# Below the Red Line

## Workers' Compensation Update

### "We've Got You Covered!"

*A Newsletter for Employers and Claims Professionals* — *March 2021*

## A Word From The Practice Chair

Welcome to Spring 2021! Things around these parts are beginning to "green-up" and we are actually seeing people venture outside. It seems novel, but taking a walk outside is really a breath of fresh air – pun intended! Do yourself a favor and get out there and enjoy some of that weather when you can, and, if any of you had a nice Spring Break then I hope you came back refreshed with your batteries charged, ready to jump back into the workers' compensation action.

My partner, Jessica Bell, who manages the Peoria office's workers' compensation practice group has provided us with the newsletter article this month. She is touching on a subject matter I'll bet you deal with practically every day, and that subject is Independent Medical Examinations (IME) per Section 12 of the Act. She touches on nothing but practical considerations as you go about the business of considering when and if you need an IME, and the "ins and outs" of what to do once those exams have been set. She also provides a bonus section to this newsletter dealing with the recent comings and goings at the Commissioner level of the Illinois Workers' Compensation Commission. The panels have been shuffled a bit and you will see some new names. Please take a look at this update.

Our Rockford Team, led by Kevin Luther, has brought into the fold another great attorney who will be part of our workers' compensation team, Heidi Agustsson. Heidi is of counsel at Heyl Royster and we are fortunate to have her joining us, making our workers' compensation bench deeper, stronger, and better.

Toney J. Tomaso
Workers' Compensation Practice Chair
ttomaso@heylroyster.com

## Independent Medical Examinations

*By: Jessica Bell, Peoria & Springfield Offices*

In the course of investigating or defending almost any claim, it's easy to see an independent medical examination (IME) as a potential solution to whatever the problem may be. Treating physician does not seem to be considering a light duty release? Time for an IME. The medical records suggest a non-work related incident is actually the cause of the employee's condition? Time for an IME. Surgery is on the table? You guessed it, set it up.

But is the timing right for an IME? What if you already had one in the case, can you get another? What if the employee refuses to attend? Though we often look to IMEs to answer questions we may have about an employee's medical condition or treatment, moving forward with an IME can raise a number of new issues to consider before even getting to the substantive issues in the case. The appropriateness, timing, and logistics of an IME are addressed in both the Workers' Compensation Act and case law.

### What Are the Procedural Requirements for an IME?

Section 12 does provide a few specific rules an Employer must follow for an IME to be proper. Failure to follow the rules could limit the remedies available to an Employer if an Employee fails to attend. Pursuant to 820 ILCS 305/12, for a Section 12 examination to be valid, an Employer must:

1. Give "reasonable" advance notice of the time and place of the Section 12 examination to the employee, including the name and address of the examining physician or surgeon.

Practically speaking, a doctor's availability for an IME is sometimes so far out, if notice of the examination is provided as soon as the date is secured, the "reasonable" standard is sure to be met. Occasionally, IMEs are set at the last minute. One consideration for what would be considered "reasonable" may be the employee's work status. If the employee is off work currently, his availability to attend an IME, even on somewhat short notice, should be wide open. That being said, there are other considerations that go into the "reasonable" standard, such as child care or transportation issues.

2. Employer must provide sufficient money to cover the cost of traveling and any meal expenses to Employee with the notice of the examination.

Note that the Act provides for money to cover the cost of "traveling" to the IME, but does not specify further. Employees frequently request reimbursement for hotel accommodations if the IME is scheduled for early morning, is some distance away from their home, or spans multiple days.

3. Employer must also reimburse employee for any lost wages to attend the IME.

Be sure to note that the rate for lost wages is based on the average weekly wage, not the TTD rate.

