

# BELOW THE RED LINE

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ROYSTER

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

*A Newsletter for Employers and Claims Professionals*

*June 2021*

### A WORD FROM THE PRACTICE CHAIR

The Summer Solstice is past us, so I can officially welcome everyone to Summer 2021. What a difference a year makes! Just thinking back where we were (in our homes, socially distancing for many of us) this time last year is a very surreal memory. I hope you are enjoying the ability to turn back the pandemic clock and that your neck of the woods allows for more activities and events. I know I missed getting together with friends and families. Who knew hugging someone was a luxury. It has been fun to embrace the newness in the State of Illinois which is Phase 5 and the opening of almost everything. I hope you are able to get out there and enjoy the moments which have eluded us for so many months. Me, well, I am actually going to attend a family wedding that was postponed twice due to the pandemic. I will get to see people, in person, whom I haven't seen for over sixteen months. It is hard to imagine, but it is happening. I hope you are all experiencing these "firsts" and it puts a big smile on your face. Time to soak up some Summer.

Each month during the pandemic Chairman Michael Brennan has a "fireside chat" of sorts (via WebEx of course) to discuss the state of the commission and how the current procedures are working or not working. He has been clear that virtual docket calls and pre-trial hearings are probably going to stay and they have been universally accepted and supported by almost every corner of the workers' compensation world. The Arbitrators have all shared evidence that the amount of pre-trial hearings that are being conducted is incredibly high in comparison to how many pre-trial hearings were held pre-pandemic. There is no plan to stop these pre-trial hearings and as a matter of fact the Chairman is toying with the idea of making more pre-trial slots available. Actual trial/docket locations

should start opening back up in July 2021, meaning, we are no longer going to be limited to only trial space in Chicago, Springfield or Collinsville. We are going to see other docket sites open up, although maybe not all of them. We are going to see docket calls setting up pre-trial hearings during the same month, and if a trial date is granted following that pre-trial hearing, then the trial date will be set the following month. More on this new procedure as to trial dates as this is rolled out at the Commission.

This month's article is written by someone very familiar to this audience .... Me. I am slowly closing in on my 25th year at Heyl Royster and have very much enjoyed and taken great pride in being a partner and now shareholder with this great firm. I am honored to lead an exceptional group of attorneys as the chair of the Workers' Compensation Practice Group, and always look forward to what is next, whatever that challenge might be. This month I am jumping into a topic I have discussed and presented on before: medical marijuana and the interplay with the Illinois Workers' Compensation Act. I will be talking about a Commission Decision issued which discusses whether we are required to pay for medical marijuana per Section 8(a) of the Act, and some practical considerations which you can take away from this case.



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# HEYL ROYSTER WORKERS' COMPENSATION UPDATE

June 2021

Editor, Amber Cameron

## WILL SECTION 8(A) OF THE ILLINOIS WORKERS COMPENSATION ACT ALLOW PRESCRIPTION OF MEDICAL MARIJUANA?

By: [Toney Tomaso](#)

*Workers' Compensation Practice Chair*

We have been talking about the legalization of marijuana as well as the Compassionate Use of Medical Cannabis Program since the Summer of 2019. We all had concerns about what might happen after legalization and what the impact would be on workers' compensation cases in Illinois. So many questions came up as a result: can my employer still have a zero tolerance drug policy; how do I defend a workers' compensation claim if someone has been drug tested and marijuana was found in their system; and will I have to pay for medical marijuana as medical treatment going forward in Illinois claims? All are good questions, and we still answer these today for many of our clients. This article will focus on the issue of whether or not the employer is responsible for payment, under Section 8(a) of the Act, for medical marijuana as a "reasonable and necessary" medical expense.

