

# BELOW THE RED LINE

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ROYSTER

## WORKERS' COMPENSATION UPDATE

“WE’VE GOT THE STATE COVERED!”

*A Newsletter for Employers and Claims Professionals*

*April 2013*

### A WORD FROM THE PRACTICE GROUP CHAIR

Spring is trying to arrive, and I’m sure we will all welcome the change this brings to our weather. Change is happening all around us, and this is even true with the Worker’s Compensation Commission. In this installment you will review summaries of the recent Commissioner changes, including a new chairman of the Commission. There have also been some changes at the appellate court which are analyzed in this issue by our workers’ compensation appellate practitioner and newsletter editor Brad Elward. We will be keeping you abreast of the impact of these changes in coming months.

I also want to remind you again to save the date of May 22, 2013, for attendance at our annual firm seminar. You will be receiving an official invitation shortly. We have put together a challenging program which will address many of the defense opportunities which are developing as a result of the 2011 reforms. In my 28 years of practice, I cannot remember a time when strategic use of available defenses has been more important. We look forward to discussing these issues with you on May 22.

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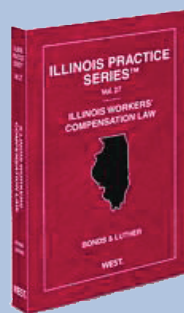
We hope you enjoy the content of this newsletter. Please also note the expanded biography of our featured author, Brad Elward. We want you to get to know our practice group attorneys who serve you. As always, if there are questions please do not hesitate to contact us.



Craig S. Young  
Chair, WC Practice Group  
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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](http://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.



# HEYL ROYSTER WORKERS' COMPENSATION UPDATE

April 2013

Brad Elward, Editor

## IMPORTANT COMMISSIONER CHANGES

Illinois Governor Pat Quinn has appointed Commissioner Michael Latz to the position of Chairman of the Illinois Workers' Compensation Commission. Subject to confirmation by the Illinois Senate, Mr. Latz will replace current Chairman Mitch Weisz.

Additionally, the terms of the following Commissioners were subject to re-appointment:

- Commissioner Mario Basurto (Panel C)
- Commissioner Ruth White (Panel B)
- Commissioner Thomas Tyrrell (Panel A); and
- Commissioner Yolaine Dauphin (Panel B)

Governor Quinn has re-appointed Commissioners Basurto, White and Tyrrell.

Assuming that the Illinois Senate confirms Commissioner's Latz' appointment, there will be two open positions for "public" representatives on the Commission.

## PREFERRED PROVIDER ANNOUNCEMENTS

The final rules on the Preferred Provider Program (PPP) have been published, and are effective as of March 4, 2013. PPPs were authorized by the 2011 legislation, 820 ILCS 305/8(a)(4).

To view the proposed rules, [click here](#). Select the link for Issue 11/March 15, 2013, and go to page 154 of the pdf.

## APPELLATE PRACTICE UPDATE

by Brad Elward - Peoria Office

The next eighteen months should prove interesting at the appellate level as some of the earliest cases interpreting the 2011 amendments make their way into the appellate court. This will definitely be a year worth watching, as we see how the amendments are construed and whether the intent of the legislation – to reduce costs – is actually achieved. Remember, as these cases move forward, you

should be looking for claims with the best facts and record for appellate review.

In 2012 there were approximately 21 appellate court decisions involving workers' compensation issues. Of these cases, one was accepted by the Illinois Supreme Court – *Gruszczka v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 101049WC involving whether the mailbox rule applies to section 19(f) judicial review filings – and that case was argued this past January. See March and September 2012 *Below the Red Line* for case details. A decision by the Court is expected mid-year.

As we have advised in the past, we stand ready to assist you with any workers' compensation appeals you may have at any level and any location in the state. We have a vast body of experience in perfecting judicial reviews and in arguing cases before the Appellate Court, Workers' Compensation Commission Division.

We would be happy to help you with your appeal!

## Changes in Appellate Court Composition

As we reported in our November issue of the newsletter, Justice John T. McCullough, Presiding Justice of the Appellate Court, Workers' Compensation Commission Division, passed away in late October 2012. Justice McCullough had served as the Fourth District representative on the court since 1991, and had been the senior member of that court since the mid-1990s. Since November, Justice William Holdridge, Third District, has assumed the Presiding Justice position.

