GOING TO THE BENCH:
BRINGING IN AN EXPERT WITNESS

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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.
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I. WHEN EXPERTS BECOME NECESSARY

In general, expert witnesses in workers’ compensation cases are essential to address certain, disputed issues in the claim. Most commonly, expert medical witnesses are used to address causal connection to the alleged work injury, maximum medical improvement (MMI), ability to return to work, etc; however there are a variety of other instances where an expert opinion may be necessary, which will further be explained below. When utilized correctly, favorable expert opinions can be valuable tools to drive down the value of the claim and lead to an early, favorable resolution.

A. Independent Medical Examination

Section 12 of the Illinois Workers’ Compensation Act allows for an employer to request a claimant to undergo an examination by a duly qualified medical practitioner or surgeon selected by the employer. Generally, the purpose of this exam is to determine causal connection, assess maximum medical improvement, determine ability to return to work, and determine the nature, extent, and probable duration of the injury received by the claimant.

One of the primary reasons to request an Independent Medical Examination (IME) is to determine if temporary total disability payments can be terminated. A claimant may be treating with a physician who continues to restrict the claimant from work without appropriate objective findings. This situation in particular may arise after the claimant has undergone surgery for his work injury, but continues to claim subjective symptoms for an extensive time after surgery. The IME becomes especially critical if the subjective complaints are not substantiated by any objective findings on exam or objective testing. An IME allows for a physician to determine if the claimant has reached maximum medical improvement and could return to some form of employment. If the IME physician provides a credible opinion that the claimant can return to full duty work, the employer can cease TTD payments. Terminating TTD provides an incentive for the claimant to return to work and pressures the claimant’s attorney to act.

IMEs also aid in providing a determination as to causal connection to the claimant’s work injury when causation appears questionable. Many workers’ compensation cases involve a claimant who has been through the workers’ compensation system on prior occasions for injuries to the same body part or has pre-existing medical conditions related to the same body part. Although a pre-existing condition is not an absolute bar to a workers’ compensation claim, it does provide a defense when the IME physician opines that the claimant’s accident did not cause his/her condition of ill-being, claimant’s condition is causally related to the pre-existing condition, or at most claimant experienced a temporary aggravation of his/her pre-existing condition.
Another situation in which an IME can be important is to bolster the effect of favorable surveillance. Surveillance is given additional credibility if an IME physician reviews it and opines, from a medical perspective that the claimant is at MMI or does not need work restrictions based on the surveillance. If the IME physician offers opinions based on the surveillance, this will also avoid the argument from opposing counsel that there is no medical opinion which indicates the surveillance is in any way relevant.

Finally, IMEs can provide a better understanding of complicated medical conditions in complex cases. In significant claims, there may be multiple medical providers involved, each with differing opinions on different claimed injuries, and the medical issues can be difficult to grasp. An IME can present an excellent chronology as to the claimant’s previous and current, extensive treatment and sort out the injuries. If the claim involves an unusual injury, such as a pulmonary issue, heart condition, or closed head injury, the IME can help to better understand the nature of the condition.

B. Utilization Reviews

Section 8.7 of the Illinois Workers’ Compensation Act governs regarding Utilization Review (UR). UR allows for an employer to evaluate the medical records to determine the appropriateness of both the level of health care services that are medically necessary for the claimant and the quality of the health care services provided. This includes an evaluation of the claimant’s treatment in terms of efficiency, efficacy, and appropriateness of treatment based on medically accepted standards.

UR becomes valuable when the claimant is engaged in what seems like never-ending treatment that is providing little to no relief. An example of this type of treatment would chiropractic care that continues for more than six to twelve visits with minimal documented improvement. UR can be used to examine this care to determine if further chiropractic treatment is required, or determine when the care ceased to become reasonable and necessary. It is important to note that the UR physician should match the specialty of the medical provider being reviewed. For example, if the treatment being reviewed is being performed by a chiropractor, the UR should be performed by a chiropractor

Pain management is another example of treatment that can not only go on for an extended period of time with limited, transient results, but can also be extremely costly. Claimants will often undergo a series of epidural injections that will only provide temporary or no relief, but yet will continue with this treatment. UR provides an excellent basis for denying further expensive pain management treatment when it is clear that the treatment is not providing long-lasting relief.

