HEYL ROYSTER

BELOW THE RED LINE

WORKERS' COMPENSATION UPDATE
"WE'VE GOT YOU COVERED!"

December 2023

A WORD FROM THE PRACTICE CHAIR

As the year winds down to its final days and we find ourselves looking ahead to a clean slate and a new year, I find myself looking back. At the close of 2023, two of my mentors over the past twenty-seven years are embarking on a new journey. Craig Young (Managing Partner for Heyl Royster) and John Flodstrom (Managing Partner of the Champaign office) are retiring and closing the chapter of their lives where they practice law. Mentors are there for you in small and big ways, and when you put all the lessons together, it is not just about the law, filing of briefs, and trial work. It was how to be a better person, a better version of yourself in all facets of your life. Craig and John understood they would not be practicing forever and that passing on knowledge and lessons learned was vital in the strength and longevity of our great firm. They led by excellent example without thought of their own career, but what was best for the team and moving the firm forward. On a personal note, I will miss my friends and the daily collaboration and comradery. Thank you for all you taught me and the members of this firm and our profession. Please know you did it right and made us all better. Enjoy your next journey, and we promise to continue your legacy of professionalism and excellence.

As I write this introductory paragraph, it is that time of year when you are not really sure what is up and what is down, what day it is, and if you are still on break or if you are supposed to be back in the saddle. If my kids are sleeping in, may I as well? Or am I supposed to be in the office today? If you feel this way, don't be alarmed; I believe that is par for the course this time of year. The nice part is, and I do hope this is true for everyone, things do slow down this time of year, and the email traffic does get a bit lighter. After all, those leftover cookies are not going to eat themselves. So, please enjoy your time with loved ones this holiday season. The workers' compensation team here at Heyl Royster looks forward to rolling up our sleeves and getting to work in 2024. After all, those claims are not going to close themselves, as they need a great team to focus, work together, and get the job done efficiently and effectively. Here's to 2024!

Ashley Broadstone, from the Peoria office, writes this month's article. Once upon a time, Ashley, while working under Craig Young, operated as a paralegal with a particular focus on workers' compensation. She got "the bug," went to law school, graduated, and returned to her home at Heyl Royster, working under the guidance of Jessica Bell in the Peoria workers' compensation department once again, but this time as an attorney. I will call this month's article excellent reference material for you. You may not deal with Occupational Disease Act (ODA) cases on a normal basis, and frankly, over a career, you may only see a handful. But they come up and can get ugly and expensive - fast. So, a little knowledge of this Act goes a long way to help you in a big way. Ashley does a great job of hitting some important highlights for you when the need arises. Also, because this is such a specialized Act, please know the attorneys here at Heyl Royster are here to help, as always. So, if you have questions, just contact us so we can make your job easier. Happy New Year everyone! Here's to a successful and prosperous 2024!

Toney Tomaso

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FEATURE ARTICLE

BY ASHLEY BROADSTONE

The Illinois Workers' Occupational Diseases Act (hereinafter "ODA") provides recovery when an employee "sustains injury to health or death *by reason of a disease contracted or sustained in the course of the employment.*" 820 ILCS 310/3 (emphasis added). The pivotal question is what counts as an injury by reason of a disease versus a plain old injury, which would be guided by the Illinois Workers' Compensation Act (hereinafter "IWCA"). 820 ILCS 305/1. Practically speaking, petitioners file few claims under the ODA, even if some sort of disease process is involved. And when they do, it often goes unnoticed.

This article compiles recent case law on occupational exposure claims to identify trends and strategies for defending these claims with confidence. While they may be more unusual than the orthopedic injuries we are typically presented with, they can often spiral out of control and lead to significant exposure if not handled properly during the initial stages.

