

# BELOW THE RED LINE

HEYL ROYSTER

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

*A Newsletter for Employers and Claims Professionals*

*October 2017*

### A WORD FROM THE PRACTICE CHAIR

Welcome to Fall 2017!

I have been looking for my coat as there is a familiar chill in the morning air!

The leaves are changing color and trick or treaters will be descending on my home for candy soon. And, if you must deal with Daylight Saving Time like I do, then don't forget to mark your calendar for November 5. You get an extra hour of sleep, and who doesn't love that.

Earlier this month we alerted you to the changes fast approaching us courtesy of the Commission and the re-shuffling of the Arbitrators (and their venue assignments). One of the great things about being part of the Heyl Royster Team of workers' compensation attorneys that covers the entire State, we are at every venue and work with each Arbitrator. We work as one cohesive team wherein we garner the benefit of each of our six offices and our experiences with the various Arbitrators. In turn, we pass this knowledge along to you and explain how it might impact your cases. When we are sent to a new arbitration venue, we already know a great deal about the Arbitrator's tendencies and policies.

Just another example of how the Heyl Royster Team brings a more thorough and detailed analysis of the matter at hand.

In this month's newsletter, my partner Dan Simmons and associate Patricia Hall delve further into the temporary total disability (TTD) issue. We all are aware of the *Interstate Scaffolding* decision and its progeny. Now, we take a look at the impact of an injured worker's decision to retire. How does the decision to retire impact an employer's obligation

to pay TTD/TPD benefits? Are there exceptions based upon why the claimant is retiring (is it forced or voluntary)? Any time you can be free and clear of your obligation for the payment of these weekly benefits, we want you to be aware of it so we can keep your claim costs down.



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### PAYING TEMPORARY TOTAL DISABILITY BENEFITS AFTER RETIREMENT?

By: Daniel R. Simmons, Springfield Office and  
Patricia L. Hall, Rockford Office

If an injured worker can prove the injury "arose out of" and "in the course of" his or her employment, and he or she is rendered unable to work for a period of time, an employer is obligated to provide temporary total disability (TTD) benefits to that injured worker. As a corollary to the recent discussions as to how an employee's termination impacts an employer's TTD obligation, in this month's issue we explore what affect, if any, an injured worker's retirement may have on an employer's obligation to pay TTD.

#### An Employer's General Obligations Regarding TTD Benefits

Section 8(b) of the Illinois Workers' Compensation Act provides for payment of temporary total disability (TTD) benefits to an injured worker "beginning on the 4th day of such temporary total incapacity and continuing as long as the total temporary incapacity lasts. In cases where the temporary total incapacity for work continues for a period of 14 days or more from the day of the accident compensation shall commence on the day after the accident." 820 ILCS 305/8(b). These benefits are meant to sustain the injured worker while he or she is receiving treatment for an injury that has prevented him or her from returning to work. "[W]hen determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 146 (2010).

Following a determination that an injury is compensable, the employee begins to receive TTD payments, and the issue then becomes duration. How long is an employee entitled to receive TTD, and under what conditions? There is often a discrepancy as to when the employee has reached the point which we refer to as "maximum medical improvement" or MMI. MMI is key to determining a termination point for TTD benefits because it is at this point that an injured worker is expected to return to work. This could be with or without restrictions, but the idea is that the worker will no longer benefit from treatment and is released to resume their duties. This determination involves a medical release to work by a physician, medical testimony or evidence regarding the injury, and the extent of the injury. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 594 (2d Dist. 2005).

Another factor central to determining TTD duration is whether the injured worker voluntarily chooses not to return to work when capable. *Land & Lakes Co.*, 359 Ill. App. 3d at 595. An injured worker is not entitled to TTD benefits if he or she *makes the choice not to return to work* after reaching MMI. *Id.*

It seems intuitive that if an injured worker chooses to leave the workforce while receiving TTD benefits, either during the course of treatment or thereafter, he or she has made the choice to forfeit those benefits. In fact, this is a well-supported position. An employer is entitled to terminate TTD benefits when an injured worker *refuses* to return to work. This is especially true when the worker is at MMI and has been released back to work, even if the release includes work restrictions. *Lukasik v. Industrial Comm'n*, 124 Ill. App. 3d 609, 614-15 (1st Dist. 1984).