URs can also determine whether major proposed treatment is necessary, such as surgery. Sometimes, a claimant’s treating physician will recommend invasive surgery, but will not have exhausted appropriate conservative care before such a recommendation, such as physical therapy or medications. Or, the treating physician will propose major treatment when the
objective testing is not revealing any positive findings. When these situations arise, UR is most likely in order.

The longer a case tends to go on due to a claimant’s ongoing, unproductive medical treatment, the more likely a UR will need to be conducted. It is important, however, that an employer use a trusted, registered UR program. Section 8.7 contains numerous requirements for UR that will not be individually addressed in these written materials.

C. AMA Impairment Rating Examination

For accident dates on or after September 1, 2011, the Illinois Workers’ Compensation Act allows for permanent partial disability to be based in part on an AMA impairment rating, pursuant to Section 8.1b of the Act. Other factors on which permanent partial disability are to be based include claimant’s occupation, age, future earning capacity, and evidence of disability corroborated by the treating medical records. Although the AMA impairment rating is only one of five factors, it can still be a vital tool in lowering exposure and resulting in a more favorable resolution of the claim. Often, the AMA impairment rating will provide a decrease in exposure.

AMA impairment rating examinations may become necessary when a claimant’s attorney makes an extremely high settlement demand that does not correspond with the expected exposure on the claim. This can become especially important when the other four factors in determining permanency have little to no weight. However, the benefits of the AMA impairment rating should be weighed against the costs. For example, in smaller claims with minimal exposure, the costs of the AMA impairment rating may outweigh the expected reduction in exposure. AMA examinations should be done on a case-by-case basis, as they can be costly. Also, if the parties are negotiating within a reasonable settlement range, an AMA impairment rating would not be of much benefit.

D. Certified Rehabilitation Counselor

A certified rehabilitation counselor can provide claimant counseling for job searches and vocational retraining in a new area of employment. When it is clear the claimant will not be able to return to his/her former employment due to the work injury, a vocational rehabilitation counselor may be necessary. An example of this would be a claimant who was engaged in the construction industry, performing work at the very heavy physical demand level, but is now restricted from performing heavy duty work. A vocational expert would most likely be necessary to work with a claimant to obtain employment. Other factors that signal the necessity of a vocational counselor would be a claimant who has no transferable skills, does not speak English, or lacks education, combined with a significant injury and inability to return a physically demanding position.

One should be leary of the claimant who is claiming to perform a self-directed employment search. Upon closer examination, the claimant may not be putting much effort into the job search or might not even be contacting the employers they claim to be contacting. The self-
directed job search may be nothing more than an attempt to prove an “odd lot” permanent and total disability. A vocational expert can provide a credible opinion that the claimant is still employable and that a job market does exist for him/her. The vocational expert may also complete a labor market survey, in which they survey potential employers to determine claimant’s current earning capacity and employability. The labor market survey can be an excellent tool in reducing exposure and obtaining a favorable settlement position.

II. TEAMWORK WITH COUNSEL

When it comes to experts, it is important for the claims handler and defense counsel to work closely together. The first step in the process, determining if an expert is needed, should be completed early on in the life of the file with the collaboration of the claims handler and counsel. Working with counsel in obtaining the specific expert in the area of need can result in obtaining a credible opinion to terminate benefits sooner rather than later.

Counsel may be aware that a credible IME physician is currently scheduling exams months out and taking many more months to prepare a report. The expert may provide excellent opinions, but their current timetable may make them unfavorable to use. This can become particularly important when there is pressure from the claimant’s attorney to proceed to trial on the matter, or TTD benefits are ongoing. Some experts gain notoriety at the Commission as being “hired guns,” and their opinions may not be given much deference by the Commission. An experienced attorney is well aware of which experts are viewed as credible and which are not. It is also important to work with defense counsel to obtain an expert based on experience in depositions. Some experts perform poorly in depositions, even contradicting their written reports. Others can provide much better explanations and bases for their opinions during depositions.

