

# BELOW THE RED LINE

HEYL ROYSTER

## WORKERS' COMPENSATION UPDATE

“WE’VE GOT THE STATE COVERED!”

*A Newsletter for Employers and Claims Professionals*

*November 2013*

### A WORD FROM THE PRACTICE GROUP CHAIR

It is hard to believe we are heading into the Thanksgiving weekend and the kickoff of the holiday season. We at Heyl Royster are thankful for much. As a law firm, there is nothing more important than our clients, and we are therefore most thankful for our relationship with all of you. We wish the best for you and your family as you give thanks tomorrow and throughout the weekend. Particularly, our thoughts and prayers are with those who were impacted by the recent weather disaster in the Central Illinois area.

This month we highlight an article by Toney Tomaso and Dominique de Vastey addressing the issue of a claimant’s noncompliance with prescribed medical treatment. While this does not occur often, it seems to be more prevalent of late, and the impact this can have on the ability to move the case toward resolution is frustrating. Toney and Dominique do a good job of highlighting the problem and suggesting possible solutions. We hope you find the article helpful.

We are heading into the last month of the current arbitrator assignments, and anticipate December will be busier than normal. Some claimants’ attorneys are attempting to bring cases to resolution before the existing arbitrators. Others are endeavoring to continue cases which should be resolved in the hope of presenting the matter after first of the year to an arbitrator perceived to be more claimant friendly. While we never have as much control over the timing of case

resolution as we would like, we will be endeavoring to manage this situation in a manner most favorable to your particular claims. I personally have a number of cases I am trying to push to trial in December. Please do not hesitate to contact any of our attorneys if you have cases you wish to push to resolution before the arbitrator reassignments take effect in 2014.

Happy Thanksgiving to all.



Craig S. Young  
Chair, WC Practice Group  
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### *In this issue . . .*

What To Do When The Claimant Will Not Comply With  
A Course Of Medical Care?

Practice Pointers

### WHAT TO DO WHEN THE CLAIMANT WILL NOT COMPLY WITH A COURSE OF MEDICAL CARE

by Toney Tomaso and Dominique de Vastey

Several provisions of the Illinois Workers' Compensation Act place the onus on the employee to cooperate with efforts to improve his or her condition, whether in relation to medical treatment, rehabilitation, or vocational placement. In this issue we look at one aspect of this obligation as it relates to a claimant's duty to cooperate during the course of medical treatment.

#### What is Section 19(d) and what can it do for me?

Under Section 19(d) of the Illinois Workers' Compensation Act, the employer has the right to request the Commission reduce or suspend a claimant's award of compensation and medical benefits if the claimant engages in activities that aggravates their condition or slows their recovery:

If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. However, when an employer and employee so agree in writing, the foregoing provision shall not be construed to authorize the reduction or suspension of compensation of an employee who is relying in good faith, on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized church or religious denomination, by a duly accredited practitioner thereof.

820 ILCS 305/19. *Id.* Section 19(d) provides a vehicle for an employer to request the Commission alter or suspend a claimant's workers' compensation benefits where the claimant's conduct threatens to thwart his recovery from his workplace injury.

#### When will this issue arise?

What happens when the claimant and employer agree on the required medical treatment, but the doctor places a condition on the employee's ability to obtain that treatment? This may occur where the doctor refuses to provide a course of treatment or medication until the patient complies with certain restrictions. In a typical example, a doctor may require a claimant to lose weight or stop smoking before moving forward with surgery that would help the claimant achieve maximum medical improvement.

At first blush, it may appear from this scenario that Section 19(d) would not apply. After all, in this situation, all the parties agree a particular treatment is necessary, but it is the health care professional, not the employer or employee, who refuses to proceed with the treatment. Would the claimant in this scenario be considered as acting unreasonably if he refuses to comply or has difficulty complying with a condition in order to receive medical treatment? We would argue the answer is yes.

Generally, an employer or insurer may request a 19(d) hearing when a claimant is not complying with the treatment plans of medical professionals to recover from their work-related injury. In this hearing, the employer must demonstrate that the claimant is acting unreasonably in a way that impedes his or her recovery or is unreasonably refusing a medical treatment that could improve his or her condition.

#### What constitutes an "injurious practice" under the Act?

To show that a claimant is unreasonably engaging in "injurious practices," an employer must show that the claimant's actions have aggravated his condition. In *Dennis Head v. Head, Inc.*, the employer claimed the claimant's continued use of his injured foot against his doctors' orders impeded his recovery. 07 IL. W.C. 56301 (Ill. Indus. Comm'n Mar. 17, 2010). The Arbitrator denied the employer's request because he failed to show that "[p]etitioner's weight bearing so imperiled or retarded his recovery as to break the chain of causal connection" between his workplace injury and his inability to work. *Id.* at \*7.

