



## **Death Claims in Workers' Compensation**

We all know that it is coming. Not one person who ever lived has avoided death. Yet, it is always met with some element of surprise. It elicits a range of emotion that is difficult to describe and creates the urgent need to perform tasks that are foreign to our everyday lives. Funeral arrangements, meeting with advisors, lawyers, accountants, friends, relatives, searching for documents and pictures, going through belongings and determining what to do with possessions. It is a very busy time for those left behind and creates tremendous stress that must be dealt with along with the mourning process. Each person that dies has touched many others and is entangled in different ways with people and organizations all of whom have responsibilities and concerns for the future without their family member, friend, co-worker or advisor.

Questions usually arise about the cause of death and who may be responsible especially with younger people that leave too soon. We spend many hours working and the likelihood is that unless retired from work, when we die, the workplace will be examined for some measure of responsibility. A death can be completely unconnected to the workplace, questionably related to the workplace or definitely related to the workplace. There are many, many ways a person can die, heart attack, cancer, car accident, industrial accident, infection, exposure, suicide, and on and on.

### **Elements – in the course of employment**

In order for an injury or death to be related to work, it must have arisen out of the employment and have been in the course of employment. In the course of employment refers to a time, place and circumstance. In today's society the workplace seems to reach endlessly into our non-work lives. Cell phones, blackberrys and the like can create an "in the course of" employment scenario where it might not be readily apparent in the traditional sense. Arising out of employment requires a showing that some act or phase of the employment was a causative factor. Both elements are required. Therefore, just because someone is at work when they die does not automatically make the death related to work. However, there is a very good chance that the family will start asking questions.

It is also true that a death occurring outside of normal work hours, may be compensable. If something occurs at work that causes symptoms eventually leading to death, the claim may still be compensable. Along those lines, a suicide, which is the ultimate intentional act, would seem far outside the work related arena. However, if a work-related injury caused the employee to be in tremendous pain that lead to the decision to commit suicide, it is possible for the courts to find a causal relation to the workplace. Please keep in mind that there needs to be proof that the

suicide is related to the employment. Generally, a suicide note claiming the reason for the suicide is necessary but it is also possible that testimony from others could establish the connection. In Harper v Industrial Com., 24 Ill.2d 103 (1962) the Supreme Court of Illinois found a suicide compensable. The worker suffered a serious back injury at work, and he required an operation. Following the injury, the worker's jolly disposition changed, and he complained of pain. After returning to work about nine months later, the worker left a note stating that he had a good wife and child, but he was just in pain. Thereafter the worker committed suicide. A psychiatrist testified that injury caused severe chronic depression. Upon appeal, the lower court's award to the widow was affirmed. The court held that when a first cause produces a second cause that produces a result, the first cause is the cause of that result. Thus, the suicide was a result of the work injury. The court further ruled that it was unnecessary to identify the precise mental state that caused the worker's suicide because there was a clear connection between the injury, the pain, and the ultimate suicide. The court held that it was not required to determine whether the suicide was the result of an uncontrollable impulse or a delirium of frenzy. Suicide without proof of a connection to the employment is not compensable as it is an intentional and deliberate injury, not accidental. But, recent appellate cases on intervening accidents have reiterated the Supreme Courts causation analysis in Harper, see Vogel v. Ill. Workers' Comp., 354 Ill.App.3d 780 (2d Dist. 2005). Nevertheless, given the past decisions on mental injury in Illinois, it is probably not enough to show that menace or stress at work leading to a suicide creates a connection to the employment unless the stress is extraordinary and far greater than one experiences in everyday life. However, the door was left open by the Supreme Court of Illinois in Goldsamt v. Industrial Com., 93 Ill.2d 115, 121 (1982), where the Court found a suicide attempt not compensable. "The problem here, however, is not the absence of physical injury, for we have severe injuries; rather, the question is one of causation. Was claimant's attempted suicide prompted in whole or in part by anxiety regarding the proposed changes in working conditions or is it reasonable to believe his depression may have resulted from causes other than those which were employment related? The arbitrator and Commission both found the latter to be the fact, and the only question before us is whether that finding is contrary to the manifest weight of the evidence. The trial judge held it was not, and we agree."