In early January 2013, Justice Thomas M. Harris, Jr., was appointed to the Appellate Court, Fourth District, and has since been appointed to the Workers' Compensation Commission panel. Justice Harris has served as a part-time Assistant State's Attorney in Logan County. From 1991 to 2007, he worked as a trial attorney handling civil cases throughout the State of Illinois. He was appointed associate judge of Logan County in 2007 and elected resident circuit judge in 2008.

## Recent Appellate Court Cases

There have been several notable decisions by the Appellate Court, Workers' Compensation Commission Division.

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sion, over the past few months. First and foremost is *Curtis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120976WC, which was handed down on March 11. In that case, a final decision of the arbitrator was entered on January 25, 2005, which addressed issues remaining from a prior section 19(b) disposition and awarded medical benefits and permanency benefits. The case was not reviewed. On January 21, 2010, the claimant filed a section 8(a) petition for additional total temporary disability (TTD) benefits. In his petition, the claimant alleged that he was entitled to "open medical rights" because he tried his claim, and that he underwent a causally-related surgery in October 2009, after which time he was authorized off work and entitled to additional TTD benefits. The claimant also filed a request for penalties and attorneys' fees based on the employer's refusal to pay the TTD benefits.

Before the Commission, the employer argued that any request for additional TTD benefits must be sought under section 19(h) of the Act, which imposed a 30-month filing deadline. According to the employer, the 30 months had expired and, therefore, barred the claimant's petition. The Commission denied the claimant's petition, explaining that the section 19(h) time limitations applied and that there was no separate time provision found in section 8(a).

The appellate court, in a unanimous decision, affirmed the Commission, finding that section 19(h) did, in fact, apply to claims for TTD benefits following the entry of a final Commission decision. In so doing, the court rejected the claimant's argument that section 19(h) was limited to disability solely in the context of permanency. According to the appellate court, the language of section 19(h) included modifiers such as "increased," "diminished," and "recurred," which specifically references TTD benefits.

Notably, the legislature also used the modifiers "recurred" and "ended" when referring to the term "disability" as referenced in section 19(h). While permanent injuries can "increase" or "diminish," only temporary disabilities can "recur." Similarly, the statute allows the Commission to "re-establish[]" compensation payments. Since only temporary disabilities can recur, it necessarily follows that only TTD payments may be "re-established." Thus, when section 19(h) is read as a whole, it is clear that the legislature did not intend to limit the scope of section 19(h) only to permanency benefits. Rather, the statute was meant to cover TTD benefits as well.

*Curtis*, 2013 IL App (1st) 120976WC, at ¶ 15.

Because the claimant's position was not supported in the statute, "we reject it."

The appellate court further noted that its interpretation of section 19(h) – as encompassing a request for payment of TTD benefits – was consistent with prior court rulings in *U.S. Steel Corp. v. Industrial Comm'n*, 35 Ill. 2d 506, 507–11 (1966) (affirming award of additional benefits, including TTD, pursuant to a section 19(h) petition); *Poore v. Industrial Comm'n*, 298 Ill. App. 3d 719, 724 (4th Dist. 1998) (concluding that to be entitled to additional TTD under section 19(h), a claimant must establish that his disability destabilized and required more treatment or recovery time); *World Color Press v. Industrial Comm'n*, 249 Ill. App. 3d 105, 109 (5th Dist. 1993) (holding that TTD benefits are available pursuant to section 19(h), on the basis that a period of TTD can be the result of a period in which a claimant's partial disability, which was once thought to be permanent, becomes unstable or degenerates and requires additional treatment to restabilize).

In another case, *Wood Dale Electric v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 113394WC, the appellate court held that the employer was not entitled to apply a pension benefit received by the claimant against his wage differential award. There, the Commission determined that the claimant was entitled to a wage differential and then further rejected the suggestion that the permanency award could be offset by the claimant's pension. According to the arbitration testimony, the claimant was entitled to a retirement pension payable regardless of any disability once he reached age 62. While the claimant

### SAVE THE DATE!

**Wednesday, May 22, 2013**

**Heyl, Royster, Voelker & Allen  
28th Annual Claims Handling Seminar**

**Concurrent Seminars:**  
**Casualty & Property or Workers' Compensation**  
1:00 – 4:30 p.m.  
Doubletree Hotel, Bloomington, Illinois

Agendas will be available soon  
**Questions? [pbaysingar@heyloyroyster.com](mailto:pbaysingar@heyloyroyster.com)**

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had intended to retire at age 65, he elected to receive his retirement pension earlier due to his disability.

