

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

HEYL ROYSTER

A Newsletter for Employers and Claims Professionals

October 2011

A WORD FROM THE PRACTICE GROUP CHAIR



With Halloween around the corner and the cold winds of winter fast approaching the Midwest, we bring you our October issue of *Below the Red Line*. This month's issue provides information on the new arbitrator assignments and venues as well as the new Commission Panel assignments released this month.

Our feature article speaks on the 2010 *Interstate Scaffolding* decision, which held that Temporary Total Disability (TTD) benefits continue until the claimant reaches maximum medical improvement (MMI), and addresses how the Commission, and most recently the Appellate Court, Workers' Compensation Commission Division, has interpreted that ruling. The *Otto Baum* case, discussed in this issue, was handled by our firms' Peoria office. Dan Simmons, one of our Springfield workers' compensation partners, and Doug Bitner, an associate in our Springfield office, authored the column and offer some tips for handling TTD claims when job offers are made within the employees restrictions, but rejected.

We hope you find this information helpful.

Kevin J. Luther
Chair, WC Practice Group
kluther@heyloyster.com

Arbitration Assignments Announced

The arbitrator assignments were recently released and are noted below, both through the end of 2011 and from January 2012 forward.

The call of former arbitrators will be handled as follows:

Former arbitrator	Hearing Site	November Arbitrator	December Arbitrator	January Arbitrator
DeVriendt	Chicago	Mason	Mason	Mason
Galicia	Chicago	Kane	Black	Eliminated; all cases reassigned
Giordano	Peoria	Granada	Luskin	See regions below.
Hagan	Chicago	Pulia/Doherty	Doherty	Doherty
Lammie	Chicago	Carlson	Flores	Flores
Nalefski	Herrin	Luskin	Granada	See regions below.
Peterson	Chicago	Thompson-Smith	Thompson-Smith	Thompson-Smith
Prieto	Chicago	Kelmanson	Kelmanson	Kelmanson

Because Arbitrators Jutila and Neal are on medical leave, Arbitrator Jutila's call will be handled by Arbitrator Williams during Arbitrator Williams' trial dates. Various arbitrators will cover for Arbitrator Neal.

Commencing in January 2012, arbitrators have been assigned to the new Downstate arbitration regions as follows:

Region	Hearing site-Arbitrator in January 2012
1	Collinsville-Simpson; Mt. Vernon-Granada; Herrin-Luskin
2	Quincy-Neal; Urbana-Tobin; Springfield-White
3	Kewanee-Mathis; Peoria-Pulia; Bloomington-Akemann
4	Geneva-Falcioni; Ottawa-Dollison; Joliet-Andros
5	Rockford-Lee; Waukegan-Erbacci; Woodstock-Holland
6	Wheaton-Kinnaman; O'Malley in February; Fratianni in March (These arbitrators will appear in Chicago for two months.)

According to the Commission site, one arbitrator will appear at each hearing site each month. Arbitrators will rotate in the sequence shown; for example, Arbitrator Simpson will appear in Collinsville in January, Mt. Vernon in February, and Herrin in March. Also by way of example, by site, in Collinsville, Arbitrator Simpson will appear in January, Arbitrator Luskin in February, and Arbitrator Granada in March.

All cases, including those with emergency petitions, will be randomly assigned among each region's arbitrators. A party with a 19(b) or 8(a) petition will need to appear before the assigned arbitrator.

To accommodate the three-arbitrator regions, effective January 12, 2012, the Commission will return to 90-day continuance cycles. Corrected notices are now being sent out. Any partially tried cases will stay with the original arbitrator.

All tried-but-undecided cases and partially tried cases will be redistributed soon among arbitrators. The Commission will prepare and pay for a transcript. If parties want a new trial, a motion can be filed immediately to the newly assigned arbitrator, who will determine if sufficient cause exists to grant a new trial.

Past issues of
Below the Red Line
are available under the
"Resources" section of our website
www.heyloyster.com

Governor Quinn Appoints Commissioners

On October 17, 2011, Governor Quinn announced the appointment of seven Commissioners. Three Commissioners, Yolaine Dauphin Michael, Thomas Tyrrell, and Chairman Mitchell Weisz, are in the midst of four year terms set to expire on January 21, 2013.

