from one job site to another, and benefits were properly awarded.

While it is clear that certain employees who are injured in certain circumstances will have compensable injuries, a number of questions remain regarding how telecommuting employees will be identified and handled in Illinois. Certainly more cases will need to be brought before the Commission before clear definitions can be developed. For example, will compensability depend on how often a claimant works at home? Will compensability hinge on whether the employer requires or simply acquiesces in work from home? It may be possible that the Commission will decide that a claimant can be considered a telecommuting employee even if the employer had no knowledge that the claimant was working at home. Likewise, the Commission could determine that an employer must exercise some control over the claimant's workplace for an action to be compensable. Given the increase in the number of telecommuting employees, it is likely that the Commission will have several opportunities to address these issues in the near future.

Limiting exposure for injuries to telecommuting employees

Despite the developing case law on the subject, there are some strategies that can be employed to limit liability in cases involving telecommuting employees. In general, the strategies fall into three categories: limiting the scope of telecommuting, exercising control over the workplace, and requiring thorough reporting of injuries.

Time and work space limitations

By limiting the scope of the employee's ability to telecommute, an employer can limit its exposure for workplace accidents. For an accident to occur in the course of employment, it must happen in a time and at a place associated with work. By restricting the time an employee is working, this element can be considerably narrowed. First, specific hours should be set for the employee's work, so that accidents that occur outside of those hours are non-compensable. If specific hours are inconsistent with the type of work being performed, a log-in system can achieve the same effect. Essentially, if an employee is not on the clock, it will be more difficult for him to establish that he was injured in the course of his employment.

This element can also be impacted by limiting the places where the employee can work. An employer can do this by requiring an employee to have a specific work area in his home, separate from the remainder of the home. If an employee has a home office, an argument can be made that an accident occurring in the kitchen is outside the course and scope of his employment.

Finally, within reason, non-work activities should be prohibited during work hours. While this may not prevent an accident from being found compensable, it allows the employer to argue that an employee who is salting his driveway or walking to get the mail is not acting in the course and scope of his employment when an accident occurs.

Work space control

By exercising some limited control over an employee's work space, the employer can further limit its exposure for these claims. Specifically, the employer should provide information and resources regarding ergonomics and repetitive trauma risks. If it is feasible, ergonomic keyboards and tools could be provided. That way, if an employee refuses to use those products, the employer can argue that the employee was not in the course and scope of his employment when the accident occurred.

If possible, an employer should visit and evaluate the home workplace identified by the employee. This provides an additional opportunity to identify potential risks and fix them before they become a problem. If the employee refuses to make changes requested by the employer,

additional arguments can be made about whether the accident occurred in the course and scope of the claimant's employment.

ACCIDENT REPORTING GUIDELINES

As a third point, in cases where there is only limited face-to-face contact, the prompt and thorough reporting of accidents is critical. For any telecommuting employee, an accident is less likely to be witnessed. Late reporting, or even the lack of a report, can make it much more difficult for the employer to investigate the claimed accident. Further, because the injured employee is living at the scene of the accident, he would have ample opportunity to alter or remove evidence if an accident is not immediately reported. While a thorough investigation is necessary in any claim, that importance is magnified where the claimant is the only employee present at the scene of the accident.

Conclusion

Injuries to telecommuting employees present unique challenges. In addition to the unstable case law, employers are often at an information disadvantage. Despite these problems, a quick response and thorough investigation can help to support the denial of a claim in appropriate situations.

If you encounter a claim involving a telecommuting employee, feel free to contact any of our workers' compensation attorneys, to further discuss the issues and possible defenses.

SAVE THE DATE!

Thursday, May 15, 2014

Heyl, Royster, Voelker & Allen
29th Annual Claims Handling Seminar

Concurrent Seminars:
Casualty & Property or Workers' Compensation
1:00 – 4:30 p.m.
Doubletree Hotel, Bloomington, Illinois

Agendas will be available soon
Questions? pbaysingar@heylroyster.com

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Workers' Compensation Practice Group

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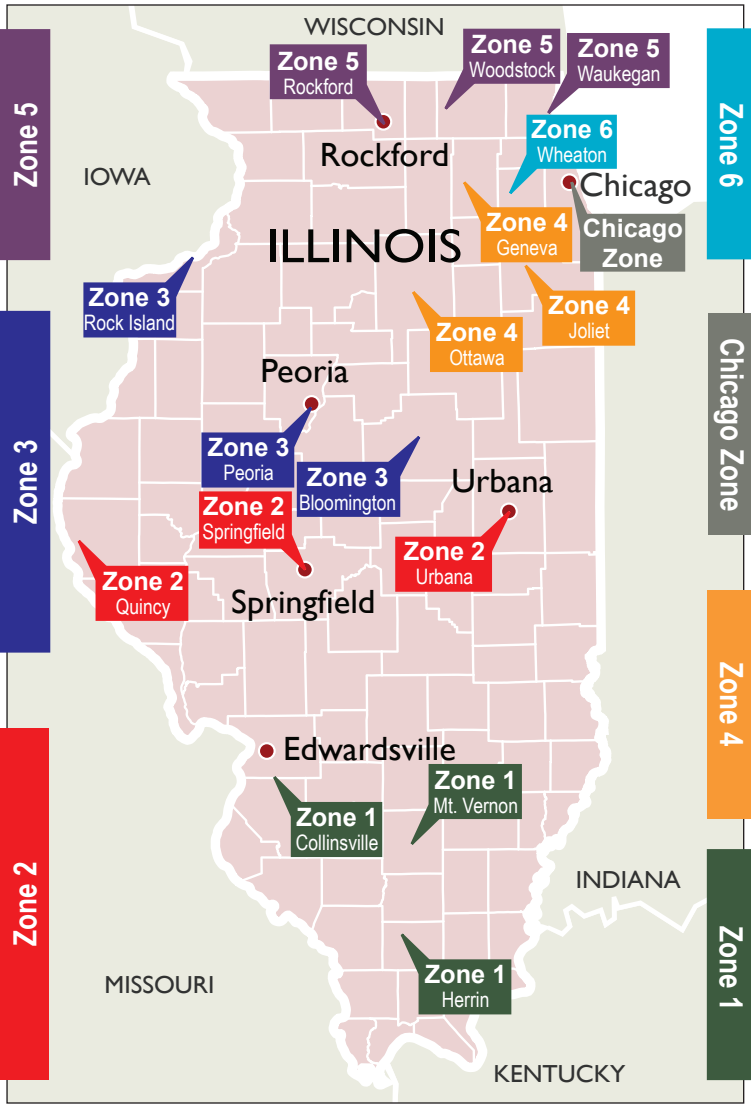

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