In the case of exposures, a death can occur well after a person stops working and may be related to the exposure while at work. However, a claim will be denied unless the Petitioner can show disablement within two years (three years if related to asbestos) of the last exposure as outlined in the Illinois Occupational Disease Act. The issue before us is whether a death claim for an asbestos-related occupational disease is barred when filed within three years from the date of death and within 25 years from last exposure when there is no disablement within three years following the date of last exposure. In Goodson, the court held that sections 1(f) and 6(c) of the Act must be read in conjunction and that merely filing an application within the appropriate number of years after death and exposure under section 6(c) is not sufficient if the employee does not establish disablement following last exposure within the applicable period prescribed under section 1(f). Goodson v. Industrial Com., 190 Ill.App.3d 16 (1989), Whitney v. Industrial Com., 229 Ill.App.3d 1076, 1077 (1992).

## **Elements – arising out of employment**

The arising out of employment requirement, or causative factor, is center stage in heart attack cases. In Sisbro, Inc. v. Industrial Com., 207 Ill.2d 193 (2003), the Supreme Court found that a "limitation" on the general rule that compensation is available to a claimant as long as a work-related injury was a causative factor in the aggravation or acceleration of a preexisting condition.

In National Malleable & Steel Castings Co. v. Industrial Com., 32 Ill.2d 184 (1965), an employee died of a heart attack. The employee's widow then filed a workers' compensation claim alleging that the employee had sustained accidental injuries which arose out of and in the course of his employment and that there was a causal relationship between the alleged injuries and the employee's subsequent heart attack and death. Evidence was presented which established that although the employee reported to work on the alleged day of the "accident," he had been sent home before he began his shift because he did not feel well. After leaving work, the employee went to a medical center, where he saw a doctor and reported that he had been having chest pains over the previous four-day period. The doctor prescribed some medication. After filling the prescription, the employee returned home and went to bed. He was found dead the next morning.

A physician who was called as a medical expert in support of the claim, gave the opinion that the employee showed definite signs of heart disease over the four-day period prior to his death and, as a result, any exertion such as walking up and down stairs, driving to work, or going to the doctor's office, could have precipitated his fatal heart attack. Since the employee had performed these activities on the workday prior to his death, the expert concluded that the employee's cause of death "was 'involved' with the decedent's final work episode." The Supreme Court rejected this opinion and found no causal relationship between the employee's fatal heart attack and his employment. Quoting a New York case, Burris v. Lewis, 2 N.Y.2d 323, 326 (1957), the court said, "But where, as here, a heart has deteriorated so that any exertion becomes an over-exertion, where the mere circumstance that the employee was engaged in some kind of physical labor is what impels the doctor to testify that his work caused his death, we would have reached a point, if this award were to be upheld, where all that is necessary to sustain an award is that the employee shall have died of heart disease."

Similarly, in Illinois Bell Telephone Co. v. Industrial Com., 35 Ill.2d 474 (1966), an employee died at home as a result of a heart attack. The only connection between the employee's heart attack and his employment was that, earlier on the day of his fatal attack, the employee had walked four blocks to deliver some papers and, upon returning to his office, felt ill and took a nitroglycerin pill. Two doctors testified that there was a causal connection between the employee's work activities and his subsequent death, "basing their opinions on the fact that [the employee] had a pre-existing heart condition and that walking magnified the work effort." Id. at 476. However, the Supreme Court found the work connection too tenuous. Citing to National Malleable, the court said: "The mere fact that he was at work on the day of his heart attack and left early is not sufficient to establish a causal relationship between his employment and his subsequent death, nor is it enough, where one's heart has deteriorated so that any exertion becomes an overexertion, to merely show that he had engaged in some kind of physical activity before suffering the attack." Id. at 477.

Notably, in Rock Road Construction Co. v. Industrial Com., 37 Ill.2d 123, 127 (1967), the Supreme Court distinguished National Malleable and Illinois Bell. In Rock Road, the claimant

was an asphalt truck driver who, after making a pickup, died at the wheel of the delivery truck. Claimant's expert expressed the opinion that the decedent's duties were in connection with climbing upon the truck and rolling the tarpaulin up and down on the day of his death and were sufficient to precipitate his fatal heart attack. Although the employer provided three medical experts, they could not agree on what had precipitated the claimant's heart attack.

On review, The Supreme Court rejected the employer's contention that claimant's condition had so deteriorated that any activity might have precipitated the attack, stating: "[T]he normality of the activity involved for the victim of a heart attack is not the controlling factor in these cases. It seems likely from this record that the ultimate result of decedent's heart condition would have been death at some indeterminate future date. It is, of course, possible that this could have occurred in a situation wholly unrelated to work or exertion. But neither of these circumstances necessarily renders an award of compensation against the manifest weight of the evidence if it may be legitimately inferred from the evidence before the Commission that occupational activity or exertion was in fact a causative factor in hastening decedent's death." Rock Road Construction, at 128.