Commissioners by panel:	Panel A	Panel B	Panel C
Employee representatives:	Thomas Tyrrell	Charles DeVriendt	David Gore
Public representatives:	Daniel Donohoo	Yolaine Dauphin Michael	Paul Latz
Public representatives:	Kevin Lamborn	Nancy Lindsay	Mario Basurto

Michael Paul Latz of Cook County has more than 20 years of experience as an attorney in private practice and in the public sector. He is currently "Of Counsel" with the firm Ancel Glink Diamond Bush DiCianni & Kraftheffer. Previously, he was an associate and partner for Bollinger, Rueberry & Garvey and associate at Potter & Schaffner and O'Conner, Schiff & Meyer. He has also served as assistant state's attorney for Cook County. He holds a J.D. from University of Notre Dame.

THIS MONTH'S AUTHOR:



Dan Simmons is a partner in Heyl Royster's Springfield office. Dan concentrates his practice in the areas of workers' compensation and civil litigation defense, including auto, premises and construction liability cases, as well as the premises liability and third party defense of employers. Dan has extensive litigation experience, and has taken numerous cases to jury verdict both in state and federal courts. Additionally, he has arbitrated hundreds of workers' compensation claims before the Illinois Workers' Compensation Commission. Dan is a frequent author and lecturer on civil litigation and workers' compensation issues.

INTERPRETING *INTERSTATE* *SCAFFOLDING*

By now most employers are well aware of the Illinois Supreme Court's January 2010 decision in *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010). The decision has had a significant impact on an employer's potential exposure for Temporary Total Disability (TTD) benefits. Since we initially reported on the case in our March 2010 newsletter there have been several Commission rulings and, within the past few weeks, the first Appellate Court ruling interpreting *Interstate Scaffolding*.

This month's newsletter addresses what has taken place with *Interstate Scaffolding* since it was decided in January 2010. To start, we will briefly revisit the facts and holding of *Interstate Scaffolding*. We then review some of the more significant Commission decisions interpreting *Interstate Scaffolding* and TTD payments. Finally, we analyze the recent Appellate Court case of *Otto Baum Co., Inc. v. Workers' Compensation Comm'n*, 2011 IL App (4th) 100959WC (Sept. 29, 2011), and discuss how the Appellate Court interpreted and applied *Interstate Scaffolding* to a scenario where an employer sought to terminate TTD obligations after its employee repeatedly rejected legitimate offers of work within his restrictions.

Interstate Scaffolding Redux

On January 22, 2010, the Illinois Supreme Court handed down its opinion in *Interstate Scaffolding v. Illinois Workers' Compensation Comm'n*. 236 Ill. 2d 132, 923 N.E.2d 266 (2010). In that case, the claimant, Jeff Urban, a union carpenter employed by Interstate Scaffolding, sustained a work-related injury in 2003. For the next two years, the claimant alternated between periods of "off-work" and "light duty" work, in which he received TTD and maintenance. In May 2005 and while on light duty work, the claimant was terminated after an incident involving defacing company property with religious graffiti. Given his termination, the employer refused to pay any further TTD benefits.

The arbitrator found that the claimant was not entitled to continued TTD benefits after his date of termination even though he had not reached maximum medical improvement (MMI). The Commission reversed and awarded TTD after the claimant's date of termination, relying on the fact that he had not yet reached maximum medical improvement. In a 3-2 decision, the Appellate Court reversed and found that the claimant was not entitled to TTD because he was terminated

"for cause." The case was then accepted for review by the Illinois Supreme Court.

In analyzing the claimant's arguments requesting TTD benefits, the Court stated:

Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied an employee who remains injured, yet has been discharged by his employer for 'volitional conduct' unrelated to his injury. A thorough examination of the Act reveals that it contains no provision for the denial, suspension, or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been "cause" for the employee's dismissal. Such an inquiry is foreign to the Illinois workers' compensation system.

Interstate Scaffolding, 236 Ill. 2d 132, 146.

