

# BELOW THE RED LINE

HEYL ROYSTER

## WORKERS' COMPENSATION UPDATE

"WE'VE GOT THE STATE COVERED!"

*A Newsletter for Employers and Claims Professionals*

*December 2014*

### A WORD FROM THE PRACTICE GROUP CHAIR

Welcome to the December edition of *Below the Red Line*, Heyl Royster's regular workers' compensation update. We hope your holidays are joyous, and the season provides you with some rest and relaxation. We all need to be rejuvenated as we head into the new year.

In this edition we touch on one of the most newsworthy issues of 2014: immigration. The political issues surrounding those who live and work in this country illegally certainly have received much attention recently. Like so many other important issues, the connection to Workers' Compensation cannot be ignored. The compensability of workers' compensation cases filed by undocumented workers has been a controversial topic in the case law and statutes of virtually every state.

It will probably come as no surprise that Illinois law treats the undocumented injured worker very favorably. In this month's feature article, Brad Elward and Dana Hughes outline the current state of Illinois' approach to this issue. Of course, the ongoing difficulty created by the *Interstate Scaffolding* case has an impact on the payment of benefits to these workers. There are a number of strategic decisions which come into play in cases involving undocumented workers. Feel free to contact any of our attorneys if you are addressing these issues.

Please accept our warmest wishes for a joyous holiday season. We look forward to working with you in 2015.

Best regards,



Craig S. Young  
Chair, WC Practice Group  
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### New Acting Commission Chair

Governor Quinn has appointed Ronald A. Rascia as Acting Chairman. Chairman Rascia first joined the Commission in 2011 as General Counsel, and later added the duties of the Secretary of the Commission. Chairman Rascia worked for the Illinois Attorney General for nine years as a supervising attorney in the General Law Bureau, where he defended State agencies in state and federal courts. As an attorney in the private sector, he served as General Counsel to Northwestern Golf Company and Platinum Financial Group. Chairman Rascia earned a B.A. in Economics from DePaul, and both a J.D. and L.L.M. in Intellectual Property from John Marshall Law School. Former Chairman Michael Latz resigned on November 30th.

### 2015 Arbitration and Commission Hearing Dates

The Commission has release the dates for 2015, which are available here: <http://www.iwcc.il.gov/calendars.htm>

### *In this issue . . .*

Benefits and Undocumented/Illegal Workers

# HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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Brad Elward, Editor

## BENEFITS AND UNDOCUMENTED/ ILLEGAL WORKERS

Illinois law, as reflected in the Workers' Compensation Act, case law, and Commission decisions, places an alien worker on the same footing as fully-documented U.S. workers with the exception of death benefits payable to beneficiaries not living in the United States, Mexico, or Canada.

Section 1(b)2 of the Act specifically defines an "employee," as meaning, "(2) [e]very person in the service of another under any contract of hire, express or implied, oral or written, ... including aliens ... ." 820 ILCS 305/1(b)2.

The Commission decisions have interpreted this definition to encompass those illegal workers who were working here in the United States and have held such workers are entitled to benefits under the Act. See, e.g. *Tamayo v. American Excelsior and Labor World, Inc.*, 99 IIC 0521; *Lopez v. AGI Media*, 07 ILCW 21879; *Miezio v. Z-Wawel Construction*, 00 IIC 0341.

The implications of these cases for Illinois employers are clear – all illegal aliens are considered employees entitled to benefits. *Zendejas v. J&J Bros. Constr.*, 09 IWCC 0650. The employee's illegal or undocumented status is irrelevant.

### What Benefits are Recoverable?

Concerning the entitlement to benefits, the decisions have been few and far between, but generally speaking, temporary total disability, medical and permanency benefits are available to an undocumented/illegal worker.

The leading Illinois case is *Economy Packing Co. v. Illinois Workers' Compensation Comm'n*, 387 Ill. App. 3d 283 (1st Dist. 2009), where the appellate court held that an undocumented alien could receive TTD and permanent total disability (PTD) benefits from any employer despite the fact that federal law (the Immigration Reform and Control Act of 1986 (IRCA) – 8 U.S.C. § 1324a et seq) prohibited potential employers from hiring undocumented aliens. The employer had argued that because of the illegal's employment status, she was unemployable in the United States.