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It is even more difficult to prove an employee is unreasonably refusing medical treatment that could improve their condition. The general rule is that "in the absence of bad faith, it is for the claimant to choose whether to continue to suffer from a disability or to submit to a major operation designed to cure it." *Rockford Clutch Div., Borg-Warner Corp. v. Indus. Comm'n*, 34 Ill. 2d 240, 246-247 (1966). In *Rockford Clutch Div.* the claimant refused to undergo surgery on his back that the treating physicians claimed was necessary for him to improve his ability to walk and thus return to work. *Id.* at 241. The Supreme Court determined the claimant was not acting unreasonably in his refusal to undergo surgery, even though his condition was deteriorating. *Id.* at 242-243.

### When does the refusal to comply with a condition before receiving medical treatment amount to unreasonable conduct under Section 19(d)?

In *Robert Cedillo v. Four Seasons Heating-Cooling*, the Commission determined the claimant was disabled due to an elbow injury and awarded the claimant temporary total disability (TTD) benefits until he achieved MMI. 03 IL. W.C. 61117 (Ill. Indus. Com'n Mar. 26, 2009) at \*4. He remained off work and continued to see a doctor for his elbow. However, the doctor had asked the claimant on multiple occasions to stop abusing alcohol in order to receive medical treatment that could cure his chronic elbow pain. *Id.*

At the initial Section 19(b) hearing and later at the Section 19(d) hearing, the doctor had stated the claimant's pain totally disabled him and prevented him from successfully returning to work. Based on this medical opinion, the Arbitrator ruled the claimant was still temporarily disabled. At the Section 19(d) hearings, the main issue was whether claimant's refusal to stop drinking constituted an injurious practice. *Id.*

At the first 19(d) hearing, the Arbitrator found there was only one incident where the claimant failed to comply with his treating physician's warning to stop drinking. *Id.* at \*5. In addition, at the time of the hearing, the claimant was still receiving treatment as he was attempting to comply with his doctor's warnings. The Arbitrator ruled this one incidence of non-compliance

did not rise to the level of "injurious practices" under Section 19(d). *Id.*

A few months after the first 19(d) hearing, the claimant's treating physician again refused to continue treating, stating:

*Robert comes in today for follow-up. I had conversation with him today. I noted that I could actually smell alcohol on his breath when he came in and I confronted him with the issue of the fact that he has this alcohol addiction and at this time there is really no medication or drugs that I going to give him any further at this time. I had as frank conversation with him today as to what his options are in terms of alcohol anonymous or other treatment and he must go to that before I am able to even approach his problem with his elbow. I told him the issues with the elbow. I believe he has this chronic pain in his elbow and I don't believe he is going to be able to do a continual vigorous work job and it might necessitate that he has to go on a disability from that and might even need to be retrained in that regard. I don't feel that he can handle that kind of job.*

*Id.* at \*3. At this point the employer stopped paying TTD benefits based on the doctor's refusal to treat the claimant. *Id.*

The Arbitrator concluded the claimant's actions had reached the level necessary to invoke the provisions of Section 19(d) because he was no longer receiving treatment for his injury due to his failure to meet the doctor's requirements and stop drinking. *Id.* at \*4. He also refused to award penalties against the employer for withholding benefits under the Act because the employer reasonably suspended benefits after the doctor refused to treat the claimant. Because the claimant still required treatment, the Arbitrator ruled the claimant's benefits could be reinstated if the claimant resumed treatment after recovering from his addiction or participating in a vocational retraining program if ordered by his doctor. *Id.*

*Robert Cedillo* illustrates the Commission is amenable to Section 19(d) claims which involve a claimant's failure to comply with pre-requisites to medical treatment. *Id.* at \*5. However, a doctor's refusal to treat a

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claimant due to non-compliance does not automatically permit the suspension of compensation benefits. *Id.* For example, the Arbitrator commented the employer did not make a good-faith effort to provide the claimant with light-duty work, a factor in determining if an employer acted reasonably in suspending benefits. *Id.* at \*4. In addition, some Arbitrators adopt the position "an employer takes his employees as he finds them" in a workers' compensation injury. *Bocian v. Indus. Comm'n*, 282 Ill. App. 3d 519, 528 (1st Dist. 1996).

In *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 412-13 (1st Dist. 2009). The employer sought a Section 19(d) hearing because the claimant intentionally smoked to delay his recovery after surgery. The employer did not want to "be held liable for expenses 'associated with such injurious practices.'" *Id.* at 412. Before performing surgery, the claimant's doctor advised him to quit smoking to assist his full recovery from his injury, and the employer's expert also provided testimony that smoking causes problems post-surgery. In spite of warnings by his treating physicians, the claimant still continued to smoke. *Id.* However, the court did not modify the claimant's compensation award because the Arbitrator found "it appear[ed that] the claimant smoked in spite of its potential impact on his recovery, not because of it." *Id.* at 413.

