

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

HEYL ROYSTER

A Newsletter for Employers and Claims Professionals

February 2012

A WORD FROM THE PRACTICE GROUP CHAIR



It is my pleasure to introduce myself as the new Chair of our Workers' Compensation Practice Group. As Kevin Luther advised you in the last newsletter, I began this position on January 1, 2012, and I look forward to working with all of you. Kevin did a great job and will continue to work with me in managing our workers' compensation practice. We all work together in our effort to serve you.

We approach 2012 with a different mindset. Our firm is taking the position that the reforms passed last year are meaningful, and are intended to reduce the number of cases found compensable and the value of workers' compensation cases generally. We plan to aggressively promote this position with petitioner's attorneys, Arbitrators, and Commissioners, and we look forward to working with you toward that end. We will be keeping you regularly updated on trends and developments, and the trial results we are seeing around the state. Please keep an eye out in the coming weeks for the announcement of our firm seminar on May 17, 2012. This program will be a detailed update on the status of the various reforms and their developing interpretation by the Workers' Compensation Commission.

One issue which is understandably causing confusion is the development of new venue sites and the zone concept. Please feel free to contact any of our attorneys with your questions in this regard and for file assignment information. In an effort to make this task easier for you, we have developed a map which you will find attached at the end of this newsletter. Our effort is to outline for you the various zones and the venue sites within those

zones, along with Heyl Royster contact information for each zone. Any questions you have regarding this new system, the Arbitrators assigned to the system, or file assignment information can be directed toward these contacts. We hope you find the map helpful.

In this edition we are pleased to highlight Kevin Luther's article on the AMA guides and disability evaluations. One of the most important aspects of the recent reforms is the adoption of the AMA guides as an additional piece of evidence to be considered in disability ratings. We are starting to see claims with accidents after September 1, 2011, and the importance of the AMA guides is becoming apparent. We hope you find the article helpful, and we look forward to reporting further to you on this important topic at the May seminar.

Craig S. Young
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THIS MONTH'S AUTHOR:



Kevin Luther has spent his entire legal career with Heyl Royster. He started in November 1984 in the Peoria office, and moved to Rockford when the firm opened that office in 1985. Kevin is a member of the firm's board of directors. He concentrates his practice in workers' compensation, employment law, and employer liability. In addition to arbitrating hundreds of workers' compensation claims and representing many employers before the Illinois Human Rights Commission, he has also tried numerous liability cases to jury verdict.

DISABILITY EVALUATION FOR ACCIDENTS ON OR AFTER SEPTEMBER 1, 2011

The New Legislation – Section 8.1b

Section 8 of the Illinois Workers' Compensation Act was amended to provide for new criteria in the establishment of permanent partial disability pursuant to Sections 8(d) and 8(e) of the Illinois Workers' Compensation Act. Many jurisdictions provide that a disability rating is to be determined by consideration solely of the American Medical Association impairment rating standards. The Illinois Workers' Compensation Act, as amended, provides that AMA impairment ratings are admissible in Illinois workers' compensation claims as one factor in the determination of permanent partial disability:

Sec. 8.1b. Determination of permanent partial disability. For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

(b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the

reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. 820 ILCS 305/8.1b.

Who May Prepare an AMA Impairment Rating?

It is anticipated that there may be issues with respect to who may prepare an AMA impairment rating in a workers' compensation claim. The statute provides that "a physician licensed to practice medicine in all of its branches" may prepare such a report on a permanent partial disability rating. This language would seem to include medical doctors, osteopaths, podiatrists, dentists, psychiatrists, and psychologists. The new legislation does not state that a treating physician may not prepare such an AMA rating; rather, it appears to be broad enough to allow treating and non-treating physicians to prepare an impairment rating.

The Factors for Permanent Partial Disability Determination

Section 8.1b states that the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" (hereinafter "Guides") shall be used by the physician in determining the level of impairment. The most current AMA *Guides* is the sixth edition, which was first printed in November of 2007. The second printing occurred in April of 2009.

Although the AMA *Guides* numbers over 600 pages and sets forth several factors and criteria to be evaluated by the physician, Section 8.1b also identifies measures

of impairment that are to be included by the physician in this analysis: loss of range of motion, loss of strength, measured atrophy of tissue mass consistent with the injury, and any other measurement that establishes the nature and extent of the impairment. 820 ILCS 305/8.1b.