## When Is an IME Appropriate?

Certainly there can be no clear cut rule on when it is time for an IME, as every case and set of facts is different. While neither the Act nor case law provide specific answers to this question, they do provide some guidance. Section 12 provides that any employee "entitled to receive disability payments is obligated to attend a Section 12 examination." You may wonder how you can get an employee to attend an IME to conduct some initial investigation if there has not yet been a determination that the employee is "entitled to receive disability benefits." Or, just the opposite, you may wonder why you would set up an IME if there has already been a determination that the employee is "entitled to receive disability payments." While both are valid questions, case law has made it clear that the mere act of filing an application for benefits with the Commission is an allegation by an employee that he/she is "entitled to receive disability benefits," so either of those scenarios still could warrant an IME. *R.D. Masonry, Inc. v. Indus. Comm'n,* 215 Ill. 2d 397, 399 (2005).

So, does that mean the employee must be *receiving* disability benefits in order for the IME to be appropriate per Section 12? No. While the Act doesn't specifically touch on whether actual receipt of disability benefits is required to attend an IME, case law has, making it clear that there is no requirement that benefits are currently being paid in order to require an employee to attend the IME. In *Paradise Coal Co. v. Industrial Comm'n,* 301 Ill. 504, 507 (1922), the court held "[t]he employer's right to require an injured employee to submit to an examination is *not* restricted to cases where the employer acknowledges his liability to make compensation payments."

Further, an IME is appropriate when the employer believes the employee's medical condition has changed and the employer seeks updated medical information regarding that condition. An employer cannot suspend TTD benefits based on an employee's failure to provide current medical information upon its request. Rather, suspension of benefits could only be appropriate if an IME is scheduled consistent with Section 12 and the employee refuses to attend. *Navistar Int'l Transp. Corp. v. Indus. Comm'n*, 331 Ill. App. 3d 405, 411-2 (1st Dist. 2002).

## Failure to Attend IME

What happens if the employee fails to attend the IME? Section 12 provides that benefits can be suspended if an employee refuses to submit himself to an IME or unnecessarily obstructs same. The language contemplates this suspension being temporary, noting an employee's right to compensation benefits may be suspended "until such examination shall have taken place." 820 ILCS 305/12.

The real debate is over whether the employee *refused* to attend the IME or simply *failed* to attend the IME. The court has made such a distinction in recent case law and addressed the consequences to the parties in each

situation. In *Jordan v. City of Peoria*, No. 16WC 35797, 2020 Ill. Wrk. Comp. LEXIS 865 (Sept. 16, 2020), the Employer scheduled an IME for the employee consistent with the requirements of Section 12, providing notice and mileage to the employee's attorney with sufficient notice for the employee to attend. The employee did not attend the IME. At trial, the employee testified that his attorney did not advise him of the IME, so he did not know he was supposed to attend. The Commission distinguished the Employee's failure to attend the IME from a "deliberate refusal to comply" and indicated suspension of benefits for his failure is not appropriate. The employee here did not *refuse* to attend the IME, though there was no dispute that he failed to attend. Of note, this case also included a request from Employer to be reimbursed or credited for the employee's failure to attend the properly scheduled IME. Because the Commission determined that the employee did not *refuse* to attend the IME, they also determined the employer was not entitled to such credit or reimbursement. However, the Commission did not otherwise address this request, leaving open the possibility of seeking such credit when there is an outright refusal to attend a properly scheduled IME.

The suspension of benefits for refusal to attend an IME is appropriate only *after* the employee refuses to attend the IME. An employer cannot suspend TTD on the suspicion that the employee's medical condition has changed and then use a missed IME to justify the prior suspension. *Fencl-Tufo Chevrolet Inc. v. Industrial Comm'n,* 169 Ill. App. 3d 510, 516 (1st Dist. 1988).

Similarly, the suspension of benefits for failing to attend an IME might not be warranted if the IME was not set with good intentions. In *Fencl-Tufov,* the employee submitted to a Section 12 examination in July 1985. The Section 12 physician recommended the employee remain off work until a follow-up appointment could occur in 6 months' time. Employer scheduled a new IME in October 1985 with a different doctor. The appellate court held the Employer had little to gain from the second examination and that the employee's failure to attend the second examination did not violate Section 12, as the first IME doctor had said the employee needed to be off for six months.