After an expert is obtained, work with counsel to ensure the expert has everything needed. This will include subpoenaing all medical records of the claimant and obtaining not only the radiology reports, but the actual films, as well as records from prior to the alleged accident. In cases involving an injury from repetitive trauma, a written job duty description and job duties video will also be significant in order for an IME physician to determine the exact nature of the work duties and base causation opinions on those job duties. Surveillance footage of the claimant can also aid an expert in determining what restrictions, if any, claimant requires.

When a letter is being sent to the expert requesting a specific type of opinion, the claims handler and counsel should collaborate and make certain the expert is being asked the appropriate questions. For example, if you do not want the IME physician to address the reasonableness and necessity of medical treatment based on an already obtained and favorable UR, you should not ask the physician to address this issue. If a vocational counselor is obtained, he or she should know the physical restrictions of the claimant on which to base their opinions. Additionally, if an issue has already previously been litigated, the expert should not be asked to re-address the issue.
Given the significant exposure that can be involved, it is important to work with counsel to select the appropriate experts. Selecting experts with counsel early in the claim, knowing which experts are viewed as credible by the commission, giving your expert the necessary information/documentation, and asking the right questions can help reduce exposure and lead to a favorable result.

III. APPROPRIATELY UTILIZING INFORMATION OBTAINED FROM EXPERTS

When favorable opinions are obtained from an expert, the best strategy is to use it to your advantage and maintain a defense based on the opinions. If an IME determines there is no causal connection to the accident, then the claim should be denied. If an IME physician opines the claimant has reached maximum medical improvement, then temporary total disability payments should be terminated. Even if the IME indicates the claimant can only return to light duty work, it is important to determine if such work can be offered to the claimant to provide a further basis to terminate TTD. In reference to a UR, if the UR expert finds treatment to be unreasonable or unnecessary, then payment or authorization of that treatment should be denied. In a situation where a vocational counselor believes the claimant can return to work with minimal vocational training or job search assistance, then this should be offered in order to stop TTD payments.

However, when a favorable report is received from an expert, it is important to analyze it carefully for any errors. There may be clear errors in the report, which should be remedied by the expert before taking further action. As an example, a UR might deny treatment because of a lack of a recent physical examination, but the UR physician might have overlooked a recent physical exam note from the treating physician.

Once an expert’s opinion or report has been received and it is favorable to the defense of the claim, these become valuable for purposes of bargaining. A favorable IME or AMA impairment rating can provide a foundation for negotiating a lower settlement. A labor market survey conducted by a vocational counselor can allow for settlement offers based on a lesser wage differential, as opposed to accepting a permanent total disability. Additionally, a functional capacity evaluation that indicates the claimant can return to regular work provides a proper basis to reject settlement demands requesting wage differential or permanent total disability. Utilizing your expert’s favorable opinions to your advantage will assist in leveraging a favorable outcome. Also, if we do not act on the valid opinions of our expert, it gives the impression that we do not find those opinions credible.

If an unfavorable report is received, all is not lost and there are additional steps that can be taken. For example, the IME physician may require additional records or information which might change their opinion. A vocational counselor that does not believe the claimant can return to any type of work may simply need the claimant’s previous resumes or employment/education history to further assess claimant’s transferable skills. Instead of
conceding contested issues, it is important to assess whether additional documentation or information could lead to a more favorable expert opinion.

Even if a bad report cannot be remedied, this does not mean the claim cannot be defended. An IME physician may opine that the work accident did cause the claimant’s current condition, but may also opine that the claimant reached maximum medical improvements months ago and can still be used to defend TTD exposure. The IME physician might also assume claimant’s history of the accident is accurate, but eyewitneses will testify the accident never happened, and there may still be an accident defense. However, if the unfavorable report is credible, it is important not to ignore the recommendations made by the expert, including paying TTD, or authorizing treatment. Disputing your own expert’s report, without proper evidence to do so, will likely result in the claimant’s attorney requesting the arbitrator for penalties and fees due to the vexatious actions of the employer/insurer or defense attorney.