The Supreme Court went on to hold that an employer's obligation to pay TTD benefits to an injured employee did not cease because the employee had been discharged, whether or not the discharge was for 'cause' (See the March 2010 Newsletter for a more thorough discussion). According to the Court, when an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to TTD benefits remains whether the claimant's condition has stabilized.

The Commission's Application Of *Interstate Scaffolding*

Interstate Scaffolding has been interpreted by the Commission on a number of occasions to uphold an award of TTD benefits for claimants who were terminated from their employment prior to maximum medical improvement. *Lopez v. AGI Media*, 11 I.W.C.C. 0576 (June 16, 2011) (claimant

Kevin Luther and Brad Elward spoke on workers' compensation reform issues at the October 12, 2011, Association of Illinois Defense Counsel seminar in Edwardsville, Illinois.

resigned when she could not produce proper documentation that she could legally work in the United States); *Waddell v. Memorial Medical Center*, 10 I.W.C.C. 0742 (Aug. 4, 2010) (basis for the employee's termination is irrelevant). The Commission has also been steadfast in finding that once an individual has reached maximum medical improvement, there is no further award of TTD benefits owed and *Interstate Scaffolding* does not apply. *Decker v. Walgreens Distribution Center*, 11 I.W.C.C. 0586 (June 16, 2011) (employee terminated after he reached MMI).

However, there have been a few cases apart from the termination context that have discussed the Court's ruling in *Interstate Scaffolding*. For example, in two cases, the Commission has found that if the claimant has left his/her employment by means of voluntary retirement as opposed to involuntary termination, then no TTD benefits are owed after that date and *Interstate Scaffolding* does not apply. *Gill v. Meany, Inc.*, 10 I.W.C.C. 0935 (Sept. 24, 2010) (employee voluntarily retired and on that date, the employer was accommodating the work restrictions; he effectively removed himself from the workforce); *Albert v. Egyptian Concrete*, 11 I.W.C.C. 0695 (July 18, 2011) (TTD was properly terminated where the employee did not present valid off-work slips and voluntarily retired). In another case, the Commission held that a claimant's decision to attend college classes while off-work does not end the employer's obligation to pay TTD benefits that were otherwise due. *Wilson v. American Red Cross*, 10 I.W.C.C. 0960 (Sept. 30, 2010) (claimant was on light duty restrictions and had not yet reached MMI). The Commission has also found that, even though an employee may still be on a weight-restriction or light-duty, if the restriction is higher than what is required to perform one's duties or profession at full capacity, then the employer has no duty to pay TTD benefits

and *Interstate Scaffolding* does not apply. *Lackscheide v. Help at Home*, 11 I.W.C.C. 0679 (July 11, 2011) (30-lb restriction was more than 25-lb required to perform job at full capacity; therefore, TTD is not required).

Otto Baum Co., Inc. v. Workers' Compensation Comm'n

As of publication in October 2011, there is only one Appellate Court decision interpreting and applying *Interstate Scaffolding*. In *Otto Baum Co., Inc. v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100959WC (Sept. 29, 2011), the claimant injured his back at work in August 2008. He was cleared for light-duty, but upon his return exacerbated his condition and was again taken off work. On two later occasions, the employer offered the claimant light-duty work within his restrictions; the claimant, however, turned the offers down claiming that it hurt to drive his car to work. The offers of work were part of the employer's return to work program that emphasized returning injured workers to the workplace as soon as possible. Two months later the claimant was again cleared for sedentary work and in early December requested light duty work from his employer. The employer refused, claiming that it had offered work to the claimant on several prior occasions and that these had been rejected by the employee, despite the offered work falling within his work restrictions.

The arbitrator awarded the claimant 3-3/7 weeks of TTD benefits to compensate the claimant for the time between the original work-related injury and the first opportunity of employment that was turned down and some time from when the injury was exacerbated. The arbitrator however denied the request for additional TTD benefits, finding that the employee had turned down work within his restrictions on multiple occasions.

