

BELOW THE RED LINE

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WORKERS' COMPENSATION UPDATE

"WE'VE GOT THE STATE COVERED!"

A Newsletter for Employers and Claims Professionals

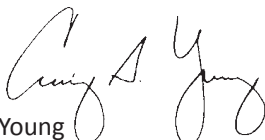
September 2014

A WORD FROM THE PRACTICE GROUP CHAIR

We welcome you to the September edition of *Below the Red Line*. In this issue, we offer brief information on the backgrounds of four recently appointed arbitrators to the Workers' Compensation Commission. As with our reporting on all arbitrators, we will be keeping you updated on our experience with the new arbitrators once their Zones are assigned and they begin handling cases. It is always important to know the arbitrators who handle your cases and we will do our best to keep you updated on those issues.

We also report on an additional difficult case from the Appellate Court, Workers' Compensation Commission Division. The *Sunny Hill* decision, expertly analyzed by Dana Hughes from our Rockford office, will present employers with increased difficulty in denying TTD benefits. As we have been regularly reporting in this newsletter and in our speaking engagements, since the Illinois Supreme Court's *Interstate Scaffolding* decision, TTD denial is very difficult when the claimant is not at MMI, remains medically restricted, and is not working for any reason. This new decision reemphasizes that point. We all know ending the TTD benefit is the most effective way to bring a claim to conclusion. Clearly, in today's legal environment it is increasingly important to develop as much evidence as possible to support a TTD termination, and a medical opinion addressing MMI is likely necessary. Dana offers some good suggestions as to how we might work together in our continued efforts to move files toward closure as the court makes terminating TTD more difficult.

We hope your fall season is off to a great start, and we appreciate our continuing relationship with you. If you have any questions on the matters raised in this newsletter, or any other workers' compensation issues, please do not hesitate to contact me or any of our attorneys.



Craig S. Young
Chair, WC Practice Group
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FOUR NEW ARBITRATORS APPOINTED

Governor Pat Quinn recently appointed four new arbitrators. They are currently receiving training and their Zone assignments will be announced shortly.

Maria Bocanegra is an attorney at Katz Friedman, specializing in workers' compensation. She previously worked as a judicial assistant to the Honorable David Furman and as a case administrator for the United States Bankruptcy Court in the District of Colorado. She was also appointed to the Illinois Department of Labor's Labor Advisory Board in 2013. She holds a J.D. from DePaul University and a B.A. from Quincy College.

Stephen Friedman is currently a Managing Partner of Rusin, Maciorowski & Friedman, Ltd., specializing in workers' compensation defense. Previously, he was an associate and a partner at Rooks, Pitts and Poust practicing workers' compensation and personal injury defense. He earned both a J.D. and a B.A. from the University of Illinois.

Steven Fruth is currently a trial attorney at the Chicago Transit Authority. He has served as a circuit judge in Cook County and as the Staff Counsel at Allstate Insurance Company. He holds a J.D. from The John Marshall Law School and a B.A. from Southern Illinois University.

Michael Nowak is an attorney at Becker, Paulson, Hoerner & Thompson, P.C., focusing primarily on workers' compensation law. Previously, he was a partner in his own firm, representing injured workers. He has served as an arbitrator for the St. Clair County Arbitration Center as well as a member of the Judicial Nominating Committee for the U.S. District Court, Southern District of Illinois. He holds a J.D. from Northern Illinois University and a B.A. from Eastern Illinois University.

**Bios are taken from the Commission website.*

In this issue . . .

- **The *Sunny Hill* Decision and the Evolution of the TTD Test: How Can We Follow the Rules When the Rules Keep Changing?**

THE *SUNNY HILL* DECISION AND THE EVOLUTION OF THE TTD TEST: HOW CAN WE FOLLOW THE RULES WHEN THE RULES KEEP CHANGING?

By: Dana J. Hughes
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The Appellate Court, Workers' Compensation Commission Division, on June 26th of this year handed down its decision in *Sunny Hill of Will County v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 130028WC, affirming the Commission's decision to award TTD to a claimant even though the claimant appeared to be "working" during the alleged period of temporary total disability. In order to examine the appellate court's reasoning, and more importantly, to understand how this ruling affects your claim defenses, we will take a look at how our courts have examined TTD over the last few decades and discuss the current test for TTD entitlement.

Examining the cases makes one wonder: Do the courts keep changing the rules when it comes to TTD? If they do, what is the current state of the law with respect to TTD liability? Finally, we will discuss the practical implications of the *Sunny Hill* case in claims handling. For advice on how to understand and manage TTD in your claims, or any issue affecting your claims, we encourage you to contact any one of our workers' compensation attorneys to discuss the facts of your individual cases to get our specific recommendations for handling.

