

BELOW THE RED LINE

HEYL...
ROYSTER

WORKERS' COMPENSATION UPDATE

"WE'VE GOT THE STATE COVERED!"

A Newsletter for Employers and Claims Professionals

November 2012

A WORD FROM THE PRACTICE GROUP CHAIR

We hope you enjoy this month's edition of Below the Red Line. In this issue, we follow up on some fraud issues we reported to you last year. As you know, the 2011 amendments included changes to the statute effecting fraud claims, and we also believe there is a changed attitude with the Workers' Compensation Commission Fraud Unit which could result in greater focus on fraudulent claims. Brad Antonacci of our Rockford office has recently received updated information on the fraud claim he handled which gives one example of increased scrutiny on fraudulent activities. Brad not only outlines the details of that case, but also offers from his experience some practical advice on issues to address when fraud is suspected. We hope you find this information helpful as we continue in our effort to fight and reduce fraudulent claims.

This fraud issue is just one example of emerging trends we are seeing as the 2011 amendments continue to be interpreted by the Commission. We are regularly meeting with clients to provide updates on the statutory changes and would be happy to meet with you to provide such an update. If this would be helpful for you in the management of your claims, please do not hesitate to contact me.

I would also like to announce, as you can see from the box on this page, that my partners, Bruce Bonds of our Urbana office and Kevin Luther of our Rockford and Chicago offices, have recently

published an updated edition of their book on Illinois Workers' Compensation Law for West Publishing. This updated edition includes case law developments and an extensive discussion of the 2011 Amendments to the Illinois Workers' Compensation Act. Our firm is proud of the work Bruce and Kevin have done on this updated edition, as this West publication continues to represent the definitive treatise on Illinois workers' compensation law.

Again, we hope you enjoy the information in this issue.



Craig S. Young
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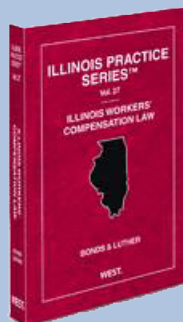


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Appellate Court News

Heyl Royster is pleased to announce that two of our partners, Bruce Bonds and Kevin Luther, have authored Illinois Workers' Compensation Law, 2012-2013 edition (Vol. 27, Illinois Practice Series, West). The book, which can be obtained at store.westlaw.com, provides a full overview of Illinois Workers' Compensation law and practice including the 2011 Amendments to the Illinois Workers' Compensation Act, and is a "must" for risk managers and claims professionals.



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Brad Elward, Editor

WORKERS' COMPENSATION FRAUD – UPDATE

by Brad Antonacci - Rockford Office

In our July 2011 issue of [Below the Red Line](#), we reported on the beginning stages of a fraud investigation based on potentially fraudulent claims brought by a claimant in one of our files. The claimant in that file was just recently arrested and charged with workers' compensation fraud, aggravated fraud, insurance fraud, and perjury, not only with respect to our claim but also regarding two additional claims against her two subsequent employers. In this article we discuss the changes to the workers' compensation fraud provision, provide detail with respect to the fraudulent claims brought by the claimant in one of our files, we again provide the complaint checklist provided by the Workers' Compensation Fraud Unit (WCFU) for matters that may involve fraud perpetuated by a claimant, and provide several tips for investigating and exposing possible fraud in workers' compensation claims.

September 2011 Changes to the Fraud Provision

The 2011 Workers' Compensation Act amendments made several changes to the fraud provision of the Act, Section 25.5. Expanding on those unlawful acts previously noted in Section 25.5 as enacted in 2005, it is now unlawful for any person, company, corporation, insurance carrier, healthcare provider, or other entity to intentionally present a bill or statement for the payment for medical services that were not provided. 820 ILCS 305/25.5.

Sentences for violating this section are as follows: If the value of the property is \$300 or less, it is a Class A misdemeanor; if the value of the property is more than \$300 but not more than \$10,000, it is a Class 3 felony; if the value of the property is more than \$10,000 but not more than \$100,000, it is a Class 2 felony; if the violation is more than \$100,000, it is a Class 1 felony. 820 ILCS 305/25.5.