What about medical treatment? Can authorization for medical treatment be suspended if the employee refuses to attend a properly scheduled IME? While the Act specifically indicates "compensation payments," may be suspended, refusal to authorize additional medical treatment until an IME can occur certainly seems appropriate. In fact, such a situation – pending medical recommendations – is precisely when an IME would be scheduled. It hardly makes sense for an employee to refuse to submit to an examination, and then be entitled to the continuing medical treatment which was the subject of the IME.

## What If I Already Had an IME?

This issue comes up a lot. Many cases involve claims to different, unrelated body parts, and exams with different doctors might be warranted. Even if the claim is limited to one specific body part or condition, that condition changes throughout the course of treatment and there may be a point where a second or subsequent examination might be appropriate. For example, in a recent case, the court acknowledged the employee's changing condition and noted if an employer believes that an employee's condition has changed such that he is able to return to work, it can request that the employee submit to a medical examination. *Navistar*, 331 Ill. App. 3d at 412.

While neither the Act nor case law provide a numerical limit to the number of Section 12 examinations an employer can solicit, there is a limit nonetheless. It is quite clear that a theme in the case law addressing IMEs is to ensure that the employer is not using an IME to harass an employee, which can be done simply by scheduling multiple examinations without justification. *King v. Industrial Comm'n,* 189 Ill. 2d 167, 176 (2000). However, if there is a legitimate reason to seek out an independent opinion, a repeat IME could be appropriate. In fact, Section 12 specifically contemplates the possibility that Employer may request multiple IMEs in a single case by indicating the purpose of an IME may be to ascertain the amount of compensation which may be due the employee *"from time to time."* 820 ILCS 305/12.

In addition to the practical and procedural considerations above, many other considerations go into the analysis of when, where, why, and how to set up an IME. For questions on any of the above, or specific facts of your case and whether an IME is appropriate and proper, feel free to contact your Heyl Royster attorneys.

## COMMISSION NEWS

On March 19, 2021, Governor Pritzker announced several appointments to the Illinois Workers' Compensation Commission.

- Deborah Baker was appointed to serve as a Labor Commissioner. A graduate of University of New Mexico and Loyola University Chicago, Baker was previously Assistant Deputy Chief Legal Counsel and Ethics Officer at the Illinois Department of Corrections and, most recently, an Arbitrator with the IWCC.
- Barbara Flores was reappointed to serve as a Public Commissioner. Previously an Arbitrator with the IWCC, Flores is a graduate of University of Illinois and Chicago-Kent College of Law.
- Christopher Harris was appointed to serve as an Employer Commissioner. A graduate of University of Illinois and University of Illinois College of Law, Harris was previously an Arbitrator with the IWCC.
- Stephen Mathis was reappointed to serve as a Public Commissioner. Prior to his time as a Commissioner, Mathis was an Arbitrator with the IWCC and Legal Counsel and Staff Analyst at the Illinois State Senate.
- Deborah Simpson was reappointed to serve as an Employer Commissioner. Simpson, a graduate of DePaul University and John Marshall Law School, was previously an Assistant State's Attorney in Kane County before being appointed Arbitrator and then Commissioner.
- Thomas Tyrrell was reappointed to serve as a Labor Commissioner. Prior to serving as a Commissioner, Tyrrell was in private practice.

With the new appointments and re-appointments, the Commission panels were restructured as follows:

**Panel A**

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|---|---|
| Employer Member: | Katherine Doerries |
| Labor Member: | Thomas Tyrrell |
| Public Member: | Maria Portela |

**Panel B:**

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|---|---|
| Employer Member: | Deborah Simpson |
| Labor Member: | Deborah Baker |
| Public Member: | Stephen Mathis |

**Panel C:**

| | |
|---|---|
| Employer Member: | Christopher Harris |
| Labor Member: | Marc Parker |
| Public Member: | Barbara Flores |

Employer Commissioner, Elizabeth Coppolleti was not reappointed. Arbitrator Raychel Wesley was assigned to take over the Arbitration Call of now Commissioner Deborah Baker.