The Commission, Panel "A": M. Portella, T. Tyrell, and K. Doerries, issued a Decision in December 2020 regarding the case of *Jerry Valadez v. City of Harvey*; 20 IWCC 0743; 2020 Ill. Wrk. Comp LEXIS 1124. This Commission appeal came from a final Decision issued by Cook County Arbitrator Fruth. This case stems from four consolidated claims filed by Mr. Valadez (hereinafter Valadez) against his employer, the City of Harvey, where he was employed since 1997 as a firefighter. After the fourth and final accident in October 2015, Valadez never returned to his full time job as a firefighter. Following the first alleged date of loss in 2011, until the last accident date in 2015, Valadez underwent a considerable amount of medical care and pain management for his lumbar spine, including a December 2014 fusion surgery at two levels. After each of the first three accident dates, Valadez did manage to return to work at full duty after

considerable medical care. Following the final date of loss, the doctors began discussing the option of medical marijuana for Valadez because he had been using opioids for pain relief for about four years which was impacting his liver and overall health. The treating doctors recommended prescribing medical marijuana use, but because of restrictions at the clinic where they were employed, they were not allowed to prescribe it for Valadez. Valadez found a doctor in another clinic where he was prescribed marijuana products. The testimony from Valadez is very telling in that upon getting off of Norco (an opioid that caused him to feel he was in a "comatose state,") and starting medical marijuana, he had a significant improvement in his daily life. He was able to play with his grandchildren again and was getting back to normal activities with the use of prescribed medical marijuana products including oils and edibles.

At hearing, Valadez submitted medical receipts and bills, including the costs associated with the prescribed marijuana products. Arbitrator Fruth denied Valadez these benefits under Section 8(a) of the Act. The Arbitrator ruled he could not authorize this specific medical care because it violated federal law. He went on to say, " ... due to the principle of federal preemption, medical marijuana is not reasonable or necessary under the Illinois Workers' Compensation Act." The Commission affirmed this part of the Arbitrator's Decision. An appeal has already been filed with the Circuit Court and therefore, this is an issue we have not heard the last about as this case works its way through the appellate process.

It is important to note that Arbitrator Fruth is correct in that medical marijuana, which is legal in the State of Illinois, is still considered an illegal substance under federal law. Under Section VI, paragraph 2 of the Constitution of the United States, what is commonly referred to as the Supremacy Clause, federal law will preempt state law where there is a conflict. Here, the conflict is medical marijuana. To keep things simple, Arbitrator Fruth correctly pointed out that the federal government prevails here.

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The takeaway from this final Commission Decision is this: if you are handling a claim where an injured worker in the State of Illinois turns in a medical receipt for medical marijuana and you do not want to pay it, then you do not have to do so. To point out an important element however, and make sure we are all on the same page- this is a Commission Decision. This Commission Decision, technically speaking, does not have precedential value and it will not until the Illinois Appellate Court makes its ruling (which we anticipate it will do). That does not mean this final Commission Decision has no value as it is still instructional. Since there are not any clear or similar cases to rely upon when making a decision on whether to approve or deny medical marijuana, you should feel comfortable citing *Jerry Valadez v. City of Harvey* when denying medical care (along with the U.S. Constitution because it is always fun doing that while handling workers' compensation matters!)

I believe it is important to play devil's advocate once in a while, and let's do that now based upon this fact pattern and twist it just a bit. What if the costs of opioids were getting out of control for Valadez and his health continued to deteriorate as a result of opioid use. Further, he could not hold down another job after vocational rehabilitation due to his opioid drug use and its impact on his physical and mental state. The parties agree to turn to medical marijuana and ultimately this course of medical action turns things around for the employee and he does find reasonable, light duty employment and the cost is pennies on the dollar versus opioids and the related costs. Can you authorize those benefits? Can you reach an accord? Could this case have a happy ending? The answer to all of these questions is "yes." If you, the employer, and the carrier/TPA are comfortable reaching such a plan of action, it can be viable. But, everyone needs to agree to it and a compromised settlement would

need to be achieved because you may not be able to get an Illinois Arbitrator to sign off on a final Decision which awards, even if the parties agree to it, medical marijuana under Section 8(a). This is an agreement you would need to work out on your own and there are ways to get that done. If you have further questions on this subject, please contact me.

We will keep you posted on the outcome of *Jerry Valadez v. City of Harvey* as it works its way to the Appellate Court. If you have any specific questions on the impact of medical marijuana in Illinois and the interplay with the Workers' Compensation Act, please contact me or any of our Heyl Royster workers' compensation team members.