A person convicted under Section 25.5 shall pay monetary restitution to the insurance company or self-insured entity or any other person for any financial loss sustained as a result of the violation of the section, including court costs and attorney fees. An insurance company, self-insured entity, or any other person suffering financial loss sustained as a result of a violation may seek restitution, including court costs and attorney fees in a civil action jurisdiction.

The fraud insurance non-compliance unit is required to report violations to the "Special Prosecutions Bureau of the Criminal Division of the Office of the Attorney General" or to the state's attorney of the county in which the offense allegedly occurred, either of whom has authority to prosecute violations. The primary insurance carrier shall have authority to issue a subpoena to a medical provider.

Our Firm's Experience Involving Alleged Fraud by a Claimant

As we reported in our July 2011 edition of [Below the Red Line](#), we were contacted by an investigator from the Illinois Workers' Compensation Fraud Unit (WCFU) as part of its investigation of potentially fraudulent claims brought by a claimant in one of our files. The employer forwarded materials to the WCFU to investigate potential fraud by the claimant involving two workers' compensation claims against the employer. In the claimant's first claim, the employer investigated the alleged accident and determined that it was physically impossible for the claimant's shoulder and arm injury to have occurred as described by the claimant. In the claimant's second claim, surveillance cameras at the employer's place of business, which were not installed at the time of the first alleged accident, confirmed that no accident took place as alleged by the claimant. The claimant alleged that she reinjured her shoulder while throwing a box onto a table. No such injury or action took place during the claimant's entire work shift, as confirmed by the video surveillance. The employer also forwarded to the WCFU statements by employees who were working with the claimant on the dates of the alleged accidents as well as the surveillance video from the alleged second accident. The employer further forwarded his notes with respect to his investigations of the alleged accidents.

The employer was then contacted by an investigator from the WCFU who expressed great interest in prosecuting the claimant for fraud for her workers' compensation claims. The investigator met with the employer at the employer's place of business, and one of our firm's attorneys attended the meeting. During that meeting, the investigator interviewed a witness and photographed the alleged accident sites. The investigator appeared very "gung-ho" about prosecuting the claim, especially given the surveillance from the date of the alleged second accident which showed no accident taking place. The investigator was even more interested when we advised her that our research

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revealed that the petitioner had filed sixteen prior workers' compensation claims.

Prior to the WCFU investigation, the petitioner filed two additional workers' compensation claims against her subsequent employers, bringing her grand total to nineteen claims.

Following the initial investigation, the petitioner was scheduled to meet with the fraud investigator but apparently did not appear for the meeting. At some point, she did appear and allegedly pleaded the 5th Amendment, refusing to answer questions posed to her by the fraud investigator.

The fraud investigators also met with our independent medical examiner and took a sworn statement with respect to his examination of the claimant. The WCFU completed its investigation and then forwarded all materials to the Illinois Attorney General, rather than the local state's attorney, as is allowed pursuant to the 2011 amendments.

Just recently in September of 2012, a press release from a local newspaper confirmed that the claimant was arrested and charged with defrauding several suburban employers out of nearly \$90,000.00 in workers' compensation payments. The claimant was charged with workers' compensation fraud, aggravated fraud, insurance fraud, and perjury. According to Illinois Attorney General Lisa Madigan, in an October 18, 2012 press release, "The Workers' Compensation system is supposed to cover costs of employees who are injured on the job. The evidence in this case shows the defendant was intent on defrauding the system for her own benefits."

Caution

It is imperative that a claim being investigated by the WCFU not be settled. If one of these claims is settled, the WCFU is no longer able to prosecute the fraud claims. We were reminded of this on numerous occasions by the WCFU.

Complaint Checklist

The employer's actions in this case must be lauded for putting the time and effort into preparing the materials he forwarded to the WCFU. The WCFU has provided a complaint checklist for matters that may involve fraud perpetrated by a claimant. The report should include the following information:

- Identity of the claimant;
- Date of injury, if known;
- Type of injury;
- Activity level with a vivid description of activities;
- Employer, if known;
- Insurance company, if known;
- Secondary employer, if known, or if claimant is self-employed;
- Additional witnesses; and
- The complainant must submit in writing, identify themselves, and be willing to testify.

