

# BELOW THE RED LINE

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ROYSTER

## WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

*A Newsletter for Employers and Claims Professionals*

*September 2019*

### A WORD FROM THE PRACTICE CHAIR

Welcome to the official start of Fall 2019. I know this is true because my neighbor decorated for Halloween already (this process began in earnest about three weeks ago!). They are big fans and it takes a long time to drag all that scary stuff out of the basement and place it all around their yard/front porch. The leaves have not started turning yet, and it really hasn't cooled off too much here, but the playing of football, baseball playoffs (please do not mention the Cubs collapse of 2019!), and Homecoming has gotten me in the mood for Fall.

Some people will tell you Fall officially starts when Starbucks begins offering pumpkin spice. I am not one of those pumpkin spice guys, but pumpkin bread works just fine for me. I have already survived two Homecoming dances and all the wonderful prep work that goes into having two high school daughters. I am always amazed at the number of pictures taken for such an event. I can honestly say I did not take that many pictures at my own wedding. I hope this Fall you are enjoying life and waiting for the leaves to turn and cooler temperatures to settle in. Until then, enjoy the warmth, and this newsletter.

This month, two of my associates from the Peoria office worked on the age-old questions: What do I do about my T.T.D. overpayment? How do I get my money back? Jessica Bell and one of our newest associates, Jacqueline Korn, answered these questions and provided us with a deep look into what the case law says on point, and what are some pragmatic ways to recoup those dollars. I

found this article to be very helpful because this topic comes up almost every week in some manner. It is always a great idea to stay on top of these issues and have some quality discussion on how to protect our credits.



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### NEW COMMISSIONER APPOINTED

On September 23, 2019, Governor Pritzker appointed Kathryn Doerries as a Commissioner of the Illinois Workers' Compensation Commission. Commissioner Doerries will serve as a management commissioner on Panel A with Commissioners Tyrrell and Portela.

At the time of her appointment, Commissioner Doerries represented the interests of the Cook County Sheriff's Office in employment matters as a Disciplinary Officer. Prior to that, Commissioner Doerries worked for the Illinois Attorney General's Office in the Industrial Commission Bureau, where she defended state agencies before the IWCC.

### TTD OVERPAYMENTS AS A CREDIT AGAINST PPD AWARDS

*By: Jessica Bell, Peoria & Springfield Office  
and Jacqueline Korn, Peoria Office*

An employee's entitlement to benefits – indemnity or medical – is one issue of frequent dispute in workers' compensation claims. Even if an employee can check the other boxes necessary to establish a valid claim – employee/employer relationship, notice, an accident that arises out of and in the course of the employment, or causation, determining what benefits are owed can still be a point of contention.

Recall that Temporary Total Disability benefits (TTD) are applicable when the employee is temporarily disabled from working, while he is still treating and his condition has not stabilized. Permanent Partial Disability benefits (PPD) are determined at the end of the claim, once the employee's condition has stabilized and he no longer seeks further treatment for the work related condition.

On occasion, during the course of a claim, an employer may pay TTD benefits in error. Perhaps the benefits were paid at the incorrect rate or for the incorrect duration. For example, the TTD rate is determined based on the claimant's average weekly wage (AWW). If wage records documenting the employee's earnings in the 52-week period prior to the injury are not available immediately upon the filing of a claim, but the claimant is off work as a result of a valid injury and TTD benefits are truly owed, payments might be made as a showing of good faith, but at a rate that ends up being too high once wage records are reviewed. Or, consider a situation where the claimant is off work and receiving TTD benefits on a regular schedule. His condition stabilizes and he returns to work, but the insurance company/third party administrator/

adjuster is not immediately informed of the return to work and TTD benefits inadvertently continue. Both of those situations result in an overpayment of TTD benefits to which the claimant was not entitled.

This arguably creates a credit, due to the employer, in the amount of the overpayment. In many instances, the claimant's attorney acknowledges the claimant's receipt of benefits to which he or she was not entitled. The overpayment may then be resolved at the time of settlement of the claim when PPD benefits are discussed, by reducing the PPD payment by the TTD overpayment. However, this compromise that claimants may be willing to make is not necessarily supported by the applicable case law.

This was exactly the case in *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217. In that case, the petitioner-appellee Naresh Patel was injured while working for Home Depot and received an award of benefits from an arbitrator that was confirmed by the Commission. Home Depot was granted a credit by the arbitrator in excess of the amount of the benefits awarded. The credit was also affirmed by the Commission. When Home Depot did not pay the award (claiming a true balance owed of zero on account of the credit), Patel filed a petition in circuit court for judgment on the award, and he requested penalties under section 19(g) of the Act.