On review, the Commission affirmed the arbitrator's award, but modified and increased the TTD benefit award to 13-6/7 weeks of benefits, which covered the time after which the employee sought to return to work in December. The Commission did not award TTD benefits for any period of time where the employer had offered the claimant light duty work and that work had been rejected. The circuit court affirmed the Commission's decision.

The issue on appeal was whether the Commission erred in awarding the additional TTD benefits for the time period from December forward that the employer refused to offer light-duty because of the claimant's prior refusals. The Appellate Court affirmed the Commission's decision to grant the claimant TTD for the time period that light-duty work

At a recent Appellate Lawyers' Association luncheon honoring the Appellate Court, Workers' Compensation Commission Division, the panel members said that the number of workers' compensation cases on appeal has remained steady over the course of 2011.

HEYL ROYSTER WORKERS' COMPENSATION NEWSLETTER

Brad Elward, Editor

was requested and not accommodated, concluding that the Commission's decision was not against the "manifest weight." The court stated that "we must infer from the Commission's decision that the Commission considered, and rejected, the possibility that the claimant's refusal was so unjustified as to warrant termination of his TTD benefits, yet determined that the claimant's refusal justified a suspension of his benefits for a time that he refused work." The court reiterated that *Interstate Scaffolding* was clear that TTD benefits continue until the employee has reached maximum medical improvement.

While this case seemingly runs against employers because it upheld the award of TTD benefits for the period when the employee again sought light duty work, in a larger sense it marks a victory for employers. Although upholding the Commission's decision on a manifest weight of the evidence basis, the Appellate Court went on to clarify the law by stating that "the Commission has discretion to terminate or suspend benefits in response to a claimant's refusal to accept work within his restrictions." This language is crucial for employers because it allows future Commission panels, under the appropriate circumstances, to terminate the employer's TTD obligation where the employee repeatedly refuses to accept work offered within his restrictions. Under such a scenario, *Otto Baum* supports the Commission's fact-finding decision and should provide ample support for upholding that decision before the Appellate Court.

Practice Pointer

The decision in *Otto Baum* highlights the need to thoroughly document in your workers' compensation files any offers of employment as well as the employee's response.

Please feel free to contact any of Heyl Royster's workers' compensation attorneys should you have any question concerning *Interstate Scaffolding*, *Otto Baum*, or any other workers' compensation needs throughout the State of Illinois.

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:

Kevin Luther

kluther@heyloyroyster.com

Bruce Bonds

bbonds@heyloyroyster.com

Craig Young

cyoung@heyloyroyster.com

We look forward to stopping by!

Workers' Compensation Venues & Contact Attorneys

Heyl, Royster, Voelker & Allen

Peoria

Attorneys:

Bradford B. Ingram - bingram@heyloyroyster.com
 Craig S. Young - cyoung@heyloyroyster.com
 James M. Voelker - jvoelker@heyloyroyster.com
 James J. Manning - jmanning@heyloyroyster.com
 Stacie K. Hansen - shansen@heyloyroyster.com
 Timothy D. Gronewold - tgronewold@heyloyroyster.com

Dockets Covered:

Bloomington • Galesburg • Peoria • Rock Island

Springfield

Attorneys:

Gary L. Borah - gborah@heyloyroyster.com
 Daniel R. Simmons - dsimmons@heyloyroyster.com
 John O. Langfelder - jlangfelder@heyloyroyster.com
 Jeffrey G. Cox - jcox@heyloyroyster.com

Dockets Covered:

Decatur • Quincy • Springfield

Urbana

Attorneys:

Bruce L. Bonds - bbonds@heyloyroyster.com
 John D. Flodstrom - jflodstrom@heyloyroyster.com
 Bradford J. Peterson - bpeterson@heyloyroyster.com
 Toney J. Tomaso - ttomaso@heyloyroyster.com
 Jay E. Znaniecki - jznaniecki@heyloyroyster.com
 Joseph K. Guyette - jguyette@heyloyroyster.com

Dockets Covered:

Danville • Herrin • Joliet • Kankakee
 Mattoon • Mt. Vernon • Urbana



Rockford & Chicago

Attorneys:

Kevin J. Luther - kluther@heyloyroyster.com
 Brad A. Antonacci - bantonacci@heyloyroyster.com
 Thomas P. Crowley - tcrowley@heyloyroyster.com
 Lynsey A. Welch - lwelch@heyloyroyster.com
 Dana J. Hughes - dhughes@heyloyroyster.com

Dockets Covered:

Chicago • DeKalb • Geneva • Ottawa
 Rock Falls • Rockford • Waukegan
 Wheaton • Woodstock

Edwardsville

Attorneys:

Daniel R. Simmons - dsimmons@heyloyroyster.com
 James A. Telthorst - jtelthorst@heyloyroyster.com

Dockets Covered:

Collinsville

State of Missouri

Attorney:

James A. Telthorst - jtelthorst@heyloyroyster.com

Appellate:

Brad A. Elward - belward@heyloyroyster.com

Dockets Covered: Statewide

Peoria

Suite 600
 124 SW Adams St.
 Peoria, IL 61602
 309.676.0400

Springfield

Suite 575
 1 N. Old State
 Capitol Plaza
 PO Box 1687
 Springfield, IL 62705
 217.522.8822

Urbana

102 E. Main St.
 Suite 300
 PO Box 129
 Urbana, IL 61803
 217.344.0060

Rockford

Second Floor
 120 W. State St.
 PO Box 1288
 Rockford, IL 61105
 815.963.4454

Edwardsville

Mark Twain Plaza III
 Suite 100
 105 W. Vandalia St.
 PO Box 467
 Edwardsville, IL 62025
 618.656.4646

Chicago

Theater District
 Business Center
 60 W. Randolph St.
 Suite 220
 Chicago, IL 60601
 312.762.9237

Practice Groups & Contacts



Appellate Advocacy

Karen Kendall
kkendall@heyloyroyster.com



Business and Commercial Litigation

Tim Bertschy
tbertschy@heyloyroyster.com



Business and Corporate Organizations

Brent Gwillim
bgwillim@heyloyroyster.com



Civil Rights Litigation/Section 1983

Brad Ingram
bingram@heyloyroyster.com



Class Actions/Mass Tort

Barney Shultz
rshultz@heyloyroyster.com



Construction

Gary Nelson
gnelson@heyloyroyster.com



Employment & Labor

Brad Ingram
bingram@heyloyroyster.com



Insurance Coverage

Gary Nelson
gnelson@heyloyroyster.com



Liquor Liability/Dramshop

Nick Bertschy
nbertschy@heyloyroyster.com



Long Term Care/Nursing Homes

Ed Wagner
ewagner@heyloyroyster.com



Product Liability

Rex Linder
rlinder@heyloyroyster.com



Professional Liability

Dave Sinn
dsinn@heyloyroyster.com



Property

Steve Heine
sheine@heyloyroyster.com



Railroad Litigation

Steve Heine
sheine@heyloyroyster.com



Tort Litigation

Gary Nelson
gnelson@heyloyroyster.com



Toxic Torts & Asbestos

Barney Shultz
rshultz@heyloyroyster.com



Truck/Motor Carrier Litigation

Matt Hefflefinger
mhefflefinger@heyloyroyster.com



Workers' Compensation

Kevin Luther
kluther@heyloyroyster.com

Peoria
Suite 600,
Chase Building
124 S.W. Adams Street
Peoria, IL 61602
309.676.0400

Springfield
Suite 575,
PNC Bank Building
1 North Old State Capitol
Plaza
PO Box 1687
Springfield, IL 62701
217.522.8822

Urbana
Suite 300
102 E. Main Street
PO Box 129
Urbana, IL 61803
217.344.0060

Rockford
2nd Floor,
PNC Bank Building
120 West State St.
PO Box 1288
Rockford, IL 61105
815.963.4454

Edwardsville
Suite 100, Mark Twain
Plaza III
105 West Vandalia Street
PO Box 467
Edwardsville, IL 62025
618.656.4646

Chicago
Theater District
Business Center
60 W. Randolph St.
Suite 220
Chicago, IL 60601
312.762.9237

To learn more about the firm, visit our website

www.heyloyroyster.com