The appellate court, relying on two prior decisions in *Tee-Pak, Inc. v. Industrial Comm'n*, 141 Ill. App. 3d 520, 528-529 (4th Dist. 1986), and *Elgin Bd. of Educ. School Dist. U-46 v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 953 (1st Dist. 2011), held that the pension benefits were the result of a normal retirement pension wholly unrelated to the claimant's workers' compensation accident. Because of this fact and the rulings in *Tee-Pak* and *Elgin*, "those payments cannot entitle Wood Dale to a credit against its liability under the Act." *Wood Dale Electric*, 2013 IL App (1st) 113394WC, at ¶ 20. Moreover, the appellate court held that Wood Dale could not defeat the wage differential award on the theory that the claimant, by retiring, had voluntarily removed himself from the work force. *Id.* at 21.

### Brad Elward - Peoria Office



Brad concentrates his work in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has been with the firm since 1991 and has handled all aspects of civil appeals, ranging from preparation of initial appeal documents through the drafting of appellate briefs and oral arguments. Brad handles workers' compensation cases before the Workers' Compensation Commission, the circuit courts, and the Appellate Court, Workers' Compensation Commission Division. He has authored more than 275 briefs and argued more than 125 appellate court cases, resulting in more than 65 published decisions.

Brad is the current Vice President of the Appellate Lawyers' Association and will become President in June of this year. He has been active in the ALA since 1995 and has served three terms as a director, and spoken on appellate topics at several ALA seminars. Speaking of his upcoming term as ALA President, Brad hopes to "bring more appellate functions to central and southern Illinois venues so that all practitioners have the opportunity to learn from some of the state's best appellate advocates." One of Brad's favorite ALA events is the Appellate Court, Workers' Compensation Commission Division, luncheon, typically held in Chicago, where all five of the panel members are available for questions from the audience. "This event provides an excellent insight for practitioners into how this Court views certain issues and practices, and affords an opportunity for people to get to know the justices on a more personal level."

Discussing the firms' approach to handling workers' compensation appeals, Brad believes that Heyl Royster stands alone in the legal services it provides to its clients. "We have a unique system for handling appeals here at Heyl Royster. Unlike many firms where the trial attorney handles the occasional appeal in the midst of his or her hectic trial practice, we have an attorney dedicated to workers' compensation appeals who regularly appears before the Commission, circuit court, and Appellate Court on workers' compensation matters. This intimate familiarity with the issues and appeal procedures means in the end, the client saves money and time on the appeal."

Brad also believes that Heyl Royster offers a significant body of experience in evaluating jurisdictional issues when a case moves from the Commission to the circuit court. "The judicial review procedure under section 19(f) is one of the most difficult and unforgiving and, in part ambiguous, processes in all of workers' compensation appellate practice. We have handled a number of complex jurisdictional questions and have seen firsthand many of the issues that arise with interlocutory orders and with defective or imperfect judicial pleadings. Having the right counsel at this critical stage can be crucial because the consequences of a mistake in the judicial review process can be devastating."

Brad is recognized by his peers around the state as highly experienced in jurisdictional issues and workers' compensation appeals.

Brad has been named an Illinois Super Lawyer since 2008 and was named a Leading Lawyer in 2013 for appellate practice. He also authored the Illinois Association of Defense Counsel *amicus curie* brief before the Illinois Supreme Court on *Interstate Scaffolding v. Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010), which addressed whether an employer was obligated to continue paying TTD benefits when the employee was terminated for cause.