The circuit court entered judgment against Home Depot for the amount of the benefits awarded, and subsequently awarded Patel attorney fees, costs, and interest. On appeal, Home Depot argued that the circuit court erred in denying its motion to dismiss and entering judgment in favor of Patel since Home Depot already paid more than it was obligated to pay. The appellate court affirmed.

According to the *Patel* court:

The fact that Home Depot inadvertently overpaid on the benefits for a certain

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time period is not something for which section 19(g) provides a remedy. Patel did not receive an award for future payments, merely an award for payments to which he was previously entitled. Just as Home Depot cannot seek to recover the amount of the overpayment by filing a claim under section 19(g), it cannot apply its credit for the overpayment to avoid an entry of judgment pursuant to section 19(g). Thus, Home Depot is not entitled to use the credit as an offset against the benefits awarded to Patel under section 19(g).

*Patel*, 2012 IL App (1st) 103217, ¶ 20.

The *Patel* court upheld the circuit court order entering judgment on the section 19(g) proceeding for the full amount of the award, without taking into account the credit offset for overpayment.

This decision comes as a departure from prior case law suggesting a credit would be available for the employer-respondent in such a circumstance. In *Messamore v. Industrial Comm'n*, 302 Ill. App. 3d 351 (4th Dist. 1999), the appellate court held that the award of TTD benefits was properly reduced by overpayment of TTD benefits and that the employer was entitled to offset the excess TTD benefits paid against the PTD benefits awarded by the Commission. The court found that the TTD benefits were not in any way associated with section 8(j) group benefits and as such, section 8(j) was not the basis of the credit sought. Because section 8(j) was not implicated, its limiting language did not constrain the Commission from using the TTD overpayment as a set-off against permanency.

In reaching this decision, the appellate court reiterated some of the policy grounds for its ruling, noting that "interpreting the statute so as to hold the employer to administrative exactness in its payment prior to adjudication, and denying it the

right to recoup any excess payment it may later discover, could frustrate a primary purpose of the Act, to provide prompt payment to the employee." *Messamore*, 302 Ill. App. 3d at 358 (citing *World Color Press v. Industrial Comm'n*, 125 Ill. App. 3d 469, 472 (5th Dist. 1984)).

*Messamore* was followed in 2000 by *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721 (3d Dist. 2000), which adopted the reasoning of *Messamore* to apply an overpayment of TTD benefits against a 60 percent of a person award under section 8(d)(2) of the Act. The court reiterated the general rule that an overpayment of TTD benefits can be credited against a PPD award. The court found it significant that the TTD benefits in question were not related to a section 8(j) group plan. So while those decisions support offsetting PPD benefits by overpaid TTD benefits, *Patel* changed things.

This is not new law. *Patel* was decided in 2012. So why are we bringing it up now? This issue is quite common in claims and it's worth revisiting potential solutions to the TTD overpayment problem in light of *Patel*.

So what happens if the employee refuses to consider the overpayment and accordingly take a reduction in PPD/PTD benefits? The parties likely will not reach a settlement agreement and, in the long run, the employee could end up filing a 19(g) proceeding over PPD benefits. In that situation, case law (*Patel*) holds that the employer is required to pay the full award and seek recompense through other civil means. According to the Illinois Supreme Court, section 19(f), while available to employees and employers alike, requires entry of an order of judgment on an award of compensation. The allowance of a credit is an offset, not an award of benefits, and thus an employer cannot seek recovery under section 19(g). A common law civil claim for voluntary payments or unjust enrichment must be filed.

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It would seem that the threat of needing to file a civil law claim for recovery of the overpayment serves as a potential deterrent to employers when considering the payment of benefits. Further, the unlikelihood of funds being available for recovery in a civil claim against an injured employee is a potential deterrent as well. If there is no practical avenue for recovery of an overpayment of benefits available to employer, or at least one without a guaranteed promise of reimbursement, wouldn't that result in a delay of payment of benefits by employer-respondent in order to ensure the very "exactness" that the *Messamore* court was trying to avoid? That logic would be inconsistent with the court's comments in *Messamore* focusing on the goal of the Act to ensure prompt payment to the employee.

So what do we do? Although many in practice may support a departure from the appellate court decision in *Patel* based on logic and ethical considerations, it is nevertheless the current status of the law. Before you get to the point of trying to make new law, try and work it out between the parties ahead of time. Present evidence establishing the overpayment to the petitioner. Once the overpayment is acknowledged, discuss how to handle it, short of taking the isolated issue to arbitration. As discussed above, one possible amicable solution is to settle the case for the appropriate PPD value, but then reduce the amount actually paid by the overpayment. If this is agreed by the parties, just make sure to note the overpayment on the settlement contracts so that everything adds up in terms of settlement values and payments actually made/received. Another possible solution is available if the overpayment is detected while the employee is still receiving TTD/TPD benefits. In that situation, try to work out an agreement where the overpayment is taken out of the ongoing weekly benefits in regular intervals until satisfied. For

example, if the overpayment is \$500, and the weekly TTD benefits that the employee is properly receiving is \$500, perhaps employee-petitioner will agree to receive only \$400 per week for five (5) weeks until the overpayment is exhausted.