Further information can also be obtained in writing from:

Illinois Department of Insurance
Workers' Compensation Fraud Investigation Unit
William Blumthal, Jr.
Deputy Director
100 West Randolph Street, Suite 9-301
Chicago, Illinois 60601
E-mail: williamblumthal@illinois.gov
Phone: 312-814-1323.

People v. Oshana

The recent case of *People v. Oshana*, 2012 IL App (2d) 101144 is the first reported case construing Section 25.5. There, the claimant alleged that he injured his right arm, shoulder, neck, and back in a work injury that occurred on October 12, 2006. He was provided with off-work slips from his treating physician. He advised this physician that he had severe disability. The claimant told this physician that he was required to use crutches, a walker, and spent most of his time in bed. He also claimed he had to "crawl to the bathroom."

The insurance carrier performed surveillance on multiple occasions and caught the claimant working at construction sites, using both arms to perform tasks. The insurance carrier then took a recorded statement from the claimant after most of the surveillance had been performed. In the recorded statement, claimant denied he was working. The insurance carrier submitted documentation to the Workers' Compensation Fraud Unit who then submitted this documentation to the Kane County State's Attorney.

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The claimant was indicted on two counts of worker's compensation fraud pursuant to Sections 25.5(a)(1) and (a)(2). Those provisions read as follows:

It is unlawful for any person, company, corporation, insurance carrier, health care provider, or other entity to:

1. Intentionally present or cause to be presented any false or fraudulent claim for the payment of any worker's compensation benefit.
2. Intentionally make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any worker's compensation benefit. (820 ILCS 305./25.5(a)(1), (a)(2))

The claimant was found guilty on both counts and was sentenced to 24 months of probation and ordered to pay restitution to insurance carrier of \$22,594.61 in addition to fines and fees to State.

On appeal, the Appellate Court reversed the trial court regarding its finding that the claimant presented a false or fraudulent workers' compensation claim under Section 25.5(a)(1). As it noted, the claimant's original accident was an accepted injury that did take place. The Appellate Court also found that the claimant was not required to report that he was working light duty. The Act makes criminal only affirmative fraud – a false or fraudulent claim or statement – not mere silence.

However, the Appellate Court affirmed the conviction with respect to Count II under Section 25.5(a)(2). They noted the claimant made several false or fraudulent statements for the purpose of obtaining workers' compensation benefits. The recorded statement to the insurance carrier was not the basis of their decision because it was ambiguous; when the claimant said he was not working, he could have been referring to the fact that he was not working for any other employer at the time of the acci-

dent. However, the Court based its decision on the fact that the claimant fraudulently misrepresented to his doctor and the IME doctor the extent of his disability and level of pain. The Appellate Court held the claimant's statements that he was limited to crutches, the use of a walker and was in bed most of the time were intentionally made for the purpose of obtaining workers' compensation benefits.

In addition, the Appellate Court found that the Workers' Compensation Fraud Act was not unconstitutional but rather clear and unambiguous. The Court also rejected the claimant's contention that Section 25.5 could not be constitutional where there was no harm caused by the infraction. According to the Court, "The conduct of masking fraudulent claims or statements in order to obtain workers' compensation benefits poses a similarly broad risk to the public by undermining the fairness and integrity of the workers' compensations system, which was designed to provide prompt and equitable compensation for employment-related injuries." *Oshana*, 2012 IL App (2d) 101144, at ¶ 39.

With respect to the restitution order, the Court found that the term "complete restitution" to the victims of the fraud means just that – full payment for all of the victim's expenses that are reasonable. But restitution may not be ordered for costs that were not related to the acts for which the claimant was convicted. The Appellate Court ordered the claimant to pay the costs of the respondent's IME and the insurance carrier's attorney's fees for the criminal trial, but it vacated the award of restitution for the respondent's surveillance costs because there was no proof the surveillance was performed as a result of the claimant's fraudulent statements. They reduced the restitution order to \$12,923.56 and affirmed the trial court's order of 24 months of probation as well as fines and fees to the State.