National Malleable and Illinois Bell do not stand for the proposition that where a causal connection between work and injury has been established, it can be negated simply because the injury might also have occurred as a result of some "normal daily activity." Rather, these cases demonstrate that whether "any normal daily activity is an overexertion" or whether "the activity engaged in presented risks no greater than those to which the general public is exposed" are matters to be considered when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance. The Supreme Court has never found a causal connection to exist between work and injury and then, in a further analytical step, denied recovery based on a "normal daily activity exception" or a "greater risk exception." Sisbro, at 212.

As evident from the Court's musings above, an investigation is essential when an employee dies, to sort out, rule out or rule in, the possibility of a potential claim. If the death occurred on the job, witness statements must be taken precisely and timely to obtain fresh and accurate information on what exactly the employee was doing at the time of decease and in the week or so prior to the death. Clearly OSHA rules make it difficult to ignore an investigation if the death occurred at work. If the death is likely related to work or questionably related to work, medical records need to be obtained, and dependents or heirs need to be identified. Exactly what the deceased was doing at the time of the death needs to be explored as well as other things going on. For instance, an act of random violence causing a death is not generally thought of to be a risk inherently related to work but a risk that all of us face from time to time and therefore, not compensable. It must also be determined if intentional activity may have contributed to or caused the decease such as impairment through drugs or alcohol. Other factors which may affect compensability include the previous health of decedent and complaints prior to death which bear on the cause of death. Remember that widows or widowers are sympathetic witnesses; therefore make sure you document your investigation thoroughly.

## **Necessary Documents**

As in all workers' compensation cases, it is the Petitioner's burden of proof and therefore, they must provide certain documents in order to establish their case. Certainly a death certificate is necessary to establish the death and an autopsy, if performed, is also a good way to obtain an independent opinion on the cause of death. It is rare that an autopsy states a causal connection to the work place but it should identify the medical cause of death and may provide additional information to base a defense to causation.

A good practice to follow is to issue a questionnaire to all known relatives to determine not only their status as dependents but also to obtain information regarding other potential dependents. Issues relating to the spouse may arise. First, there may be an issue as to whether a valid marriage existed between the spouse and the decedent. On some occasions, multiple individuals may claim to be married to decedent.

Common law marriages are not recognized in Illinois but Illinois will recognize a common law marriage from another state. Obtaining an official marriage certificate(s) is a must. Do not rely on religious certificates of marriage. A flipside of this issue is whether a valid divorce was entered. Therefore, obtain divorce papers for the deceased and former spouse.

Next, obtain the official birth certificates of all minor children. There may be children not living with the deceased who are still entitled to benefits, as well as adopted and unborn children who exist at the time of death. Birth certificates for all individuals claiming to be children are critical.

### **Determine the Death Benefit**

Section 8(b) of the Act seems to indicate that workers' compensation benefits are not to exceed the average weekly wage. However, the weekly benefit in death claims is calculated like the TTD benefit (66-2/3% of the employee's average weekly wage) subject to the maximum TTD benefit and a minimum of one-half the statewide average wage.

Paragraph 4.1 of section 8(b) indicates that the minimum weekly compensation rate for death cases must not be less than 50% of the state average weekly wage. Thus, the minimum changes as frequently as the maximum TTD rate changes. Total compensation payable for death cases before February 1, 2006 is a minimum of \$250,000 or 20 years of death benefits whichever is greater; on or after February 1, 2006 death benefits were increased to \$500,000.00 or 25 years of benefits, whichever is greater.

For the widow(er), Section 7 states that the death benefit is payable during the life of the widow(er) until death. If they remarry, and have no children, then they are entitled to a lump sum benefit equal to 2 years of compensation benefits. This lump sum extinguishes their further rights. If the widow(er) has children from the decedent, then even if the widow(er) remarries, benefits are payable until the youngest dependent child reaches the age of 18 or until the widow(er) dies, whichever comes later. A child under 18 at the time of death is eligible to receive benefits for a period of not less than 6 years, and if a child is enrolled as a full-time student, payments continue until the child turns 25. If a child is physically or mentally

incapacitated (incapable of engaging in regular and substantial gainful employment), payments must continue for the duration of the incapacity.