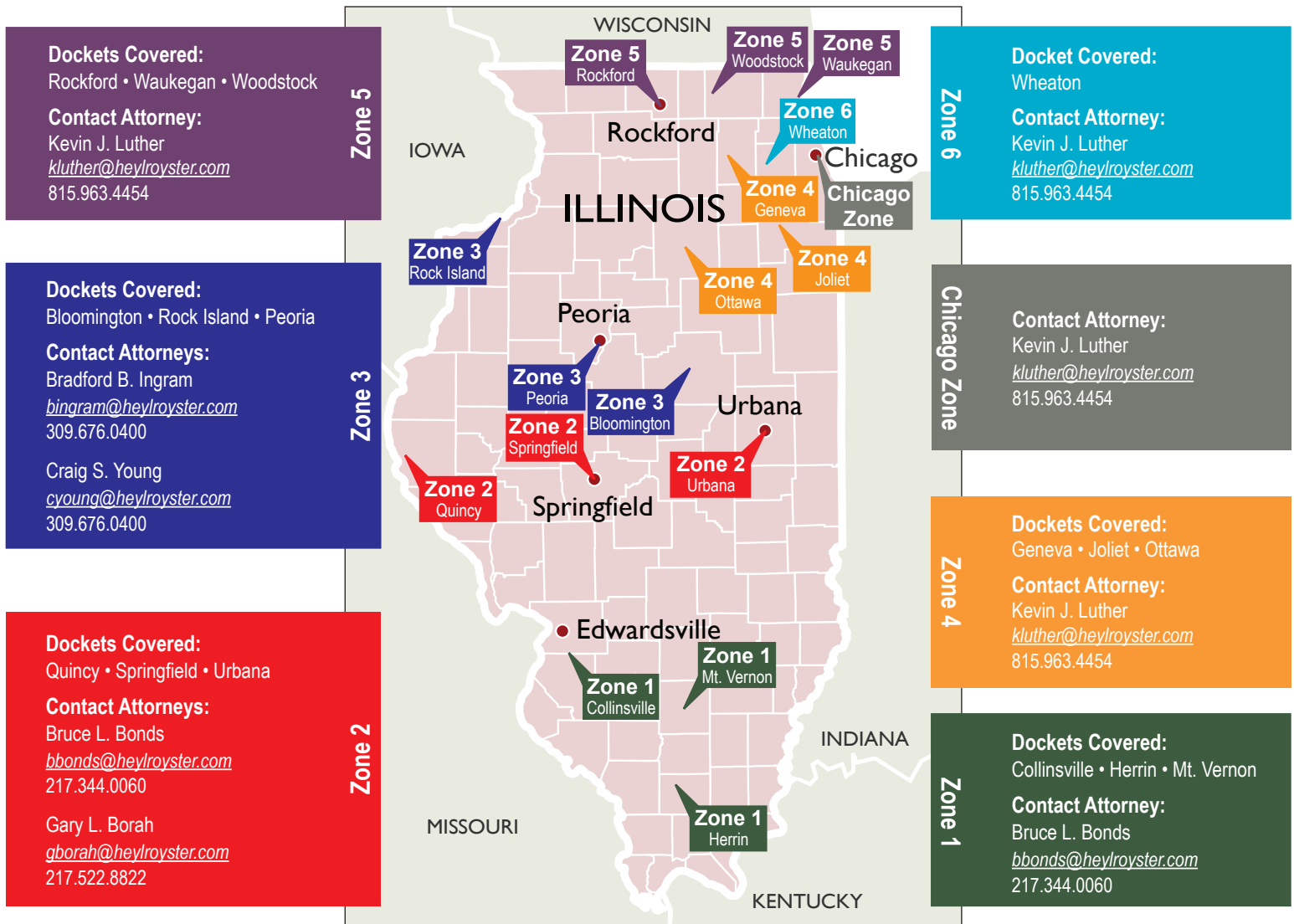
In addition to his work as an appellate attorney, Brad's writing skills have been honed through the publication of articles and books on naval aviation topics. His most recent book covers the developmental and operational history of the Boeing F/A-18E/F Super Hornet and EA-18G Growler. "The interest in naval aviation is something that dates back to watching the movie *Midway* as a child, and then it resurfaced during the 1991 Gulf War. I started writing aviation articles in 1997 for a few international publications and the books came along a few years later." Brad's writing has seen him land and take-off from an aircraft carrier, fly several tactical jet simulators, and most recently fly in an F/A-18F Super Hornet.



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**"We've Got the State Covered!"**



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