The Appellate Court, Workers' Compensation Commission Division, concluded that Section 19(d) requires the breaking of the causal chain between the claimant's workplace injury and current condition. *Id.* at 412. In claimant's case, he was already a smoker before his workplace injury required him to have spinal fusion. *Id.* at 411. Because of this preexisting condition, the court found the claimant's smoking was not an intervening cause that would relieve the employer from liability because Section 19(d) does not require "an injurious practice be the sole cause of a claimant's condition" before the Commission modifies an award. *Id.* at 413; see 820 ILCS 305/19(d) (West 2013).

The court also observed the claimant made a good-faith effort to quit smoking. *Id.* at 413. It determined that the Workers' Compensation Commission, in its discretion, could reasonably have concluded the claimant "should not be penalized [for trying] to prevail over his addiction." *Id.*

While both alcohol abuse and cigarette smoking are addictions, this case differs from *Robert Cedillo* because the record showed that the claimant made an effort to follow the doctor's requirements. Contrast *Cedillo* at \*4 with *Global Products* at 412. In addition, the employer did not build a record that illustrated how the claimant's actions objectively worsened his condition. *Global Products* at 414. Another key distinction is that the claimant's treating physician did not deny further medical treatment based on the claimant's inability or refusal to comply with his orders. Contrast *Cedillo* at \*3 with *Global Products* at 410.

### If reasonable minds can differ, how should an employer go about asserting a successful Section 19(d) claim?

An employer may want to suspend its payment of workers' compensation benefits if it believes the claimant is engaging in activity in violation of Section 19(d). However, in suspending payment, please note that the employer risks monetary penalties under Sections 19(l) and 19(k) of the Act if the Arbitrator determines the employer's actions were unreasonable or vexatious. *Thomas Bowe v. Riggs Constr. Co., Inc.*, 07 IL. W.C. 00958 (Ill. Indus. Com'n Apr. 3, 2008). Therefore, any decision to ask for a Section 19(d) hearing while suspending benefits should be thoroughly considered in light of the unique facts of the case.

Before an employer makes the decision to suspend benefits based on Section 19(d), they should make sure they have created a sufficient record of the claimant's alleged *unreasonable* actions. For example, an action may more likely be viewed as injurious to the claimant's recovery, if the claimant's treating physician states it is, in fact, injurious. If applicable, the employer should also show how the claimant's non-compliance and subsequent deterioration amounts to a condition for which the employer should not be fully liable.

If the employer has a good-faith basis in believing that an award should be reduced or modified under Section 19(d), he should come before the Arbitrator ready to prove his case at the earliest possible point in the claimant's treatment in order to avoid unnecessarily paying out large sums of money over time. Commission Rule 7110.40 governs the procedure and encourages

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employers to file such petitions as soon as possible and to set forth the nature of the injury and the treatment required. 50 Ill. Admin. Code 7110.40. To ensure the Arbitrator has enough information about the claimant's course of treatment it is also advisable for the employer to document the claimant's non-compliance with treatment and its negative impact on claimant's recovery over time.

With this in mind, employers should add Section 19(d) to their arsenal in dealing with non-compliant claimants.

Should you have any questions concerning whether a Section 19(d) petition is appropriate for your case, please feel free to contact any Heyl Royster workers' compensation attorney across the state.

### PRACTICE POINTERS

As a reminder to employers, Section 12 permits an employer to request to have a physician present at any independent medical examination (IME) of the claimant performed at the request of the claimant's attorney. Although rarely used, in certain cases where a "surprise" IME report may be expected, it may be advisable to let the claimant's counsel know early in the litigation that the employer desires to exercise its right to have a physician present at all IMEs. If done in writing, this will encourage claimant's counsel to provide advanced notice of the time and date of the IME sought.



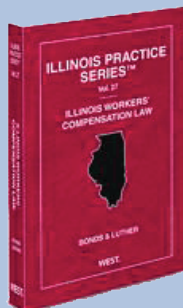
#### Toney Tomaso - Urbana & Edwardsville Offices

Toney is a partner who concentrates his practice in the areas of workers' compensation, third-party defense of employers, workers' compensation appeals, and protecting workers' compensation liens. He works out of the Urbana and Edwardsville offices covering a vast majority of the state of Illinois for workers' compensation docket and trial coverage purposes. Toney takes great pride in working directly with employers and their insurance carriers in order to build an important relationship and foster a team mentality and approach to defending workers' compensation claims.