#### The Impact of Retirement

This seemingly clear distinction becomes muddy when an injured worker chooses to retire while they are receiving TTD. After all, isn't that

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a voluntary action? A recent unpublished Rule 23 order of the Illinois Appellate Court, Workers Compensation Commission Division, sheds light on this topic as it addresses when an employer can be held responsible for paying TTD benefits to an injured worker after that injured worker retires. *City of Chicago Heights v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 162246WC-U.

In the recent appellate decision involving an injured firefighter, the appellate court issued an order regarding a 61-year-old injured firefighter that was diagnosed with a work-related left knee medial meniscus tear and preexisting left knee moderate degenerative disease. *City of Chicago Heights*, 2017 IL App (1st) 162246WC-U, ¶ 10. The torn meniscus was approved by the employer as compensable and the firefighter underwent surgery to repair the tear. *Id.* He was subsequently placed on permanent restrictions that required a sedentary position as a result of the preexisting degenerative condition. *Id.* ¶ 13. The employer refused to accommodate the restrictions, and as a result, the worker chose to retire earlier than planned. *Id.* Following his retirement, the firefighter received a total knee replacement due to the preexisting degenerative disease. *Id.* ¶ 16. The issue became whether the knee replacement and subsequent restrictions were a result of the work injury, and whether the employer was required to pay TTD benefits for the time the firefighter was treating after retirement. *Id.* ¶ 19.

Following a 19(b) hearing, the arbitrator found that the degenerative condition was asymptomatic prior to the work injury, and therefore, the knee replacement and subsequent restrictions were compensable. *Id.* The arbitrator awarded the firefighter medical expenses and TTD benefits related to the knee replacement. *Id.* The arbitrator also found that since the employer refused to accommodate the firefighter's restrictions, it was reasonable to expect he had no choice but to retire. *Id.* Due to the forced retirement, the arbitrator

awarded the firefighter TTD benefits for the nearly two and a half years following the firefighter's retirement until the 19(b) hearing. *Id.* The Illinois Workers' Compensation Commission corrected certain portions of the arbitrator's decision, but otherwise affirmed and adopted the arbitrator's decision. *Id.* ¶ 20. On judicial review, the circuit court of Cook County confirmed the Commission's decision, and the appellate court affirmed. *Id.*

In this situation, the court has concluded it was reasonable for the worker to retire and continue receiving TTD benefits until he or she has been fully compensated for missed time. In *City of Chicago Heights*, the appellate court considered this situation as leaving this worker with no other choice than to enter retirement early in order to receive an income. *Id.* ¶ 30. In *City of Chicago Heights*, the court held that the injured firefighter was entitled to receive TTD benefits for the period following his retirement until he reached maximum medical improvement (MMI) because he was forced into retirement as a result of his employer's refusal to accommodate his permanent restrictions. *Id.* ¶ 13.

According to the court, the key factor in permitting termination of TTD benefits upon retirement was the worker's motivation for entering retirement. *Id.* ¶ 30. The court distinguished between an injured worker who has the ability to return to work and instead decides they would rather be retired, and an injured worker who is capable of returning to work, but is prevented from doing so by the employer. *Id.*

The court further distinguished the situation where the worker who does not have the ability to return to work as a result of the injury chooses retirement income as a way to meet his or her living expenses. See *Land & Lakes Co.*, 359 Ill. App. 3d at 595. The court found that an employer can be required to pay TTD benefits to a worker following retirement if the choice to retire was due to circumstances beyond the worker's control and

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resulted from a compensable injury. *City of Chicago Heights*, 2017 IL App (1st) 162246WC-U, ¶ 30.