The appellate court first concluded that the IRCA did not preclude an award of PTD benefits. Second, the court concluded that "the traditional test to determine whether an employee falls into the 'odd-lot' category cannot be applied to undocumented aliens," because an alien would always be able to demonstrate that no work was available due to her illegal status. *Economy Packing Co.*, 387 Ill. App. 3d at 293-294. According to the court, "an undocumented alien may establish that she is permanently and totally disabled under an 'odd-lot'

doctrine, so long as her employability is not based upon her immigration status." *Id.* at 294.

The *Economy Packing* court pointed out that the issue was one of first impression in Illinois, and as a result, consulted a non-Illinois decision from North Carolina for guidance (*Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346 (2002)), then concluded that once the undocumented worker demonstrates that she cannot sustain regular employment in a well-known branch of the labor market without regard to her undocumented status, the burden then shifts to the employer to produce sufficient evidence that suitable jobs would regularly and continuously be available to the undocumented alien but for her legal inability to obtain employment.

The *Economy Packing* court concluded that the evidence was sufficient to show that the claimant was unable to work, and that none of the consulted vocational experts considered the claimant's immigration status when proffering their opinions. Thus, in the end, the employer was required to approach the case in a very similar manner as it would a traditional U.S. citizen or otherwise properly documented worker, and to establish through competent evidence that the worker's condition permitted certain levels of work and that such work was available. In some respects, this burden is lesser when dealing with undocumented workers because there is no requirement that the employer actually attempt to place the worker in alternative employment.

In a footnote the court noted the employer had argued the traditional "odd-lot" test could not be applied to an undocumented alien because a lawful employer could not mitigate its damages either by returning the injured employee to work in a modified capacity or providing job placement services, without violating IRCA. The court said the Commission had not addressed this point, and further that it did not need to address this point, because the claimant had been found to be incapable of returning to work, and "[c]onsequently, the issue of mitigation is not relevant to the facts of this case." *Economy Packing Co.*, 387 Ill. App. 3d at 294.

This language was seized upon by the Commission in *Lopez*, where the Commission denied a wage differential in favor of a PPD award. The Commission observed that, "[b]y basing a wage differential award on a job in the U.S., [it] would presuppose that petitioner would actually be able to take the employment offered. However, petitioner is an undocumented worker. The Arbitrator is unwilling to sanction the illegal employment of the petitioner." *Lopez*, 07 ILCW 21879, at 48 (citing *Miezio v. Z-Wawel Construction*, 00 IIC 0341).

In *Tamayo v. American Excelsior and Labor World, Inc.*, 99 IIC 0521, the Commission found that claimant was entitled to

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vocational rehabilitation and retraining to allow her to return to work as a secretary in any country where she would be legally entitled to earn wages. "The Arbitrator takes judicial notice that, in general, wages in Mexico are lower than those in the U.S. The Arbitrator draws the reasonable inference that it follows from *Tamayo* that, *ceteris paribus*, an undocumented worker from a lower-wage country, whether or not he or she returns to work in the homeland, would be entitled to a greater wage differential award than would a properly documented worker." *Lopez*, 07 ILWC 21879, at 48-49.

As a result, the Commission, which adopted the arbitrator's findings, upheld the concept of awarding PPD benefits, but reversed the PPD award in total because it found no evidence of disability.

In *Miezio*, the Commission side-stepped the question of whether, as a matter of law, the fact that a claimant cannot legally be employed in this country absolutely precluded an award under Section 8(d-1) of the Act, noting instead that it is a factor to be considered in the totality of evidence.