**Jessica Bell**

*Peoria & Springfield Offices*

Jessica focuses her practice on the defense of insurance clients and employers in workers' compensation matters. She joined the firm with extensive workers' compensation defense experience, having appeared before the Illinois Workers' Compensation Commission representing employers and insurance companies across the state. Jessica has also spoken with businesses directly to help assist in their understanding of the Workers' Compensation system, as well as the handling of claims within their business.

Jessica is a member of the Workers' Compensation Lawyers' Association, Peoria County Bar Association, and Illinois State Bar Association. She is a past treasurer and vice-president of the Tazewell County Bar Association and former Tazewell County Assistant State's Attorney. As an ASA, Jessica appeared before Judges in the 10th Circuit, handling matters ranging from petty offenses to felonies.

HEYL ROYSTER

# REGIONAL ZONE MAPS

**Chicago Zone**

**Contact Attorney:**
Brad A. Antonacci
*bantonacci@heylroyster.com*
Kevin J. Luther
*kluther@heylroyster.com*
312.971.9807

**Zone 6**

**Dockets Covered:**
Elgin • Geneva • Wheaton
**Contact Attorney:**
Kevin J. Luther
*kluther@heylroyster.com*
815.963.4454

**Zone 5**

**Dockets Covered:**
Rockford • Waukegan • Woodstock
**Contact Attorneys:**
Kevin J. Luther
*kluther@heylroyster.com*
Lynsey A. Welch
*lwelch@heylroyster.com*
815.963.4454

**Zone 4**

**Dockets Covered:**
Kankakee • Joliet • Ottawa
**Contact Attorney:**
Kevin J. Luther
*kluther@heylroyster.com*
815.963.4454

**Zone 3**

**Dockets Covered:**
Bloomington • Rock Island • Peoria
**Contact Attorney:**
Jessica M. Bell
*jbell@heylroyster.com*
309.676.0400

**Zone 2**

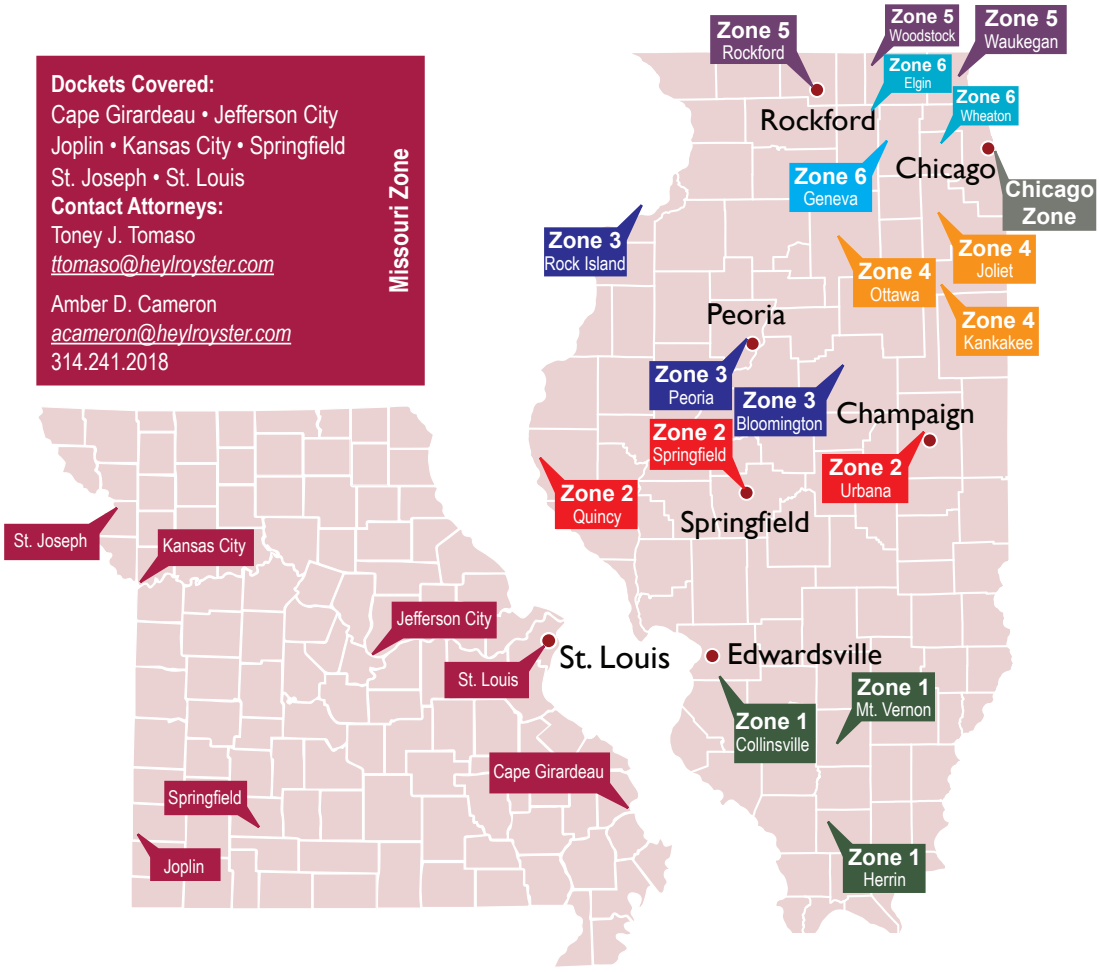
**Dockets Covered:**
Quincy • Springfield • Urbana
**Contact Attorney:**
Bruce L. Bonds
*bbonds@heylroyster.com*
217.344.0060