Illinois courts look favorably on injured workers who are unable to comfortably return to work as a result of the injury, or when an employer is found to have prevented the worker from returning to work. *Id.* ¶¶ 19-20. The water is muddied, however, when the worker chooses retirement *as an alternative* to returning to the workforce. Retirement as it relates to TTD is evaluated as either voluntary or forced. Retirement is voluntary when the injured worker makes no attempt to return to work, and there is nothing preventing the worker from doing so. Retirement is forced when the injury prevents the worker from being released by a physician and they opt to receive retirement benefits to supplement their income, or when the worker attempts to return to their position and is met with refusal by the employer.

In *Land & Lakes*, an injured worker with a compensable claim was awarded TTD benefits for a period after retirement where the employer filled the injured worker's position while he was off of work and refused to place the worker elsewhere within the organization when the worker was released with restriction and requested to return to light duty. *Land & Lakes Co.*, 359 Ill. App. 3d at 586. In that case, the injured worker chose to begin receiving his pension and social security income early in order to meet his living expenses when he was turned away after going to work with restrictions and still under a doctor's care for his work injury. *Id.* at 589.

In another case, the court affirmed the denial of TTD benefits following an injured worker's retirement because the retirement was voluntary. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 59. There the employer accommodated the work restrictions imposed by the doctor, and the injured worker was assigned to a position within the organization. *Sharwarko*, 2015 IL App (1st) 131733WC, ¶ 7. However, while the injured worker was receiving TTD benefits, he

requested to exercise an early retirement option offered by his employer. *Id.* ¶ 15. The court found the choice to retire was voluntary, and that the employer would have continued to accommodate the worker's restrictions had he chosen to remain active within the organization. Again, the key to an employer's obligation to provide TTD benefits to a worker that retires while receiving those benefits centers on the injured worker's motivation for entering retirement.

*City of Chicago Heights* certainly gives rise to discussion regarding the risks and benefits of not accommodating work restrictions for injured workers eligible for retirement. As an employer, it is important to consider these possibilities when faced with a compensable claim and an injured worker placed on restrictions.

As always, if you have any questions concerning this issue or any other workers' compensation issues regarding your claims, please feel free to contact one of our workers' compensation attorneys across the state.



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## Dan Simmons - Springfield

Dan concentrates his practice in the areas of workers' compensation, third-party defense of employers, and general insurance defense – including auto liability and premises liability.

Dan has extensive litigation experience and has taken more than 40 cases to jury verdict in both state and federal courts. He counsels and represents employers in Central Illinois on workplace risk management, including ways to minimize retaliatory discharge claims. Dan has also arbitrated hundreds of workers' compensation claims before the Illinois Workers' Compensation Commission. He appreciates that clients are often looking to conclude claims in the most efficient and economical means possible, and he strives to achieve every client's goals through motion practice, settlement, or trial.

Dan is a frequent author and lecturer on civil liability and workers' compensation issues, and he speaks to both clients and Illinois attorneys seeking continuing legal education. He has a particular focus on speaking with employers on issues of risk management and injury prevention. For claims that cannot be prevented, Dan works with clients on strategies to effectively bring their matters to a satisfactory conclusion.

Dan has spent his entire legal career at Heyl Royster in the Springfield office. He is a past president and program director of the Lincoln-Douglas American Inn of Court – which is designed to promote legal education, civility and collegiality among members of the bar.



## Patricia Hall - Rockford

Patricia focuses her practice on workers' compensation, employment & labor, casualty/tort litigation, and governmental matters.

Before joining Heyl Royster, Patricia worked for legal assistance representing indigent clients in domestic relations cases in Illinois state court, as well as preparing estate planning documents for elderly clients. During the summer of 2014, she clerked for Judge Lisa Fabiano, and during the summer of 2015 she clerked for Judge Eugene Doherty – both of the 17th Judicial Circuit. In her third year of law school, Patricia clerked for the Shannon Law Group in Woodridge, IL, where she was responsible for cases involving consumer rights and breach of contract.