## Is the undocumented/illegal worker entitled to TTD benefits if terminated because of his or her illegal status?

Following the Illinois Supreme Court's decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010), which held that an employee terminated for cause was entitled to receive TTD benefits until he reached maximum medical improvement. The Commission in *Rosas v. GM Warehouse, Inc.*, 12 IWCC 0419 (April 23, 2012), held that an illegal alien, who could not return to work for his former employer because prohibited from working by federal law, was nevertheless entitled to receive continued TTD benefits the same as a worker on restrictions who is discharged for cause.

According to the Commission, the claimant "was allegedly terminated because he was unable to provide a valid social security number. If [the claimant] did not have a valid social security number, his continued employment ... by Respondent would be a violation [of] 8 U.S.C.S. § 1324 a(a)(2)." *Rosas*, 12 IWCC 0419, \*14. The Commission rejected the argument by the employer that there was a valid reason for discharge, namely, the claimant's inability to be employed due to federal law, noting, "the reasoning for [the claimant's] discharge is immaterial to the issue at hand. The only material question is whether [he] was at MMI. It is clear from the medical records ... and Respondent's Section 12 report that [the claimant] was not at MMI ... ." *Id.*

## Conclusions

Given the language of the Illinois Act and the *Economy Packing* case, it is clear that undocumented/illegal workers are employees under the Act. Moreover, with respect to most benefits, the undocumented/illegal worker is likewise entitled to medical and TTD benefits, and permanency benefits, although the latter has some limitations.

## Death Benefits

As noted, death benefits are limited based on the recipient's location. When the dependents of a deceased employee are aliens not residing in the United States, Mexico, or Canada, the amount of compensation payable is limited to the beneficiaries described in paragraphs 8(a)-(c), and is 50 percent of the compensation provided therein. Section 8(a) applies to the widow, widower, and children, section 8(b) applies to totally dependent parents, and section 8(c) applies to partially dependent parents and children. 820 ILCS 305/7(i).

## PTD and Wage Differential Benefits

Permanent total disability and wage differential benefits are treated slightly different, based on the difficulties associated with presenting the claimant with alternative job market options.

Handling PTD and wage differential cases requires a multi-faceted approach. First, as a matter of law, a wage differential award should not be available to an undocumented worker because of the difficulty in establishing alternative employment. Instead, it should be argued that a PPD award is best suited for undocumented/illegal workers. *Lopez*, 07 ILWC 21879, at 48-49.

Second, if a wage differential award is not prohibited as a matter of law, then it should be defended by pointing to available work in the abstract, apart from whether the claimant, as an illegal alien, could actually obtain the employment.

Third, a PTD claim should be defended by showing the availability of work within the claimant's restrictions, as happened in *Economy Packing Co.* Again, by not having to show that the work is actually available should place employers in an easier position versus documented workers.

If you have any questions concerning claims by undocumented/illegal workers, please feel free to contact any of our attorneys across the state.

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*December 2014*

*Brad Elward, Editor*



## **Brad Elward - Peoria Office**

Brad concentrates his work in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 275 briefs and argued more than 200 appellate court cases, resulting in more than 86 published decisions.

Brad is the Immediate Past President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law.

Brad was recently published in Volume 101, No. 12, of the Illinois State Bar Journal, where he wrote on the subject of the Supreme Court's recent mailbox rule decision and its application to workers' compensation judicial reviews.



## **Dana Hughes - Rockford Office**

A native of Rockford, Dana has been an associate in our Rockford office since 2006. She represents employers before arbitrators and commissioners of the Illinois Workers' Compensation Commission and before the circuit court in third party liability claims. Dana has also represented businesses in subrogation matters, and has defended businesses and individuals in automobile negligence and premises liability actions. Her writing has been published in the Northern Illinois University Law Review and Kane County Bar Association newsletter. Dana has presented before the Illinois State Bar Association's Insurance Law Section and contributes to Heyl Royster's annual claims handling publication. Dana serves on the Winnebago County Bar Association's Board of Directors and volunteers as an arbitrator in the 17th Circuit's court-annexed arbitration system.