Following the identification of the impairment rating by a physician, the statute then provides that in determining the level of permanent partial disability, the arbitrator shall base his or her determination on the following factors: (1) the reported level of impairment pursuant to the AMA impairment rating, (2) the occupation of the injured employee, (3) the age of the employee at the time of the injury, (4) the employee's future earning capacity, and (5) evidence of disability corroborated by the treating medical records. The statute provides that no single enumerated factor shall be the sole determination of liability; rather, the relevance and weight of any factors is used in addition to the level of impairment. The statute also specifically states that the Illinois Workers' Compensation Commission must, in written order, explain the relevance and weight of any factors used in addition to the level of impairment as reported by the physician.

The plain language of Section 8.1b suggests that an impairment rating must be considered along with four other factors as identified in the statute. However, it was reported by the Illinois Workers' Compensation Commission that at a meeting of the Illinois Workers' Compensation Commission on November 17, 2011, the Commission voted unanimously to provide the following recommendation to arbitrators: (1) an impairment report is not required to be submitted by the parties with the settlement contracts, (2) if an impairment rating is not entered into evidence, the arbitrator is not precluded from entering a finding of disability. www.iwcc.il.gov/amamemo.pdf.

The memorandum further states that these are provided as a guidance of the Commission's review of the new law and some current "relevant arguments" and interpretations. It is stated that it is "not a rule of general applicability." It concluded that each commissioner and arbitrator should issue a decision that responds to the factual situation on review before them. www.iwcc.il.gov/amamemo.pdf.

In addition to identifying an AMA impairment rating as one factor in determining the level of permanent partial disability, the statute specifically mentions four other factors to consider. By mentioning these four other factors, it can be argued that any other factors not identified in the statute are not to be considered. For example, a possible factor such as "subjective complaints of pain" is not mentioned. It can therefore be argued that subjective complaints of pain are not to be considered by the arbitrator or the commissioner in his or her determination of permanent partial impairment. Any testimony or evidence about what the petitioner may notice about him or herself during the course of a workday is also not identified as a statutory factor, and an argument can be made that this testimony and evidence is no longer admissible. Any testimony requesting the petitioner to state, "What do you notice about yourself now as opposed to before the accident?" may also be excluded because it was not specifically mentioned as a factor in the statute.

With respect to the factors that are mentioned, one of them is "the occupation of the injured employee." This factor has little guidance in prior case law, and we can only assume that if the occupation is more "physical" in nature, then the arbitrator or commissioner is to conclude that there could be more impairment. In other words, it can be argued that this factor means that an individual with a broken arm who works in an office setting should be awarded less permanent partial dis-

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ability than an individual who broke his or her arm and works in a factory.

Another factor is the “age of the employee at the time of the injury.” This factor could seem to cut both directions with respect to the determination of permanent partial disability. For example, one can argue that an injury when a person is more “senior” has a greater effect on permanent partial impairment than an individual who is less senior. On the other hand, an argument can be made that an injury to a “less senior” person may have more of an impairment on his or her job because that less senior individual has more years to work than a “senior” worker with the same injury.

The factor of “the employee’s future earning capacity” has little guidance from past case law and decisions. For example, if an employee’s future earning capacity is decreased, then typically those petitioners assert Section 8(d)1 wage-differential claims by their election as opposed to requesting a PPD decision based on Section 8(e) or 8(d)2.

The last reported factor is “evidence of disability corroborated by the treating medical records.” This would appear to be a “catchall” allowing the arbitrator or commissioner to view the entire treatment. One may argue that this is redundant because in preparing an AMA impairment rating, the physician is required to review the past medical history and treatment records as a part of the three-step process, as identified below.

AMA Guide – Not Straightforward

As noted above, the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition, contains over 600 pages and spans 17 chapters. The 17 chapters of the sixth edition can be broken down as follows:

1. Conceptual Foundations and Philosophy
2. Practical Application of the Guides
3. Pain
4. Cardiovascular System
5. Pulmonary System
6. Digestive System
7. Urinary and Reproductive Systems

8. Skin
9. Hematopoietic System
10. Endocrine System
11. Ear, Nose, Throat, and Related Structures
12. Visual System
13. Central and Peripheral Nervous System
14. Mental and Behavioral Disorders
15. Upper Extremities
16. Lower Extremities
17. Spine

AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (2008).

The Sixth edition contains five axioms which are to provide direction and define categories.

1. The Guides adopt the terminology and conceptual framework of disablement as put forth by the International Classification of Functioning, Disability, and Health (ICF);
2. The Guides become more diagnosis based with these diagnoses being evidence based when possible.

