HEYL ROYSTER

BELOW THE RED LINE

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

SEPTEMBER 2022

A WORD FROM THE PRACTICE CHAIR

As I write this note to you, I am sitting at my desk, overlooking the northern parts of Champaign, and starting to see the first signs of color changes in the treetops. Welcome to the autumn season! I know those who live for Halloween, pumpkin spice lattes, and sweaters have a huge grin on their face right now. By now, I expect you are back in the swing of things at school, watching some good football and trying to figure out where you put your fall jacket and if it is still in style. I must admit, I am looking forward to the change of season and all it has to offer.

I want to send out some positive thoughts and well-wishes to those of you with friends and family in Florida. Watching the news feeds covering the devastation left in the path of Hurricane Ian can only leave you stunned. I want folks to know we are thinking about them today and in the coming weeks, as they deal with this terrible storm and the damage it has brought forth.

This month my partner Chris Drinkwine has authored an article concerning the *Malecki* case and the recent decision issued by the Appellate Court overturning a favorable defense finding. There is a great lesson or warning to take away from reading this article and the case. Make sure you get what you pay for from your IME expert. When you ask for an opinion, be as thorough as you can in your request and ensure your expert covers all the bases you need covered for your defense of the claim.

Toney Tomaso

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FEATURE ARTICLE

MALECKI V. IWCC: THE IMPORTANCE OF SECURING A COMPLETE CAUSATION OPINION

By Christopher Drinkwine,
Co-Chair, Appellate Practice Group

The Illinois Workers' Compensation Commission Division of the Illinois Appellate Court rarely reverses the Commission because its decision is against the manifest weight of the evidence. However, that is what occurred recently in *Malecki v. Illinois Workers' Comp. Comm'n*, 2022 IL App (1st) 210713WC-U. This case has several interesting aspects, not the least of which is the demonstration of the importance of securing a complete causation opinion to counter the treating physician's opinion that the claimant's job duties have a causal connection to the condition of ill-being.

In *Malecki,* the claimant was employed as a truck driver who testified that while on his garbage route on July 6, 2016, he started to feel his right foot get heavy walking to his truck. As he went along his route, he was unable to move his right foot to push the gas and brake pedals of his truck. Prior to the alleged accident date of July 6, 2016, claimant experienced and was treated for lower back pain and a prior MRI revealed a grade 1 anterolisithesis at L4-L5, spondylosis changes at L4-

L5, mild arterolisthesis, severe spinal and bilateral recess stenosis at L4-L5, and multilevel neural foraminal stenosis. However, none of the claimant's pre-July 6, 2016, medical records referenced right foot complaints, pain or tingling.

Ultimately, one of claimant's treating physicians made an initial diagnosis of spondylolisthesis and opined that the claimant sustained an exacerbation of the low back and right lower extremity radiculopathy on July 6, 2016 while working. The treating physician diagnosed right drop foot and recommended a transforaminal lumbar fusion of L4-L5 and L5-S1 and ultimately performed the surgery. In the treating physician's opinion, to a reasonable degree of medical and surgical certainty, the cumulative effects of the claimant's job duties aggravated his longstanding back condition on July 6, 2016, resulting in drop foot.

The employer's Section 12 examining physician concluded that the claimant appeared to have developed symptoms related to stenosis and spondylolisthesis while at work, which was distinct from being caused by his work. The employer's IME physician noted that when the claimant developed right foot symptoms, he was simply walking back to his truck and did not believe that the symptoms were related to a work injury in July 2016. The employer's IME found the origins of the claimant's back problem to be at least six years old and a progressive issue that finally caught up with him while he happened to be at work. The employer's physician offered no opinion as to whether the claimant's job duties contributed to or exacerbated his condition.

Claimant's Application for Adjustment of Claim alleged repetitive trauma in the course of employment. The Arbitrator found, among other things, that the claimant failed to prove that he sustained an accidental injury which arose out of and in the course of his employment and that his current condition of ill-being is causally related to a work accident. The Arbitrator held that the evidence did not support a finding of accident and, consequently, the claimant's condition of ill-being was not causally related to his employment and benefits were denied. The Arbitrator supported his findings regarding causal connection by relying upon with the employer's IME expert's opinion. The Commission affirmed and adopted the arbitrator's decision, and the circuit court confirmed the Commission's decision.

In rejecting the Commission's causation finding, the Appellate Court noted that claimant's treating physician testified that it was not until July 6, 2016 that the claimant had a motor deficit classified as drop foot that the cumulative effects of the claimant's job duties aggravated his longstanding back condition on July 6, 2016, resulting in drop foot. In contrast, the Appellate Court indicated that the employer's IME physician never offered an opinion as to whether the claimant's job duties on July 6, 2016 contributed to his condition of right drop foot and instead opined only that the claimant's right foot symptoms developed while at work. The Appellate Court explained that the claimant never contended that the act of walking back to his truck caused or contributed to his drop foot, nor did he deny his long-standing back condition. The Appellate Court noted claimant's argument was that his work activities on July 6,

2016 exacerbated his back condition, resulting in right drop foot. The Appellate Court concluded that claimant's treating physician's causation opinion supported that claim, and the employer's IME physician never addressed the issue of repetitive work duties exacerbating a pre-existing condition. As a result, the Appellate Court held that the Commission's finding that the claimant failed to prove a causal connection between his condition of ill-being and his employment was against the manifest weight of the evidence.