## *Practice Tip . . .*

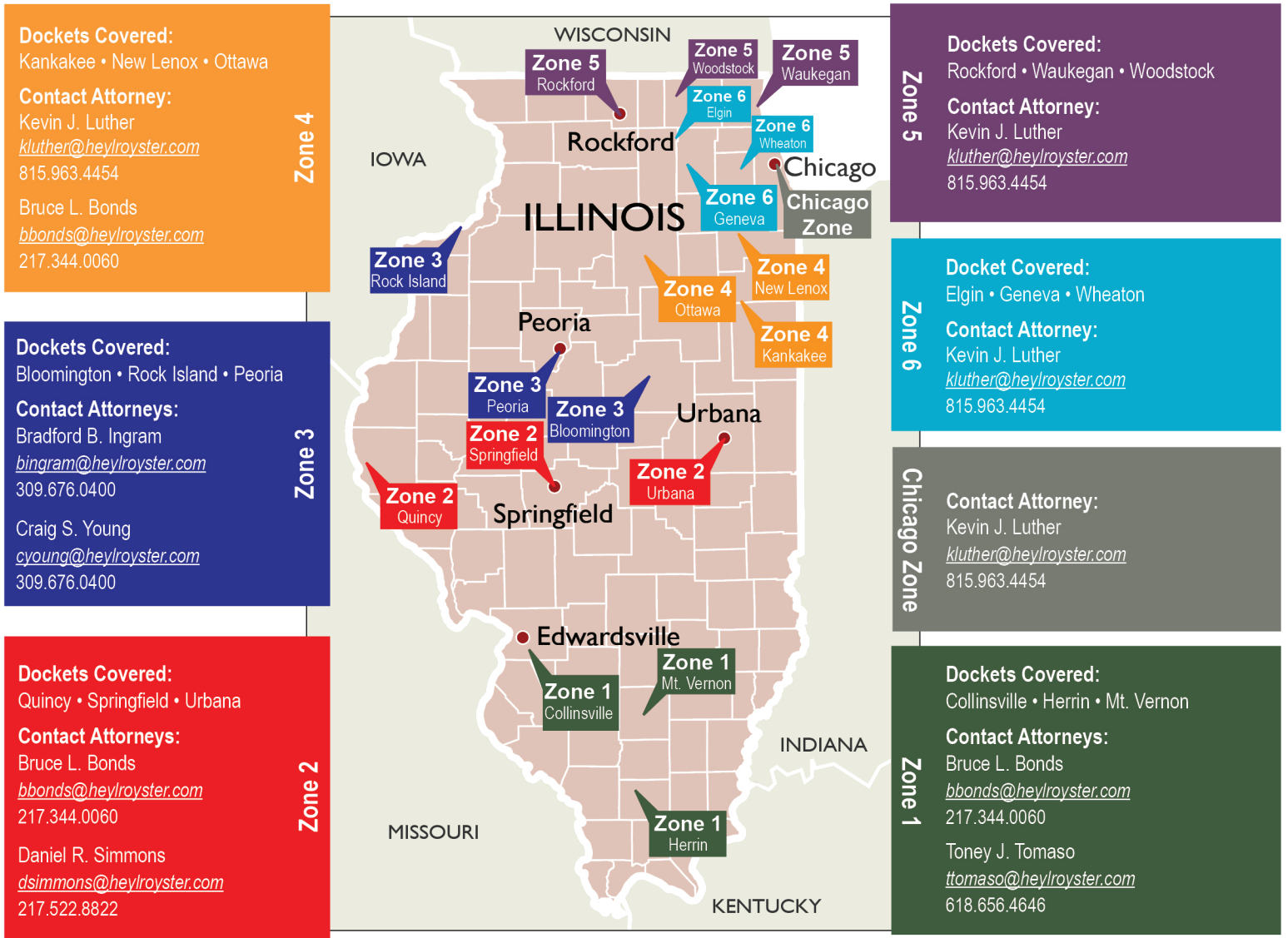
- **Keep in mind when you are corresponding with counsel that copying a nurse case manager or voc rehab specialist on an e-mail may destroy the attorney/client communication privilege.**



# WORKERS' COMPENSATION GROUP

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