**Zone 1**

**Dockets Covered:**
Collinsville • Herrin • Mt. Vernon
**Contact Attorneys:**
Toney J. Tomaso
*ttomaso@heylroyster.com*
618.656.4646

**Missouri Zone**

**Dockets Covered:**
Cape Girardeau • Jefferson City
Joplin • Kansas City • Springfield
St. Joseph • St. Louis
**Contact Attorneys:**
Toney J. Tomaso
*ttomaso@heylroyster.com*
Amber D. Cameron
*acameron@heylroyster.com*
314.241.2018




## Workers' Compensation Practice Chair

**Contact Attorney:**
Toney Tomaso - *ttomaso@heylroyster.com*
217-344-0060

## Workers' Compensation Appellate

**Contact Attorneys:**
Toney Tomaso - *ttomaso@heylroyster.com*
217-344-0060
Christopher Drinkwine - *cdrinkwine@heylroyster.com*
815-963-4454

## State of Wisconsin

**Contact Attorney:**
Kevin Luther - *kluther@heylroyster.com*
815-963-4454

## Jones Act Claims

**Contact Attorney:**
Ann Barron - *abarron@heylroyster.com*
618-656-4646

# WORKERS' COMPENSATION OFFICE LOCATIONS

**Champaign**
301 N. Neil St.
Suite 505
Champaign, IL
61820
217.344.0060

**Chicago**
33 N. Dearborn St.
Seventh Floor
Chicago, IL
60602
312.853.8700

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

**Peoria**
300 Hamilton Blvd.
Second Floor
Peoria, IL
61602
309.676.0400

**Rockford**
120 W. State St.
Second Floor
Rockford, IL
61101
815.963.4454

**Springfield**
3731 Wabash Ave.
Springfield, IL
62711
217.522.8822

**St. Louis**
701 Market St.
Peabody Plaza
Suite 1505
St. Louis, MO
63101
314.241.2018

**WWW.HEYLROYSTER.COM**

# WORKERS' COMPENSATION PRACTICE GROUP

**Practice Group Chair**
Toney Tomaso
*ttomaso@heylroyster.com*

## Champaign Office

**Contact Attorney:**
**Bruce Bonds**
*bbonds@heylroyster.com*

John Flodstrom
*jflodstrom@heylroyster.com*

Joseph Guyette
*jguyette@heylroyster.com*

Toney Tomaso
*ttomaso@heylroyster.com*

## Peoria Office

**Contact Attorney:**
**Jessica Bell**
*jbell@heylroyster.com*

Bruce Bonds
*bbonds@heylroyster.com*

Craig Young
*cyoung@heylroyster.com*

James Manning
*jmanning@heylroyster.com*

## Appellate

**Contact Attorney:**
**Toney Tomaso**
*ttomaso@heylroyster.com*

Christopher Drinkwine
*cdrinkwine@heylroyster.com*

## Chicago Office

**Contact Attorney:**
**Brad Antonacci**
*bantonacci@heylroyster.com*

Kevin Luther
*kluther@heylroyster.com*

Lynsey Welch
*lwelch@heylroyster.com*

Reginald Lys
*rlys@heylroyster.com*

Joseph Rust
*jrust@heylroyster.com*

## Rockford Office

**Contact Attorney:**
**Kevin Luther**
*kluther@heylroyster.com*

Lynsey Welch
*lwelch@heylroyster.com*

Christopher Drinkwine