We are pleased that the Workers' Compensation Fraud Act has withstood constitutional challenges. The *Oshana* case demonstrates the importance of obtaining clear and specific recorded statements as well as the importance of the use of video surveillance in claims where fraud is suspected. If the recorded statement had been clear and if the questions to the claimant were specifically referring to whether he had worked for any employer *after* the accident, the claimant's conviction under Section 25.5(a)(1) likely would have been affirmed by the Appellate Court.

Conclusion

As we noted in our prior newsletter, there have only been a handful of convictions in each of the past few years for violations of the Illinois Workers' Compensation Fraud Statute. We

Please visit our website and see our updated newsletter index, which lists the four most recent newsletter editions and then takes you to our Past Editions page, where we have referenced each issue by subject matter. We hope this new format will help you more easily locate past articles concerning topics that impact your claims handling.

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will continue to keep you advised with respect to our claim and with respect to any trial or convictions that may result. We again note several tips for investigating and exposing possible fraud in a workers' compensation claim:

Verify that medical records, reports, and off-work slips provided by claimant are complete and unaltered. Request medical records directly from medical providers to ensure the documents are accurate.

Take recorded or written statements from claimants, coworkers, and supervisors. This should be done as soon as possible to document any accidents or claimed injuries, and to make the claimant commit to a specific version of the incident.

Use video surveillance in cases of suspected fraud to develop evidence of any activities that are inconsistent with medical histories or work restrictions. The video surveillance in our claim certainly caught the attention of the fraud investigator and was noted by the Attorney General.

Use a private investigator or other sources of investigation in cases where there is suspicion that an employee might be earning income while collecting TTD benefits. If the claimant has filed an Application for Adjustment of Claim with the Workers' Compensation Commission, records subpoenas can be issued by defense counsel to obtain employment records from other employers.

Be careful to preserve all evidence of potential fraud, including tape recordings, video or photographic evidence, and original documents.

Report of fraudulent activity should be submitted to the WCFU as soon as possible. There is a three year statute of limitations for prosecution of workers' compensation fraud.

If you have any questions concerning potential fraud claims or other matters involving Workers' Compensation law, please feel free to contact any of our Workers' Compensation attorneys throughout the State.



Brad Antonacci - Rockford Office

A native of Hampshire, Illinois, Brad served as an Editor of the Bar Review at Northern Illinois University College of Law. After graduating from law school in 2002, Brad joined Heyl Royster as an associate in the Rockford office. He concentrates his practice in the area of workers' compensation and civil litigation and has arbitrated numerous workers' compensation claims and argued many cases before the Commission.

Brad co-authored, "Loaning Employer Not Liable in Tort When Borrowing Employer Assumes Liability," published in the Illinois Defense Counsel Quarterly, Volume 18, Number 1 (2008). Recently he was named to the 2012 Illinois Super Lawyers *Rising Stars* list. The Super Lawyers *Rising Stars* selection process is based on peer recognition and professional achievement. Only 2.5 percent of Illinois lawyers under the age of 40 or who have been practicing 10 years or less earn this designation.

APPELLATE COURT NEWS

During a recent luncheon event in Chicago, at least two members of the Appellate Court, Workers' Compensation Commission Division, voiced their approval of the appellate court referencing so-called "learned treatises" in appellate opinions. The question addressed to the court arose from the early 2012 decision in *Will County Fire Protection District v. Workers' Compensation Comm'n*, 2012 IL App (3d) 112007, which relied, in part, on a medical treatise in defining the word "shoulder" under the Act. One of the attendees asked the panel how it viewed the use of such treatises where the work had not previously been admitted into evidence at arbitration.

The Appellate Court, Workers' Compensation Commission Division, completed its October call in Chicago last week and will be holding its next argument call in December 2012 in Chicago. Rule 23 decisions from this recent call have already begun appearing on the Illinois Supreme Court webpage.