In the event the employee-petitioner will *not* agree to any compromise like those proposed above, and the matter proceeds to arbitration, the best course of action may be for respondent to try to get the Appellate Court, Workers' Compensation Commission Division, to decide the case. *Patel* is a section 19(g) decision that went to the "normal" appellate court, and a ruling was issued by the first district. None of the appellate court panel members were on the Workers' Compensation panel, and the Workers' Compensation panel will more likely contribute beneficially to the panel decision based on its in-depth understanding of Workers' Compensation, especially considering the pertinent comments made in *Messamore*.

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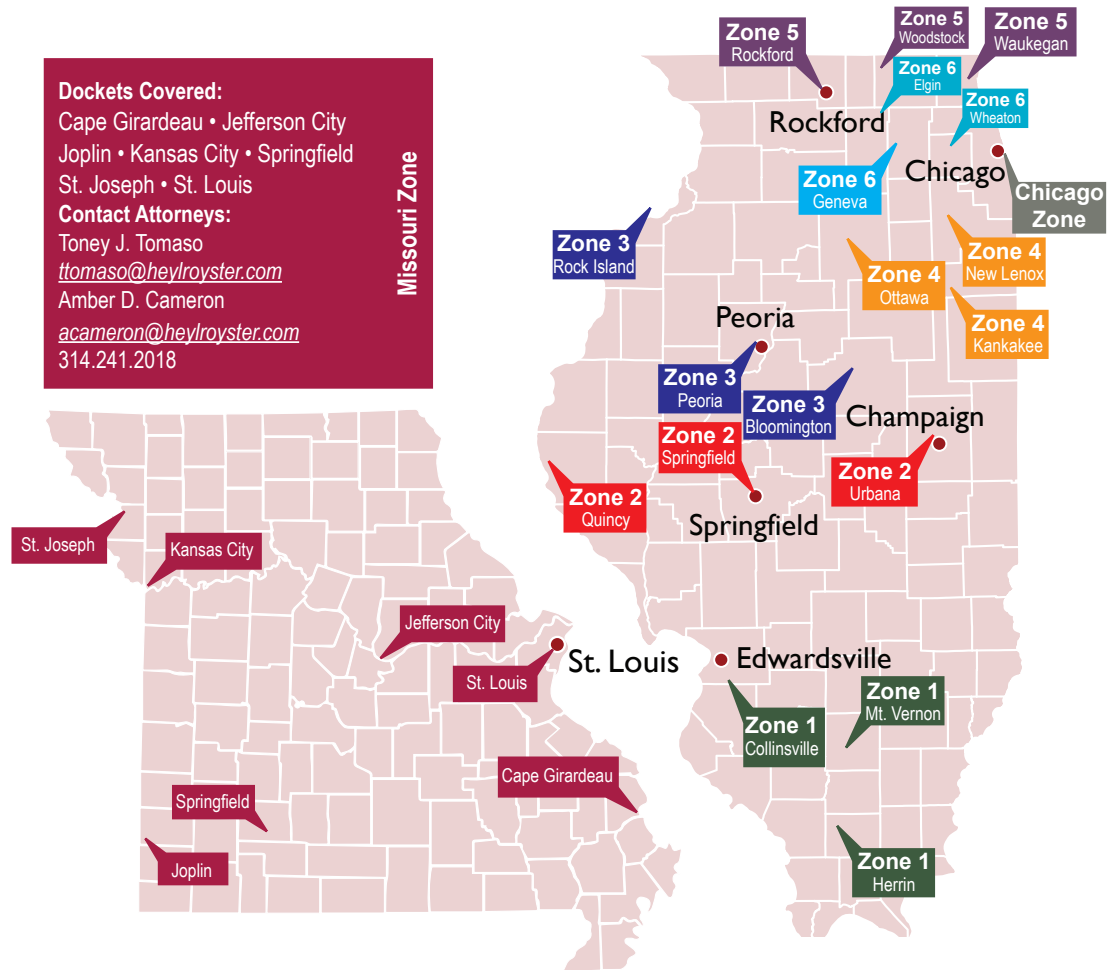
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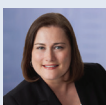
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