Patricia received her Juris Doctor degree, cum laude, from Northern Illinois University College of Law. She received her Bachelors of Arts degree, magna cum laude, in Psychology from Arizona State University, and she worked full-time during college. While in law school, Patricia was a three-year member of the Dean's list. Among her law school honors and activities: she was a recipient of the NIU Outstanding Woman Student Award, a champion of the school's Lenny Mandell Moot Court Competition and Client Counseling Competition, and a semi-finalist in the LLSA National Moot Court Competition. She was president of the Student Bar Association.

## WORKERS' COMPENSATION COMMISSION UPDATE

As we have recently learned, the Workers' Compensation Commission will be making the following arbitrator zone re-assignments effective January 1, 2018:

- **Zone 1** (Collinsville • Herrin • Mt. Vernon)  
William Gallagher, Edward Lee, Nancy Lindsay
- **Zone 2** (Quincy • Springfield • Urbana)  
Michael Nowak, Christina Hemenway, Maureen Pulia
- **Zone 3** (Bloomington • Rock Island • Peoria)  
Douglas McCarthy, Gerald Granada, Melinda Rowe-Sullivan
- **Zone 4** (Kankakee • New Lenox • Ottawa)  
Barbara Flores, Greg Dollison, Anthony Erbacci
- **Zone 5** (Rockford • Waukegan • Woodstock)  
Jessica Hegarty, Carolyn Doherty, Michael Glaub
- **Zone 6** (Elgin • Geneva • Wheaton)  
Ketki Steffen, Christine Ory, Stephen Friedman

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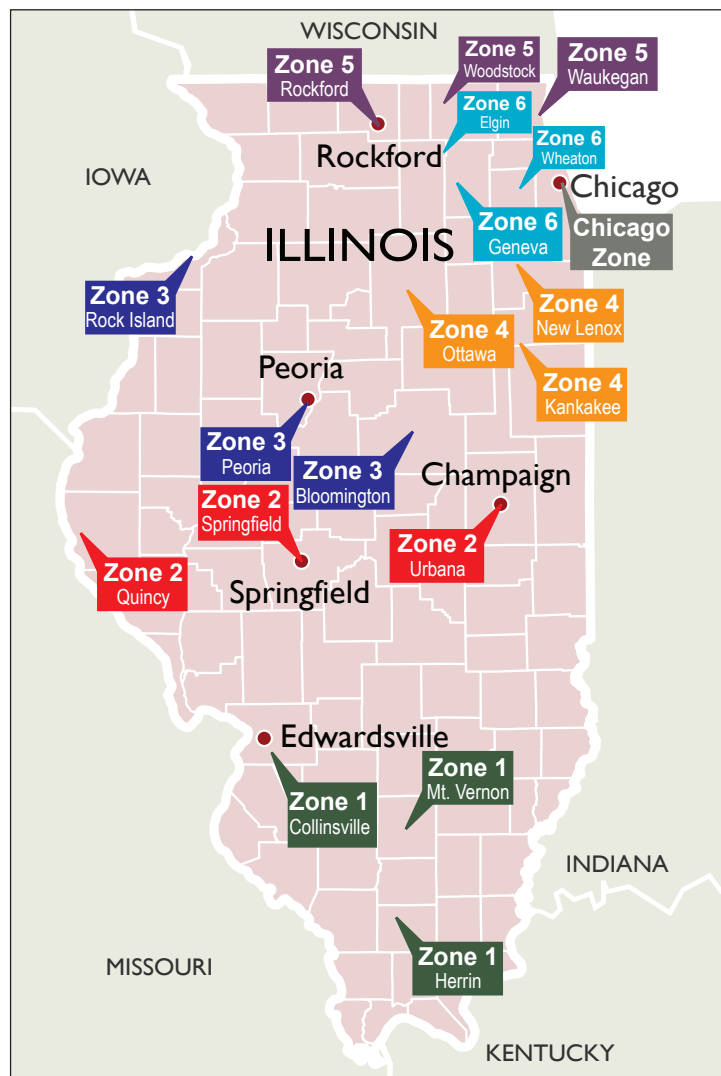
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