RECENT CASE LAW

In *Caponigro v. Illinois Workers' Comp. Comm'n*, claimant brought a claim under the IWCA alleging she was exposed to chemicals while cleaning urinals. 2020 IL App (4th) 200096WC-U, ¶ 4. Her claim was initially accepted and deemed compensable, but at arbitration, it was determined that she failed to prove a causal connection between her alleged exposure and her *current* condition of ill-being. *Id.* ¶ 2. The evidence shed light on significant credibility issues with the claimant. While there were suspicions during her initial course of treatment about the legitimacy of her complaints, by her treating physician no less, claimant ultimately stopped treating for more than two years, resuming treatment a few months before arbitration. *Id.* ¶ 41. During this two-year gap, claimant remained active and did not limit her activities to avoid potential environmental triggers. *Id.* This was demonstrated by surveillance footage and social media posts presented by respondent, which showed claimant eating at a public restaurant, attending a professional sporting event, shopping, going to a water park, participating in a school trip

to an orchard, smoking, and going to a baby shower. *Id.* ¶ 43. The arbitration hearing itself allowed the arbitrator to make her own personal observations about the consistency and legitimacy of petitioner's ongoing complaints. *Id.* The arbitrator awarded claimant 10% MAW for the initial injury, but further specified that claimant failed to prove her current condition of ill-being was causally related to the accident, and therefore, respondent was not obligated to pay for any additional medical treatment. *Id.* ¶ 2. The Commission and appellate court affirmed. *Id.* ¶ 2, 44.

In *Reese v. Illinois Workers' Comp. Comm'n*, the claimant brought a claim under the ODA and alleged he suffered from work-related emphysema. 2021 IL App (4th) 190630WC-U, ¶ 2. Claimant testified to his 32-year history working in coal mines, his exposure to coal dust among other things, and his history of smoking. *Id.* ¶ 5. Both parties presented medical expert testimony, and ultimately, the Commission found the record established two causes for claimant's emphysema: coal mine dust inhalation and cigarette smoking. *Id.* ¶ 13. The experts both testified emphysema can be multifactorial in etiology and the risk from smoking versus coal mine dust is comparable. *Id.* Therefore, the Commission's decision that the claimant's coal mine exposure was a causative factor (even though no one specifically opined on this) was not against the manifest weight of the evidence. *Id.* ¶¶ 6, 13.

In *Duncan v. Illinois Workers' Comp. Comm'n*, claimant sought benefits for irritant-induced bronchial reactivity. 2021 IL App (5th) 200346WC-U, ¶ 2. Claimant worked as a gas journeyman for Ameren and alleged two specific exposures to chemicals and fumes. *Id.* ¶¶ 5, 34. The Commission ruled claimant failed to meet his burden in proving irritant-induced asthma or a permanent exacerbation of asthma. *Id.* ¶¶ 1-2. The important piece considered here was claimant's longstanding, preexisting history of asthma. Respondent's expert testified that the two alleged work exposures triggered asthma attacks, which were similar to the asthma attacks, dyspnea, and bronchospasms claimant had experienced for more than a decade. *Id.* ¶¶ 25, 35. Additionally, video surveillance captured him active outdoors, exposed to multiple fumes, without any evidence of impairment or difficult relating to such exposures. *Id.* ¶ 54. Thus, while there was evidence of a temporary aggravation of claimant's condition, there was no evidence to support a permanent change. *Id.* ¶¶ 25, 46. The Commission affirmed the arbitrator, and this decision was upheld on appeal. *Id.* ¶¶ 1, 61.

In *American Coal Company v. Illinois Workers' Comp. Comm'n*, the claimant brought a claim under the ODA alleging work-related coal worker pneumoconiosis (CWP), asthma, and emphysema. 2022 IL App (5th) 210200WC-U, ¶ 2. Claimant testified to his 30-year history in the coal mining industry with various exposures and his history of smoking. *Id.* ¶¶ 5-6, 10. In addition to pulmonary experts, the parties retained radiologists to interpret and opine on several x-ray films spanning 2002 to 2012 to identify if and when there was objective evidence of CWP. *Id.* ¶¶ 16, 19-20, 22, 25. Claimant's experts testified there was evidence of CWP while respondent's experts stated the objective findings were negative for CWP and instead pointed to nonoccupational asthma with

claimant's history of smoking, exposure to secondary smoke, and obesity contributing to his symptomology. *Id.* ¶¶ 15-25. Ultimately, the arbitrator found in claimant's favor noting (1) claimant's alleged work-related exposures were unrebutted, (2) claimant

was a forthright and credible witness, and (3) the testimony of claimant's experts was more persuasive. *Id.* ¶ 27. The Commission affirmed the arbitrator's findings but only as it relates to the CWP, meaning the Commission did not believe claimant met his burden in establishing work-related emphysema or asthma. *Id.* ¶ 32. The appellate court affirmed. *Id.* ¶ 44.