Children eligible to receive benefits under paragraph (a) are defined as children that the deceased left surviving, including a posthumous child, a legally adopted child, a child whom the deceased was legally obligated to support or a child to whom deceased stood *in loco parentis*. Faber v. Illinois Workers' Compensation Commission, 352 Ill. 115 (1933). The Illinois Supreme Court has also held that a moral duty to provide support is recognized. Superior Coal v. Illinois Workers' Compensation Commission, 304 Ill. 320 (1922). Nonetheless, keep in mind that the total compensation payable for the death benefit is a minimum of \$500,000 or 25 years of benefits whichever is greater, and this applies to any and all dependents.

Parents of the decedent may receive benefits only if they are totally dependent upon the earnings of the decedent. Grandparents, grandchildren or collateral heirs must establish dependency upon the decedent's earnings to the extent of 50% or more of total dependency to receive 5 years of benefits.

Death benefits provide some of the most complex legal issues and calculations in Illinois workers' compensation. Due to the high reserves and potential payout, it is critical to know and understand the rules and details with regard to such claims to be confident that you are accurately paying benefits. For instance, if an illegally employed minor dies, the benefit is increased by 50% under Section 7(h). Additionally, if payments are to be made to nonresident alien dependents, the amounts to be paid are reduced 50% but only for payments outside of North America. Full benefits must be paid even if the dependents are living in Mexico or Canada under Section 7(i).

## **Dependency**

A more complex issue arises when the decedent leaves no surviving widow(er) or children. In that event, Section 7 provides for a descending order or list of beneficiaries.

Dependency must exist at the time of the injury. L.M.&O Motor Co. v. Illinois Workers' Compensation Commission, 335 Ill. 254 (1929). It is not necessary to show that the claimant would have been without means of support; the test with regard to contributions of dependency looks to whether contributions were relied upon by the applicant for their means of living and whether applicant was substantially supported by the decedent at the time of the latter's death. Roseberry v. Illinois Workers' Compensation Commission, 33 Ill.2d 250 (1965).

If no widow(er), children or totally dependent parents exist then benefits go to children who would not otherwise take under paragraph Section 7(a) and are in any manner dependent or whose parents are partially dependent upon the earnings of the decedent. These individuals are entitled to 8 years of benefits. Interpretations of clauses of the Act like "in any manner dependent" or "partially dependent" are factual questions and therefore you may need a hearing before the Commission to determine the apportionment.

## **Beneficiary Eligibility**

Upon the death or ineligibility of any one member of the class of dependents entitled to compensation, the remaining members of the class succeed to the balance of the award and the employer is liable to pay the full amount of the award as long as there are any members of the class entitled to it. Beckemeyer Coal Co. v. Illinois Workers' Compensation Commission, 370 Ill. 113 (1938).

## **Burial Expense**

The burial expense is \$8,000.00. The employer is also obligated for TTD and medical expenses during the life of the decedent, if the latter lived for a period following the accident.

## **Petitioner Attorney's Fees**

In an undisputed death claim, attorneys' fees are \$100.00 by law. In a disputed claim, fees are still limited to 20% of 7 years of benefits unless otherwise approved by the Commission.

## **Survival of Action after Death**

With respect to the survival issue, two sections of the IWCA may have some application, Section 8(e)19 and Section 8(h).

**§8(e)19:** In a case of *specific loss* and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before payment or payment in full for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency.

**§8(h)** In case death occurs *from any cause* before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, parent (or any grandchild, grandparent or other lineal heir or any collateral heir dependent at the time of the accident upon the earnings of the employee to the extent of 50% or more of total dependency) such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7.

The old general rule was that a specific loss (injury to the arms, hands, legs or feet) survived a subsequent unrelated death pursuant to Section 8(e)19 but a "man as a whole" injury (back, torso or head) did not survive. However, in *Electro-Motive*, the Appellate Court applied a "man as a

whole” case (non-specific loss) to section 8(h) finding that benefits did not abate at the death of an employee for unrelated causes. Electro-Motive v Industrial Com., 250 Ill.App.3d (1993). In fact, Respondent stopped payments at the date of death and the court awarded penalties for failure to pay the full award of the arbitrator. While in *Electro-Motive*, an Application was filed before the employee died, the reasoning would seem to apply had an Application been filed by heirs or an estate after the decease.