The Test for TTD Benefits

The test for whether a claimant is entitled to TTD benefits has evolved and changed over the last few decades. In the past, the Illinois Supreme Court consistently stated that a claimant was considered totally disabled when he could not perform any services except those for which no reasonably stable labor market exists. See the court's holdings, for example, in *E.R. Moore Co. v. Industrial Comm'n*, 71 Ill. 2d 353 (1978), *J.M. Jones Co. v. Industrial Comm'n*, 71 Ill. 2d 368 (1978), and *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278 (1982). All of those decisions, each three decades old or older, involved employers who challenged total disability awards where claimants were working in some capacity during the alleged periods of disability. The Court's focus was not on the claimant's medical condition during the alleged period of disability,

but on the nature and regularity of the work performed by the claimant during the time period. However, in recent years, there has been a shift to an analysis of the claimant's physical condition coupled with his return to work status.

In *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170 (5th Dist. 2000), the appellate court outlined the considerations for whether TTD was appropriate. Among the factors to be considered in determining whether a claimant has reached maximum medical improvement include a release to return to work, with restrictions or otherwise, and medical testimony or evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized.

Then, in 2010, the Illinois Supreme Court handed down the seminal case of *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132 (2010). While *Interstate Scaffolding* presented the Court with the narrow issue of whether a claimant is entitled to TTD benefits after he was terminated from his employment due to his own volitional conduct while he was still partially restricted due to the work injury, the court articulated the current test regarding TTD liability, generally. The court stated that the test is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement, such that he is capable of returning to the work force. The court stressed that "work" is but one factor in the analysis of whether one is at MMI or entitled to TTD benefits. Other factors, as delineated by the Court ten years prior in *Freeman United Coal*, include release to return to work with restrictions or not, and medical testimony or other medical evidence concerning claimant's injury, the extent thereof, the prognosis, and whether the injury has stabilized. However, according to the *Interstate Scaffolding* court, whether a claimant is working in a "stable labor market" is not dispositive of the TTD issue; the claimant's work – type, hours, and earnings – may be relevant to the issue of whether his condition has stabilized.

The *Sunny Hill* Decision

In *Sunny Hill*, the appellate court considered whether a licensed practical nurse, who injured her shoulder at work, was entitled to TTD benefits during a time in which she appeared to be "working" at her flower shop, while she was totally restricted from work by her treating physician. The claimant owned the flower shop with her two daughters, who ran the shop. The claimant helped at the shop three days per week, but she did not earn any money for her efforts there.

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Brad Elward, Editor

In determining this work did not relieve the employer of its TTD obligation, the court focused on the fact that the claimant helped at the shop in the ways she did prior to the work accident and did no more there than "she would at home." Furthermore, her treating physician had not released her to return to work. The court found that the claimant was entitled to TTD during this time period because the mere fact that she was "helping" at the flower shop did not prove that her condition had stabilized such that she was no longer temporarily totally disabled from work.

Based on the *Interstate Scaffolding* decision, the *Sunny Hill* court felt the issue of TTD could not be disposed of merely by the fact that the claimant appeared to be working. Rather, the court examined whether the claimant's condition had stabilized. To do so, the court relied on the medical evidence which revealed that the claimant had not been released to return to work and was actively treating during this disputed period of alleged temporary and total disability. The court did examine the "work" performed by claimant at the shop – type, hours and earnings – and found that it did not constitute that which would preclude an award of TTD. She performed light tasks, worked no set hours, and did not earn any money for her efforts. The court was careful not to characterize the claimant's activities as "work" for purposes of its analysis. Furthermore, it went so far as to discount earlier appellate cases in which the court focused its analysis of TTD entitlement on the claimant's actual ability to work, arguing that it never intended to automatically prevent a claimant from receiving TTD if the claimant was engaged in any work.

While *Sunny Hill* reemphasizes the Illinois Supreme Court's *Interstate Scaffolding* test focusing on the stability of the claimant's condition, a careful reading of *Interstate Scaffolding* imparts an element of work ability into the TTD analysis. *Interstate Scaffolding* focused on the stability of claimant's condition as it applies to claimant's ability to reenter the workforce.

Looking at the case, perhaps evidence of a claimant performing work activities coupled with a credible medical opinion that the claimant is capable of returning to work in some fashion would lend more support to an employer's argument that a claimant is not entitled to TTD. While the claimant bears the burden of proof, once the claimant is restricted such that he appears incapable of work, it is up to the employer to develop evidence to the contrary. The *Sunny Hill* court was silent as to whether the surveillance footage captured the claimant performing activities outside her restrictions, or whether that evidence would have changed the court's analysis.

Even so, the *Sunny Hill* decision has hammered home the current court's reliance on medical evidence and testimony in deciding critical TTD issues. Moreover, it has emphasized that more must be shown than occasional work by the claimant while receiving TTD benefits. The work must be of such a nature as to support a finding that the claimant's condition and disability has stabilized. When we develop our claim defenses, we must take a multi-layered approach and deeply and thoroughly develop evidence, including medical evidence, in support of our positions.