IV. PRODUCTION OF EXPERT OPINIONS

Pursuant to Section 12 of the Workers’ Compensation Act, the opinion of an IME must be disclosed to a claimant’s attorney, even if the report is unfavorable. However, as previously mentioned, a records review is not required to be disclosed. The disadvantage of a records review is that a physician does not perform a physical examination of the claimant and only reviews the claimant’s records.

In terms of utilization reviews, these reports must also be disclosed pursuant to Section 8.7 of the Workers’ Compensation Act. Not only does the report have to be disclosed to the claimant’s attorney, but the physician whose treatment was being reviewed must also be given this report. A labor market survey conducted by a vocational counselor is not required to be provided to the claimant’s attorney. A vocational rehabilitation report must be disclosed to the claimant’s attorney.

V. CONCLUSION

Experts can make or break a workers’ compensation claim. It is critical to recognize when an expert is necessary and also to select the right expert. Working with your counsel to select the proper experts early in the claim will help identify which experts are necessary, help identify the experts who are credible, ensure the proper questions are asked, and also ensure the expert is provided with all documentation and information necessary to offer strong opinions. Once the expert opinions are obtained, it is crucial to act accordingly based on the opinions. If the opinions are favorable, the opinions should be utilized to leverage the best possible result. These favorable reports can be used to control medical treatment that appears out of control, significantly decrease TTD exposure, reduce permanency exposure, and in general bolster defenses should the case proceed to trial. Sending the message to claimant’s attorney that you
intend to rely on your experts’ opinions and will take the case to trial if necessary can provide the best possible outcome, and result in early claim resolution.
Brad A. Antonacci  
- Partner

Brad concentrates in the areas of workers’ compensation and civil litigation. With extensive experience defending hundreds of employers before the Illinois Workers' Compensation Commission, Brad has arbitrated many workers' compensation claims as well as argued numerous reviews before the Workers’ Compensation Commission during his career. He has also argued appeals of Workers’ Compensation Commission decisions before the circuit court. Brad has spoken on and authored articles regarding employment layoffs and temporary total disability benefits. Brad has also spoken on updates to Workers’ Compensation case law. He has authored articles regarding the Workers’ Compensation Fraud Statute. Brad also co-authored, “Loaning Employer Not Liable . . ., Personal Comfort Doctrine,” for the Illinois Defense Counsel Quarterly (2008). In 2012, Brad was named to the Illinois Super Lawyers Rising Stars list. He is a member of the Winnebago County Bar Association in its workers’ compensation section. Brad is also a member of the drone law practice group, which advises clients on issues relating to drone operations.

Brad has spent his entire legal career with Heyl Royster in the Rockford office beginning in 2002 and became a partner in 2013. Brad received his J.D. from Northern Illinois University School of Law, where he was an editor of the Law Review, and a B.A. from the University of Illinois.

Significant Cases
- **Ordoniz v. Dano Auto Body** - Petitioner claimed he injured his low back and allegedly suffered a herniated disc while removing a car door from a vehicle. He amassed approximately $225,000 in outstanding medical bills for treatment in the form of chiropractic care, physical therapy, medications, numerous spinal injections, a radiofrequency ablation, and numerous radiological tests. The Workers’ Compensation Commission relied on our IME and Utilization Review reports in finding petitioner suffered a lumbar strain and in denying approximately $225,000 in alleged outstanding medical bills as unreasonable, unnecessary, and causally unrelated to the work injury. The Commission awarded 3% person-as-a-whole.