**Heyl, Royster, Voelker & Allen
presents our**

27th Annual Claims Handling Seminar

Concurrent Sessions:
Workers' Compensation
or
Casualty & Property

Thursday, May 17, 2012
1:00 p.m. – 4:30 p.m.
Doubletree Hotel
Bloomington, Illinois

An agenda will be available soon

Invitations will be mailed at a later date

3. Simplicity, ease of application, and following precedent, where applicable, are given high priority, with the goal of optimizing interrater and intrarater liability.
4. Rating percentages derived according to the Guides are functionally based to the fullest extent possible.
5. The Guides stress conceptual and methodological congruity within and between organ system ratings.

AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (2008), p. 2.

The Guides state that there is increased use of the Guides to translate objective clinical findings into a percentage of the whole person in various workers' compensation systems in the United States and abroad. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 20. It is reported that in the United States, 44 states, 2 commonwealths, and federal employee compensation systems (in about 90+ percent of U.S. jurisdictions) either mandate or recommend using the Guides to measure impairment in workers' compensation claims. The Guides state that even in the handful of states that have not yet adopted the Guides to evaluate impairment in workers' compensation cases, the Guides is often used to assess damages in personal injury claims under federal statutes and state common law. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 20.

At What Time Do You Request an AMA Impairment Rating?

With respect to timing, permanent impairment ratings according to the Guides are to be done only after a maximum medical improvement (MMI) status is obtained. The impairment should not be considered until a reasonable time has passed for the healing or recovery to occur. This would depend on the nature of the underlying pathology, as the optimal duration for recovery may vary considerably from days to months. Clinical findings

must indicate that the medical condition is static and well stabilized for the person to have reached MMI. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 24. The AMA Guides refers to maximum medical improvement as the status where patients are as good as they are going to be from the medical and surgical treatment available to them. It can also be conceptualized as the date from which further recovery or deterioration is not anticipated, although over time (beyond 12 months) there may be some expected change. The Guides, however, do not permit the rating of future impairment. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 26.

MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment. MMI is not predicated on the elimination of symptoms and/or subjective complaints. MMI can be determined if recovery has reached the stage where symptoms can be expected to remain stable with the passage of time, or there can be palliative measures that do not alter the underlying impairment substantially, within medical probability. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 26.

The Guides require a clear, accurate, and complete report to support a rating of permanent impairment by a licensed physician. A three-step process is required by the examiner to estimate impairment according to the Guides: clinical evaluation, analysis of findings, and discussion of how the impairment rating was calculated. These three steps should be clearly identified in a written report. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 28.

The Guides can be interpreted to require that an actual clinical examination be performed, in addition to review of medical records. The Guides state that relevant history is to be obtained by review of the medical records necessitating the requesting of past medical history, and relevant history is to be obtained from the "patient's presentation of the current history." The Guides state that it is important to review medical records before

performing an impairment rating, as this will enable the examiner to do things such as (1) clarify or at least document inconsistencies, if any, between the history provided by the patient and the history contained in the medical records, (2) reconcile inconsistencies, if any, between the patient's history during the examination and other previous medical records, and (3) focus on the portion of the history pertinent to the impairment rating. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 28. The Guides further state that "the physical examination should be performed in a manner and setting that facilitates the effective communication between the patient and the examiner, thereby decreasing anxiety and increasing concentration and effort." *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 28.

The AMA Impairment Rating Report

The Guides contain a "standard report" that the evaluator may use. The purpose of this form is to ensure that all essential elements are included in the impairment evaluation report. This form, appearing as "Figure 2-3" of the Guides, may be reproduced without permission from the American Medical Association. There is nothing in the statute stating that the report is automatically admissible. Accordingly, it is expected that the report can be objected to as hearsay so as to require an evidence deposition in order to place the opinion on the appropriate rating into evidence at trial. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008), p. 28.

The majority of workers' compensation claims are musculoskeletal injuries. These injuries are rated by diagnosis, with modifications based on functional status, physical findings, and clinical studies. The Guides provide for diagnostic grids for the following regions of the body: (1) Upper extremities: digit, wrist, elbow, and shoulder; (2) lower extremities: foot/ankle, knee, and hip; (3) spine: cervical, thoracic, lumbar, and pelvis. *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (2008).