CONCLUSION

While the Appellate Court's reversal of the Commission's decision in *Malecki* was unfavorable for the employer in that case, we can make sure our claims have well-thought-out expert opinions on all disputed issues in the claim so that we can rely upon the same in the future defense handling of the case. When retaining an expert physician for an independent medical examination and asking that expert to provide an opinion on the issue of causation, its imperative that you are aware of the theory of trauma (acute or repetitive) Petitioner is alleging and present the proper questions in your cover letter for the doctor to provide a complete and credible causation opinion. If there is any doubt about the theory of injury in your claim, it is perfectly fine to ask for your expert's opinion under both theories. It's also imperative to ask for clarification or a supplemental report from your expert if the doctor's opinions did not completely answer the questions presented so that you can protect against an outcome like the one that occurred in *Malecki*.

ABOUT THE AUTHOR

Chris Drinkwine is Co-Chair of our Appellate Practice Group and is responsible for appeals in Workers' Compensation cases.

After earning his J.D., *cum laude*, from Northern Illinois University College of Law, Chris served as an Assistant State's Attorney. In that capacity, Chris gained experience in traffic, misdemeanor, juvenile, and felony prosecution and tried numerous cases to verdict. From there, Chris was recruited by the Honorable John W. Rapp, Jr. of the Illinois Appellate Court, Second District, to serve as his law clerk. When the Honorable Frederick J. Kapala replaced Judge Rapp on the Illinois Appellate Court, Chris continued in that role. Later, Judge Kapala promoted Chris to serve as his Senior Law Clerk when Judge Kapala was appointed to the federal bench. Prior to joining Heyl Royster, Chris worked closely with Judge Kapala in federal court for 12 years and gained extensive experience in all types of criminal and civil litigation, including section 1983 civil rights claims, employment discrimination, ERISA, consumer protection, insurance coverage, patent, trademark, antitrust, habeas corpus, constitutional challenges to statutes, and breach of contract.

Chris has trained in basic and advanced trial advocacy with the Illinois State's Attorney's Appellate Prosecutor in Springfield, Illinois, and at the National District Attorney's Advocacy Center, in Columbia, South Carolina.

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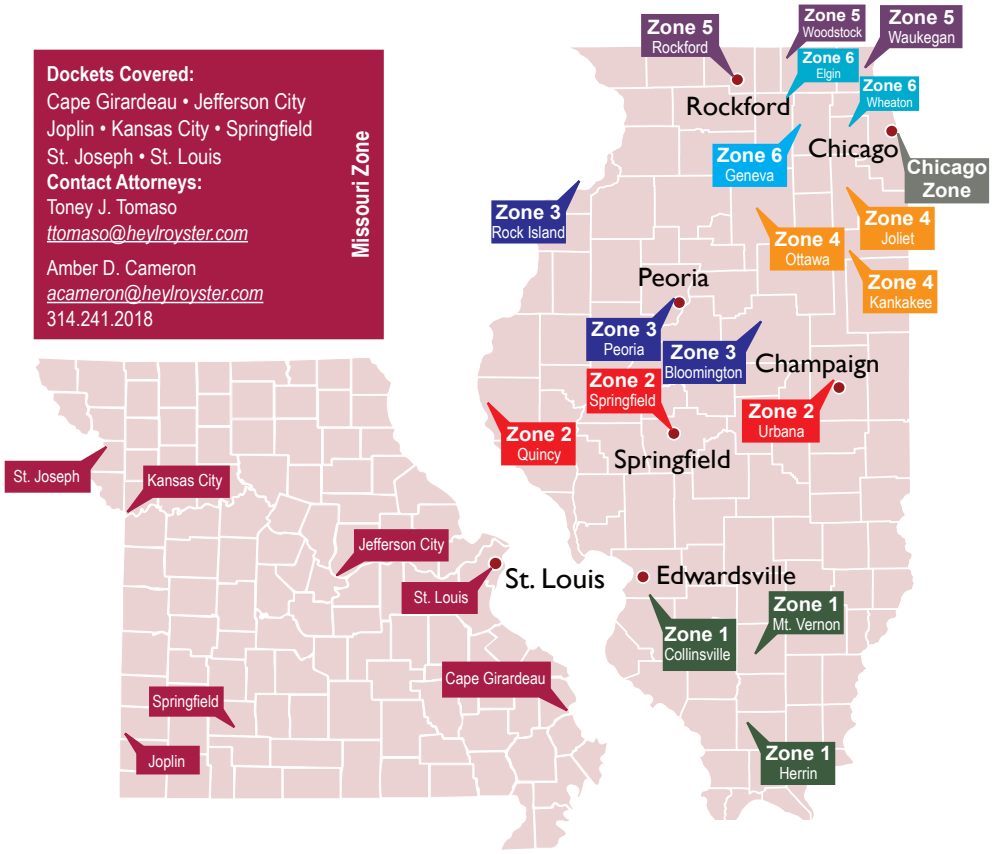

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