- **Alanis v. Woodstock Christian Life Services** - Petitioner injured her lower back while pushing a cart and slipping and falling on some water. She received medical treatment for approximately one month, was released from treatment and was released to return to work. She eventually began treating with a pain management physician who performed a series of lumbar spine injections as well as a radiofrequency ablation. When the pain management physician released petitioner after one year of treatment, the petitioner had accumulated an extensive amount of outstanding medical bills which we denied. Relying on our IME physician, the Workers’ Compensation Commission denied approximately $34,000 in alleged outstanding medical bills and awarded 6% person-as-a-whole for a lumbar strain.

- **Hieber v. Glass and Mirror Company** - Petitioner suffered a compensable and accepted right shoulder injury. Following right shoulder surgery, petitioner developed an infection in the right shoulder which resulted in a revision surgery. Subsequent to the second surgery, the petitioner suffered from kidney failure and eventually required a kidney transplant. On behalf of glass and mirror company client the firm presented evidence and an expert opinion that the renal failure was not related to the right shoulder surgeries and infection, that petitioner had risk factors for developing renal failure, and that petitioner subsequently developed renal failure in the transplanted kidney. The arbitrator found the petitioner’s renal failure to be causally connected to the right shoulder work injury and awarded all benefits related to the renal failure. On review, the Worker’s Compensation Commission found no causal connection between the work injury and the petitioner’s kidney condition, and the circuit court affirmed on appeal. The Commission’s decision resulted in a reduction of the arbitrator’s award of more than $300,000.

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Publications


Public Speaking

- “Functional Capacity Evaluations As Evidence of Disability In Workers’ Compensation Claims”
  Heyl Royster’s 31st Annual Claims Handling Seminar (2016)
- “Workers’ Compensation Case-Law Update”
  Winnebago County Bar Association (2016)
- “All I Want for the Holidays is a Drone: Permitted Uses Today and What to Expect Tomorrow”
  Heyl Royster Governmental Lunch & Learn Seminar, Rockford, IL (2015)
- “Vocational Rehabilitation – Respondent’s Perspective”
  IICLE Advanced Workers’ Compensation Seminar (2014)
- “Case Law Update”
  Heyl Royster 26th Annual Claims Handling Seminar (2011)
- “TTD Liability and Mass Layoffs”
  Heyl Royster 24th Annual Claims Handling Seminar (2009)

Professional Recognition

- Named to the 2012 and 2013 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.

Professional Associations

- Illinois State Bar Association
- Winnebago County Bar Association
- Illinois Association of Defense Trial Counsel

Court Admissions

- State Courts of Illinois
- United States District Court, Northern District of Illinois

Education

- Juris Doctor, Northern Illinois University School of Law, 2002
- Bachelor of Arts-Sociology, University of Illinois, 1999

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Mohit Khare
- Associate

Mohit focuses his practice in the defense of civil litigation, including casualty matters and representing employers in Workers’ Compensation claims.

Prior to joining Heyl Royster, Mohit was an Assistant States’ Attorney with the Winnebago County State’s Attorney’s Office (2011-2016), where he handled various criminal matters, including misdemeanors and felonies, including as a 2nd chair handling major felonies. He has handled more than 25 jury trials and 75 bench trials/motions. His trial experience includes murders, violent crimes, property crimes, and traffic cases. Motions litigated have included motions to suppress statements, motions to quash arrest, sentencing hearings, and various other substantive legal motions. Mohit has also worked with all of the police departments in Winnebago County in authorizing charges, preparing arrests warrants, and approving search warrants. Mohit began his legal career clerking at a worker’s compensation/personal injury law firm during law school. After graduating from law school he worked at a personal injury firm prior to joining the Winnebago County State’s Attorney’s Office.

Mohit graduated from the University of Illinois-Chicago in three years with a Bachelor’s degree in Economics. He worked as an accountant for Aon for a year before attending law school at Northern Illinois University.

Publications

Public Speaking
- “The Local Government Travel Expense Control Act”
  Heyl Royster Governmental Seminar (2016)

Professional Associations
- Illinois State Bar Association
- Winnebago County Bar Association

Court Admissions
- State Courts of Illinois

Education
- Juris Doctor, Northern Illinois University, 2010
- Bachelor of Arts-Economics, University of Illinois at Chicago, 2006

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