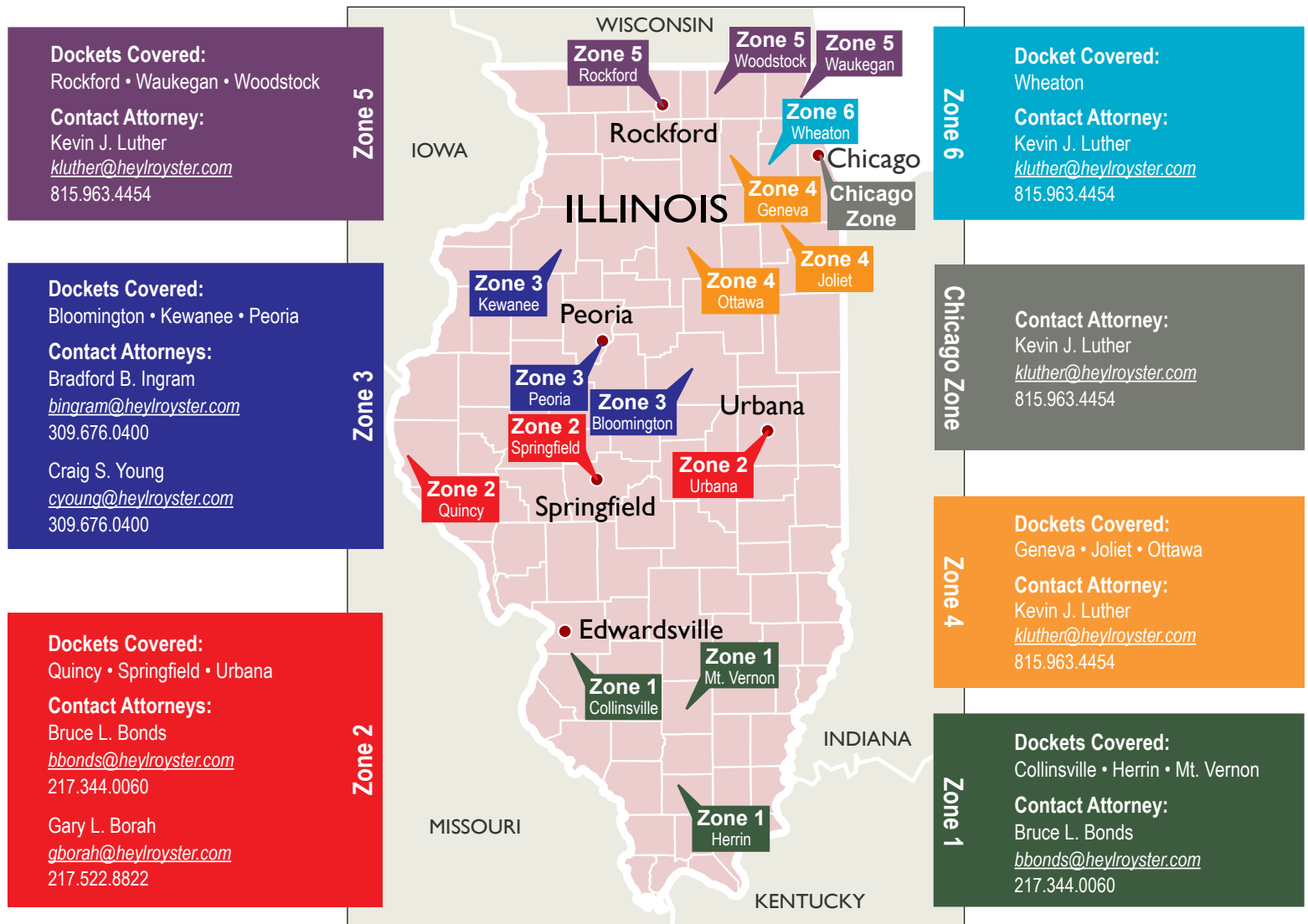
Also, on a very sad note, Justice John T. McCullough, who has served as the Presiding Justice of the Appellate Court, Workers' Compensation Commission Division for the past 22 years, passed away on October 30, 2012. Justice McCullough served 50 years on the bench.

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

Heyl Royster

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