Although the Illinois Workers’ Compensation Act only refers to decedents and heirs as proper beneficiaries in the event of a death, the Illinois Supreme Court in Republic Steel Corp. v. Industrial Com., 26 Ill.2d 32 (1962), found that accrued benefits as of the date of death were assets of the estate.. The Commission awarded the injured worker TTD benefits and a permanency award payable in annual installments. Id. at 34-35. The injured worker died while the employer’s appeal to the circuit court was pending. The circuit court then entered an order substituting the estate for the deceased worker, and ordered the employer to pay the estate the amount of compensation accrued as of the date of death. The court abated the portion of the permanency award due after the date of death. Id. at 36. On appeal, the employer argued that the estate had no standing to collect any benefits, which could only be paid to dependents, and thus all benefits should have been abated. Id. at 37. However, the Supreme Court rejected that argument, noting that benefits which accrued up to the date of death were payable to the estate, regardless of dependency, while benefits which did not accrue until after the date of death were abated. Id. at 46. This ruling was later followed by the Appellate Court First District in Nationwide Bank & Office Management v. Industrial Com., 361 Ill.App.3d 207 (2005).

The previous case of Electro-Motive suggests that an estate can collect benefits that were awarded even if after the date of death. Remember, however, that cases tried after the death of the injured party present a proof problem for a Petitioner. All issues can be settled on a compromise basis, the evaluation of whether to proceed to trial or not should take into consideration the burden of proof and likelihood that Petitioner can establish all elements of the case.

A claim brought under section 8(e)19 still requires a finding of dependency for beneficiaries other than a widow or widower. We typically see such dependents as children but it is likely that any person that can establish they were dependent financially on an injured worker would be in line to collect if the proof problems are overcome. The Appellate Court in Divittorio v Industrial Com., 299 Ill.App.3d 662 (1998) very liberally construed what was necessary to prove dependency by stating that the Petitioner must only prove a “reasonable expectation of support” existed when the decedent died. To determine whether there was a “reasonable probability” that decedent would support the petitioner one must look to the *totality of the circumstances* existing before the decedents death including the length of time of the support or lapse of support, the mutual attitudes and financial abilities of the parties involved.

Any time the court points to the totality of the circumstances, we know that they are leaving tremendous discretion to the arbitrators, commissioners and judges in determining the issue. The language of Section 8(e)19 was not altered in the 2006 amendments and therefore the expectation is that the courts will continue to liberally construe the dependency requirements. In summary, it appears that an estate can be a proper party at least to the extent of benefits accruing

before the decease and that all injuries can survive the death of the injured worker for remaining benefits if there is a widow, widower or dependents.

### **Life Insurance in Lieu of Workers' Compensation.**

Section 4(i) of the Illinois Workers' Compensation Act allows an employer to elect to obtain a life insurance policy on his employees and apply the benefits to a payout for the death of the employee. In theory, this would replace or reduce the amount due under the Illinois Workers' Compensation Act in the event of the death of an employee.

If purchasing life insurance on an employee that is intended to replace any death benefit of the IWCA, it is recommended that the language stating so be very clear. The life insurance policy itself should state that the proceeds of the life insurance policy are to be paid in lieu of workers' compensation. If an employer intends for the policy to fully cover the exposure under workers' compensation then it is recommended that the benefit level equal or exceed the amount to be paid under the IWCA. As noted above, the minimum payout is \$500,000.00 but the amount can be far greater as it is based on 25 years of payments at the death benefit rate. The maximum death benefit through December 31, 2008 is \$1,216.75 per week or \$1,581,775.00 if paid out each week for 25 years. The next consideration is whether the life insurance premium is less expensive than the workers' compensation premium during the period of time the insurance is in place.

Finally, consideration should be given to providing notice to an individual who is going to receive life insurance in lieu of workers' compensation and even have them sign an acknowledgement of the arrangement to avoid a later dispute.

### **Conclusion**

Anytime a death occurs there are many things to think about; the last of which is probably the need to investigate the incident thoroughly to evaluate or control a workers' compensation potential claim. However, it is important to conduct such an investigation with some knowledge of the courts tendencies and the laws to be applied. Just as in any other work related injury an employer should have a checklist of items to cover immediately to be able to make decisions on what further things need to be done and how to respond to questions from family or attorneys representing the family. It is a good idea to have your own counsel to discuss the matter and investigation to be conducted in order to make sure that your efforts lead to usable information. Insurance adjusters and brokers are also good sources of information to start the process.