In *Cummings v. Illinois Workers' Comp. Comm'n*, the claimant brought a claim under the ODA alleging various respiratory complaints. 2022 IL App (1st) 210956WC-U. Importantly, claimant's testimony about his alleged exposures while working as a hazardous materials technician were vague and nonspecific. *Id.* ¶ 13. The arbitrator further noted that even in the medical records, claimant avoided specific testimony as to the onset of his symptoms or the specifics of any particular trigger. *Id.* ¶ 14. The arbitrator also had doubts about plaintiff's expert who testified about the wrong chemical and was unaware of the permissible exposure limits for the relevant chemical, or whether petitioner's exposure was above or below the limits. *Id.* ¶¶ 16-17. On the other hand, respondent's expert emphasized the lack of industrial hygiene data noting that a causation opinion could not be made within a reasonable degree of medical certainty without data evaluating the workplace, particularly the types and amounts of exposures claimant would have experienced. *Id.* ¶ 18. With this, the arbitrator gave more weight to respondent's expert, and in conjunction with claimant's vague testimony, ultimately found claimant failed to meet his burden in establishing an occupational disease or causation under the Act. *Id.* ¶¶ 7, 19. On appeal, the claim was remanded on evidentiary grounds which are irrelevant for the purposes of our discussion here. *Id.* ¶ 41.

PRACTICAL TIPS

The initial steps to investigate an occupational exposure claim are critical for developing evidence that can either encourage a favorable settlement or be a smoking gun for the defense at trial. Initial investigations must consider the details pertaining to a petitioner's alleged exposure(s). Is it a particular substance? A combination of substances? Was it one instance of exposure, or repeated exposure over a lengthy period of time? If a single exposure, how long did it last? If there is an allegation that the exposure was over the course of several years, then what roles did the petitioner have during that time period, and how might each role affect their exposure? What are petitioner's hobbies, and is there any indication the exposure was nonoccupational? Are there other contributing factors, such as medical comorbidities? Meticulous efforts to investigate petitioner's exposure can not only lock a petitioner in to a specific version of events but also provide a broader picture for a reviewing physician to understand what the allegations are and how they might have contributed to any alleged work injury or disease process. If petitioner cannot provide enough detail about their exposure(s), like in *Cummings*, they bear the risk of being found uncredible. On the other hand, if petitioner's testimony goes unchallenged, then respondent waives the issue as we saw in *American Coal Company*.

Another key area to focus in on is the importance of expert witnesses. Occupational exposure claims tend to be a battle of the experts and can easily hinge on impressions of credibility or the strength of the underlying basis for the opinion. An expert radiologist might be especially useful in an occupational disease claim since disease processes, especially those involving the lungs, are often confirmed (or debunked)

through imaging studies. Industrial hygienists can also provide expert opinions regarding exposure to workplace hazards by providing an objective assessment based on professional standards and guidelines, and that evaluation can subsequently be provided to a medical expert to opine on disease processes and/or causation. Since these cases are based on credibility assessments and weighing of competing evidence, this step can provide more *objective* evidence to support a defense theory.

The diligent work-up and investigation of the claimant's medical history and course of treatment is also valuable to defending these claims. Preexisting conditions and/or gaps in medical treatment can tip the credibility scale. Even if the initial injury or exposure might be compensable, nature and extent allegations can be defended by using evidence that

petitioner's condition has returned to baseline, or they have not sustained a permanent change. Use of surveillance and other social media investigation can also be strategically used to further assess petitioner's credibility.

In sum, occupational exposure claims are often defensible given that people, in general, experience multiple exposures from different facets of life and often have preexisting conditions that need to be accounted for when determining what condition, if any, is related to their work. It is vital that respondents act diligently in building a convincing, objective case to support their defense theory. This may require taking a step back and looking outside the box to develop new, creative approaches. It may also require testing of the other side's theory through use of pretrial conferences or other informal discussions with opposing counsel. Additionally, using professionals who have specialized experience in the disease at hand or alleged exposures is a given, as well as those who understand the conundrum of causation in a workers' compensation context. With quality investigation and claim management, and use of the tips recommended herein, you can succeed in minimizing exposure for any occupational disease claim. Your experienced workers' compensation attorneys at Heyl Royster are here to assist you with any occupational disease claim questions you may have. We look forward to hearing from you!