[Toney Tomaso](#)

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Toney is chair of the firm's Workers' Compensation Practice. He concentrates his practice in the

areas of workers' compensation, third-party defense of employers, workers' compensation appeals, and protecting workers' compensation liens. He works out of the Champaign and Edwardsville offices covering a majority of the state of Illinois and Missouri for workers' compensation docket and trial coverage purposes. Based upon the current makeup and system put in place by the Illinois Workers' Compensation Commission and the Missouri Division of Workers' Compensation.

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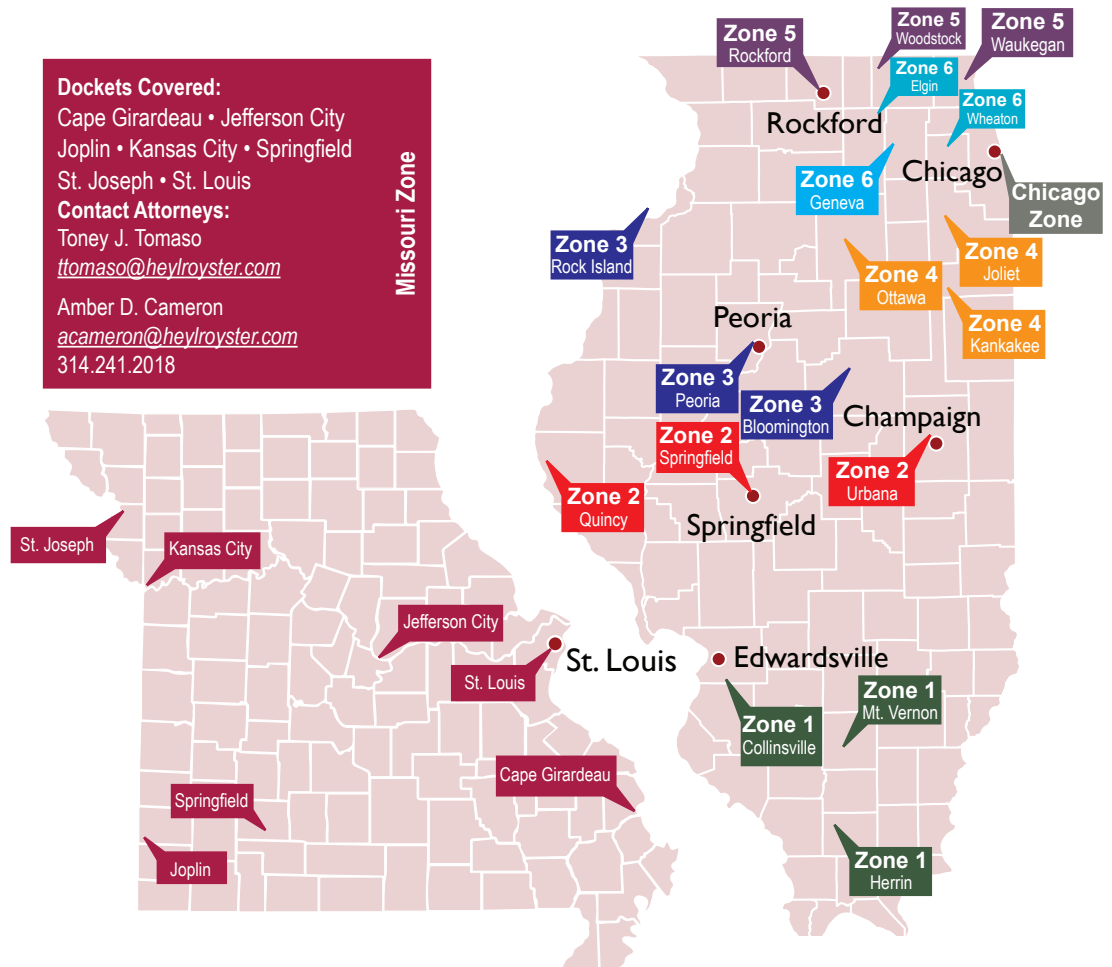
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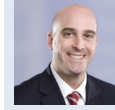
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