Conclusion

In conclusion, the new legislation, which applies to accidents on or after September 1, 2011, may have a substantial effect on the way workers' compensation disability is determined in Illinois. An impairment rating pursuant to the AMA Guides is now admissible and represents one of four criteria to be utilized by arbitrators and commissioners in the assessment of permanent partial disability determinations.

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HRVA Makes House Calls!

If you or your organization is interested in a presentation on the recent Amendments to the Workers' Compensation Act and how they will affect your claims handling, Heyl Royster would be happy to visit. To schedule your "house call" please contact:

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Bruce Bonds
bbonds@heyloyster.com

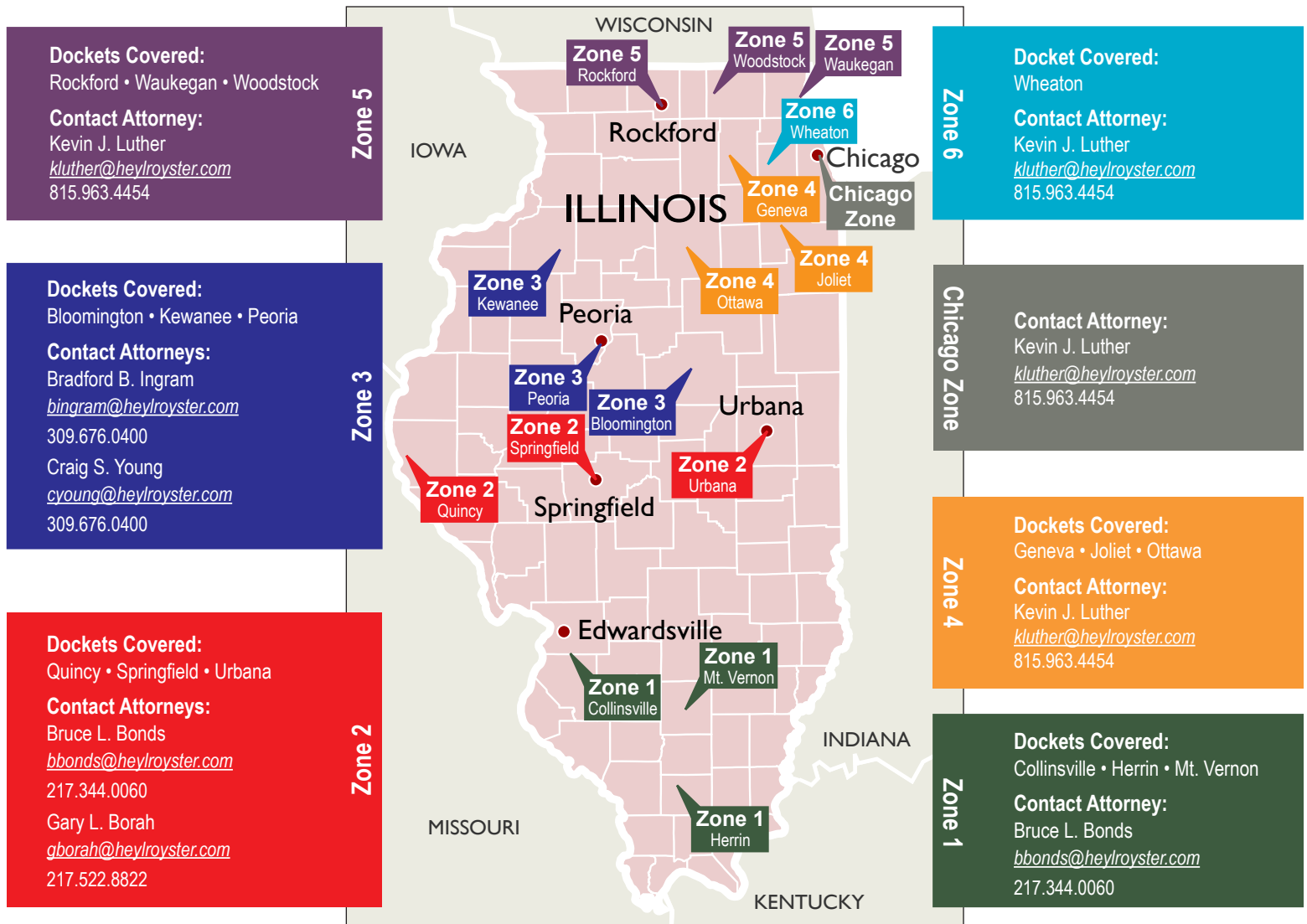
Craig Young
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We look forward to stopping by!

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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