#### Dominique de Vastey - Edwardsville Office

Dominique de Vastey represents employers in the areas of general tort litigation and workers' compensation. She also defends clients in asbestos-related products and premises liability actions, and has appeared before the Illinois Workers' Compensation Commission. Her practice also includes preparing a wide variety of civil cases for trial and alternative dispute resolution proceedings. During law school, she served as Editor-in-Chief of the Midwest Journal of Law & Policy and participated in national moot court competitions. She clerked at the Missouri Attorney General's Office handling Second Injury Fund litigation and investigated charges before the Missouri Human Rights Commission. She also worked in Washington, D.C. at the Department of Justice's Civil Rights Division where she verified that private companies and government entities were in compliance with immigration and employment law.



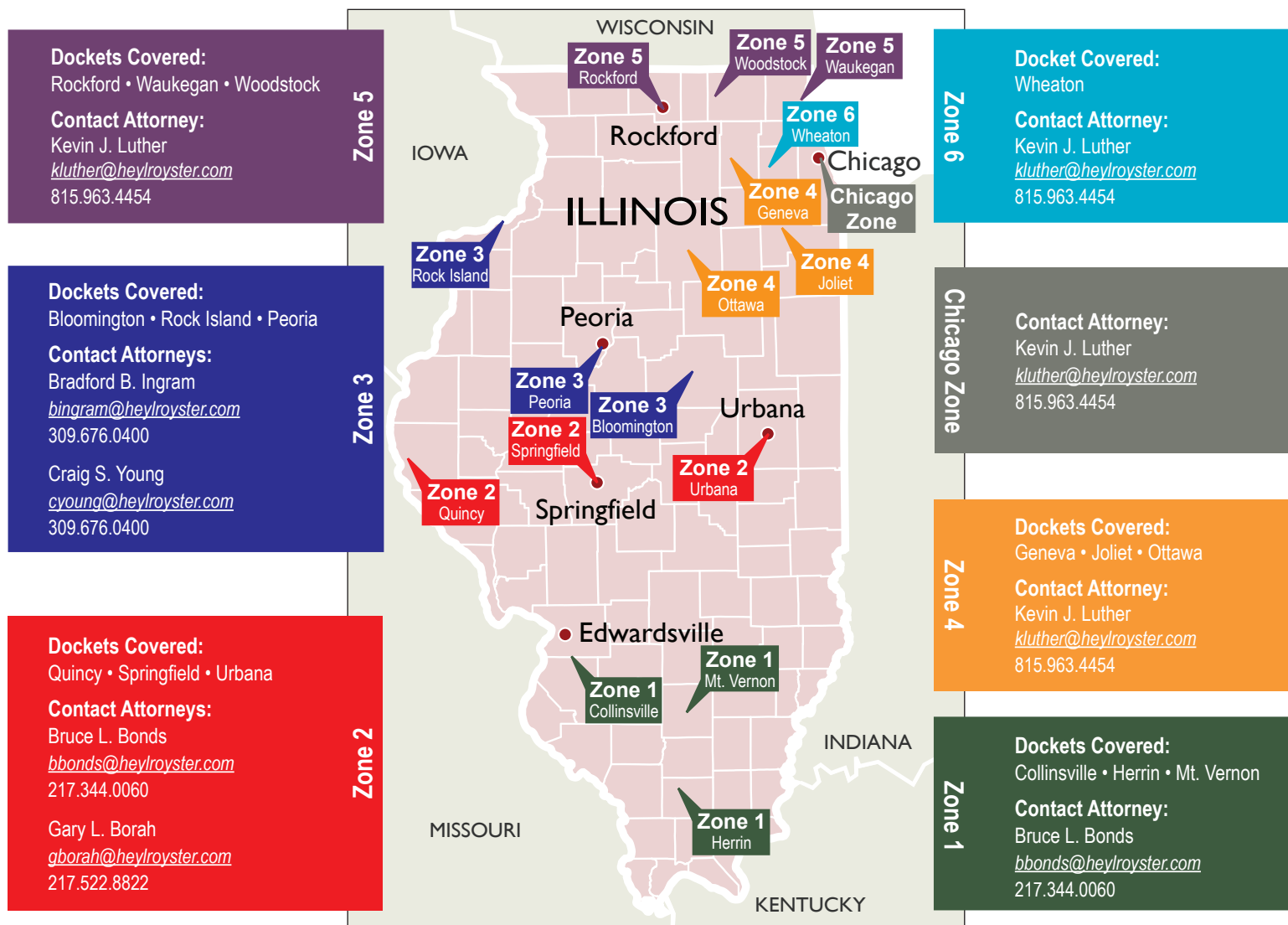
### New Edition in Print!!

The Third Edition of ILLINOIS WORKERS' COMPENSATION LAW, 2013-2014 (Vol. 27, Illinois Practice Series, West) is now available. Authored by Heyl Royster partners Kevin Luther and Bruce Bonds, this work can be purchased at store.westlaw.com.

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