*cdrinkwine@heylroyster.com*

Heidi Agustsson
*hagustsson@heylroyster.com*

Jordan Emmert
*jemmert@heylroyster.com*

## Edwardsville Office

**Contact Attorney:**
**Toney Tomaso**
*ttomaso@heylroyster.com*

John Flodstrom
*jflodstrom@heylroyster.com*

Amber Cameron
*acameron@heylroyster.com*

## Springfield Office

**Contact Attorney:**
**Dan Simmons**
*dsimmons@heylroyster.com*

John Langfelder
*jlangfelder@heylroyster.com*

Jessica Bell
*jbell@heylroyster.com*

## St. Louis Office

**Contact Attorneys:**
**Toney Tomaso**
*ttomaso@heylroyster.com*

**Amber Cameron**
*acameron@heylroyster.com*

Jenna Scott
*jscott@heylroyster.com*

HEYL ROYSTER

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website **www.heylroyster.com**

**Appellate Advocacy**
Ann Barron
*abarron@heylroyster.com*

**Business and Commercial Litigation**
John Heil
*jheil@heylroyster.com*

**Business Organizations & Transactions**
Ken Davies
*kdavies@heylroyster.com*

**Casualty/Tort Litigation**
Nick Bertschy
*nbertschy@heylroyster.com*

**Civil Rights/Section 1983 & Correctional Healthcare**
Keith Fruehling
*kfruehling@heylroyster.com*

**Construction**
Mark McClenathan
*mmcclenathan@heylroyster.com*

**Employment & Labor**
Brian Smith
*bsmith@heylroyster.com*

**Governmental**
Andy Keyt
*akeyt@heylroyster.com*

**Healthcare**
Deanna Mool
*dmool@heylroyster.com*

**Insurance Services**
Patrick Cloud
*pcloud@heylroyster.com*

**Long Term Care/Nursing Homes**
Tyler Robinson
*trobinson@heylroyster.com*

**Product Liability**
Mark Hansen
*mhansen@heylroyster.com*

**Professional Liability**
Renee Monfort
*rmonfort@heylroyster.com*

**Toxic Torts & Asbestos**
Kent Plotner
*kplotner@heylroyster.com*

**Trucking/Motor Carrier Litigation**
Matt Hefflefinger
*mhefflefinger@heylroyster.com*

**Workers' Compensation**
Toney Tomaso
*ttomaso@heylroyster.com*

*Scan this QR Code for more information about our practice groups and attorneys*

---


**Peoria**
300 Hamilton Blvd.
Second Floor
Peoria, IL
61602
309.676.0400

**Champaign**
301 N. Neil St.
Suite 505
Champaign, IL
61820
217.344.0060

**Chicago**
33 N. Dearborn St.
Seventh Floor
Chicago, IL
60602
312.853.8700

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

**Rockford**
120 W. State St.
Second Floor
Rockford, IL
61101
815.963.4454

**Springfield**
3731 Wabash Ave.
Springfield, IL
62711
217.522.8822

**St. Louis**
701 Market St.
Peabody Plaza
Suite 1505
St. Louis, MO
63101
314.241.2018

**Jackson**
1000 Highland
Colony Pkwy.
Suite 5203
Ridgeland, MS
39157
800.642.7471