ABOUT THE AUTHOR

Ashley Broadstone

Associate in Peoria, IL

- Business Organizations & Transactions
- Casualty & Tort
- Civil Rights Litigation/Section 1983 & Correctional Healthcare
- Medical Malpractice
- Professional Liability
- Workers' Compensation

Ashley's attention to detail and communication skills are key to formulating successful problem-solving defense strategies.

Ashley is an Associate working out of the firm's Peoria office, focusing her practice on Workers' Compensation and civil litigation, including defense of personal injury claims (premises, motor vehicle accidents, medical malpractice, and other casualty litigation). She worked in a number of legal roles before becoming an Associate with the firm in 2022, including her position as a Paralegal at Heyl Royster from 2016-2019 where she was a part of the Workers' Compensation Practice Group. She gained invaluable experience working on a case from beginning to end, including in-depth analysis of medical records and defense strategies. Additionally, she completed an Externship at the U.S. Attorney's Office for the Western District of Missouri, exposing her to criminal and civil disputes at the federal level. She was a Rule 13 Certified Extern for the Missouri Attorney General's Office, focusing primarily on Section 1983/civil rights litigation. These prior experiences, combined with her participation at Heyl Royster as a law clerk and Summer Associate in law school, give Ashley a unique, well-rounded approach to solving any legal problem that comes her way.

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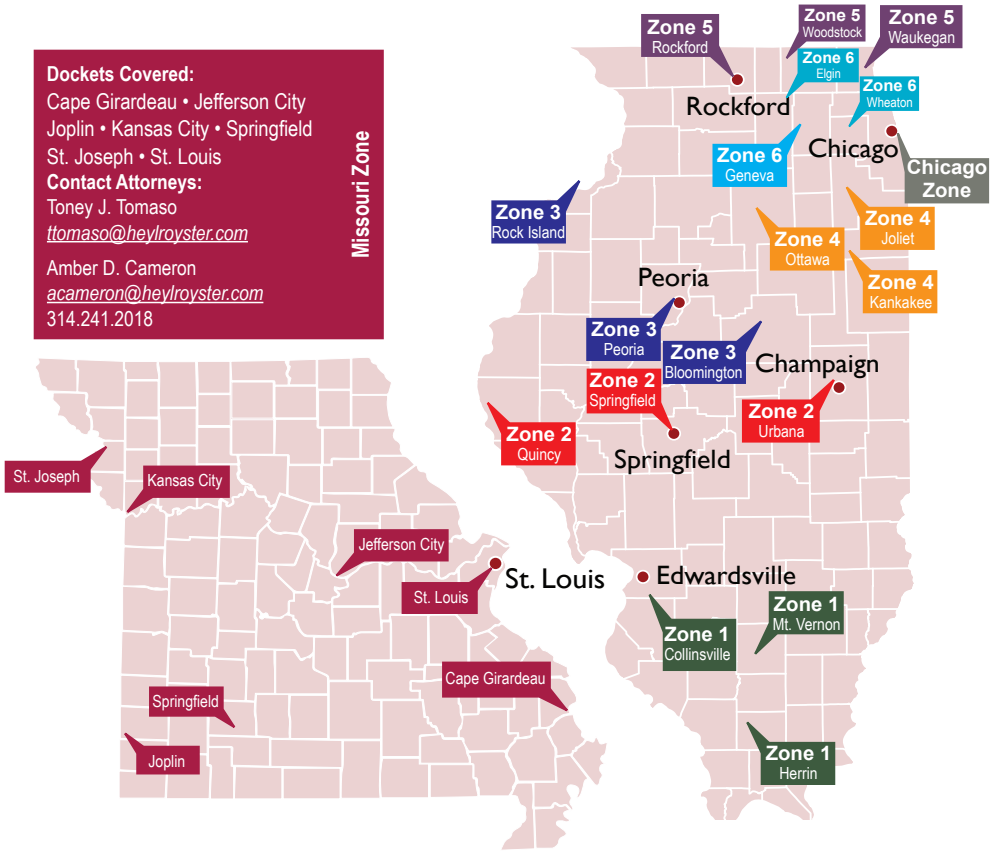

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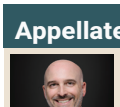

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