As always, if you have any questions concerning TTD benefits in your cases, please feel free to contact any of our workers' compensation attorneys across the state.

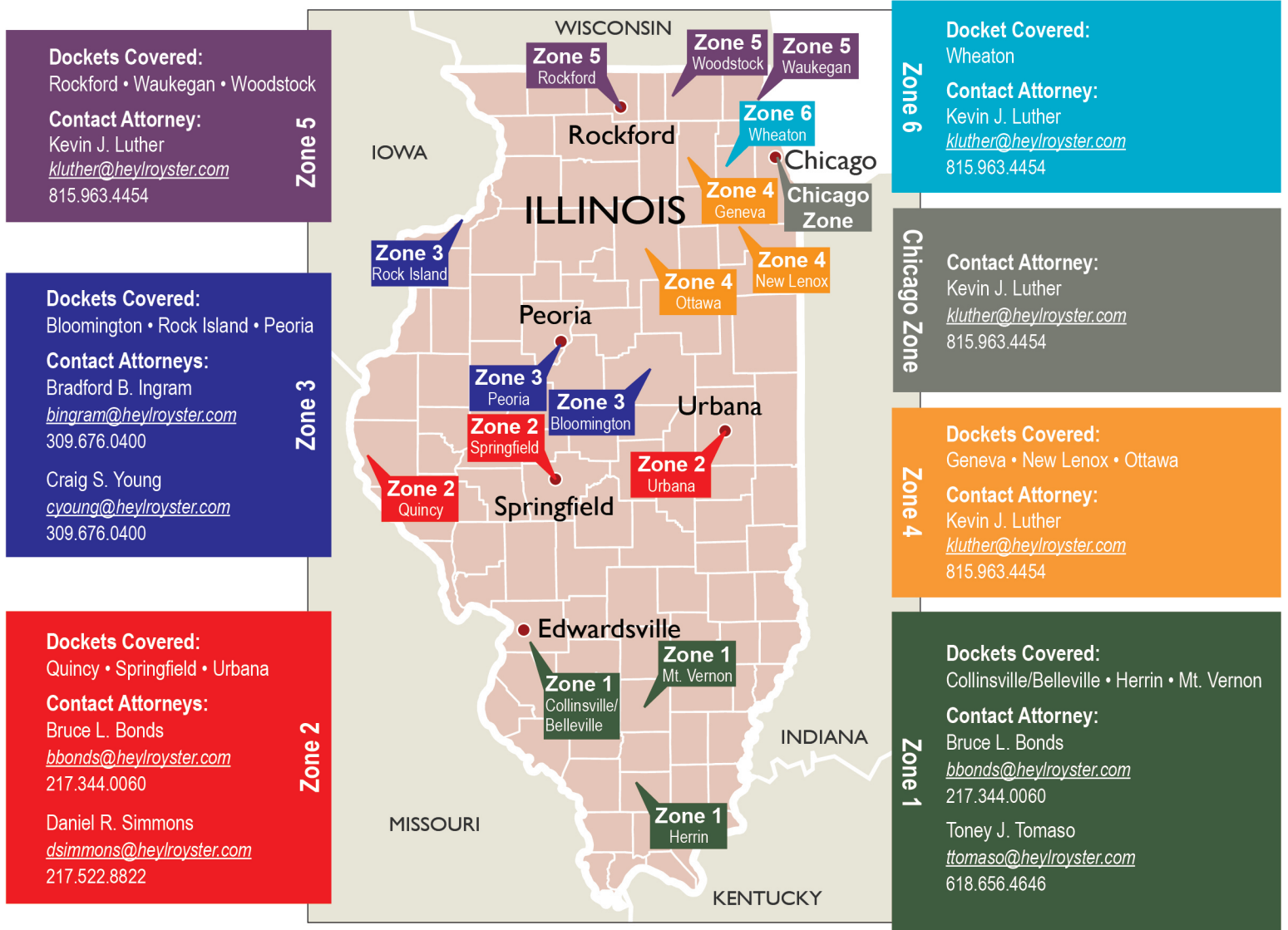


A native of Rockford, Dana has been an associate in our Rockford office since 2006. She represents employers before arbitrators and commissioners of the Illinois Workers' Compensation Commission and before the circuit court in third party liability claims. Dana has also represented businesses in subrogation matters, and has defended businesses and individuals in automobile negligence and premises liability actions. Her writing has been published in the Northern Illinois University Law Review and Kane County Bar Association newsletter. Dana has presented before the Illinois State Bar Association's Insurance Law Section and contributes to Heyl Royster's annual claims handling publication. Dana serves on the Winnebago County Bar Association's Board of Directors and volunteers as an arbitrator in the 17th Circuit's court-annexed arbitration system.

WORKERS' COMPENSATION GROUP

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ILLINOIS ZONE MAP



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