Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

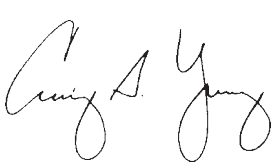
A Newsletter for Employers and Claims Professionals — *December 2013*

A Word From The Practice Group Chair

Welcome to the December edition of *Below the Red Line*. We wanted to ensure your receipt of this prior to Christmas, in part to wish you the best of the season, and also to report on some good news–the Supreme Court issued its highly anticipated decision in the *Venture-Newberg* traveling employee case. As you may know, that decision was released late last week.

Enclosed you will find a detailed analysis of the *Venture-Newberg* opinion prepared by Brad Elward, who manages our Workers' Compensation appellate practice. Brad has keen insights on both the appellate court and Supreme Court approach to the traveling employee issue. Certainly, we are pleased to see the Supreme Court overrule the appellate court's expansion of the traveling employee doctrine. Given the significant change we have seen to the doctrine with appellate court decisions over the past three years, it is refreshing to see the Supreme Court apply a common sense approach. While there are limits on the application of *Venture- Newberg* to other fact patterns, let's hope this clear reversal by the Supreme Court ushers in a more realistic view of the traveling employee doctrine at all levels of the workers' compensation system.

With this last edition of *Below the Red Line* for 2013, all of us at Heyl Royster wish you and yours the best of the holiday season. We deeply appreciate the opportunity to serve you, and we look forward to our continued relationship in 2014.



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Supreme Court Puts Brakes on Traveling Employee Doctrine Expansion

On Thursday December 19, 2013, the Illinois Supreme Court handed down its much-awaited decision in *The Venture-Newberg Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, which clarified the traveling employee doctrine in the context of an employee hired specifically to work at a distant job location. As we have discussed in prior newsletters, the majority of the Appellate Court, Workers' Compensation Commission Division, found that the claimant Daugherty was a traveling employee and awarded benefits under the Act.

Below we provide a brief discussion of the facts of the case and the appellate court disposition as a prelude to our discussion of the Supreme Court's ruling. At the end of this edition, we provide an analysis of how we believe this case might impact other traveling employee cases and what it means in light of the recent efforts by the appellate court to enlarge the definition of who is a traveling employee in Illinois.

Facts *Redux*

The claimant was a pipefitter who resided in Springfield, Illinois, and was a member of the local plumbers & pipefitters union also based in Springfield. Venture–Newberg was a contractor hired to perform maintenance and repair work at a nuclear power plant in Cordova, Illinois, which is located between 200 and 250 miles from Springfield. The Cordova plant positions were temporary and were expected to last only a few weeks. Those hired for the Cordova job were expected to work between six 10–hour days and seven 12–hour days and could be called in on an emergency basis.

The claimant reported to work at the Cordova plant in March 2006, and after completing his day shift, he and another worker spent the night at a local lodge some 30 miles from the jobsite rather than drive back to Springfield. Both men were scheduled to begin work at 7:00 a.m. the following day. The next morning both men were injured in an automobile accident en route to coffee before work.

Appellate Court Disposition

Although the arbitrator denied benefits, the Commission, in a split decision, reversed and awarded compensation based on the traveling employee doctrine. The circuit court reversed, but the appellate court reinstated the Commission majority findings. *The Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2012 IL App (4th) 110847WC In so doing the appellate court majority found: (1) the claimant was employed by Venture–Newberg; (2) he was assigned to work at a nuclear power plant in Cordova, Illinois, operated by Exelon in excess of 200 miles from his home; and (3) the premises at which the claimant was assigned to work were not the premises of his employer. These facts, the court observed, established the claimant's status as a traveling employee.

Additionally, the appellate court majority found the claimant's actions at the time of his accident were reasonably foreseeable. According to the majority, the Commission found that Venture–Newberg "must have anticipated that the claimant, recruited to work at Exelon's facility over 200 miles from the claimant's home, would be required to travel and arrange for convenient lodging in order to perform the duties of his job, and that it was reasonable and foreseeable that he would travel a direct route from the lodge at which he was staying to Exelon's facility." *Venture-Newberg*, 2012 IL App (4th) 110847WC, at ¶ 16. Therefore, the court concluded the Commission properly found the claimant's injury, sustained when the vehicle in which he was riding to work from the lodge at which he was staying skidded on a public highway, arose out of and in the course of his employment. Alternatively, the majority found the accident compensable because it believed the demands of the job required the claimant to travel and work away from the employer's business, and to be available to work on short notice.

The Supreme Court Speaks …

In a 6-1 decision authored by Chief Justice Garman, the majority found that the claimant Daugherty was not a traveling employee at the time of his accident. *The Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728. In rejecting application of the traveling employee doctrine, the Court drew heavily on two prior decisions – *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 338 N.E.2d 379 (1975) and *Chicago Bridge & Iron, Inc. v. Industrial Comm'n*, 248 Ill. App. 3d 687, 618 N.E.2d 1143 (5th Dist. 1993), which involved injuries to an employee required to frequently travel (*Wright*) and periodically travel (*Chicago Bridge & Iron*). The Court observed that Wright was a permanent employee who was regularly required by his employer to travel out of state and that his employer reimbursed him with *per diem* and mileage expenses. It further noted that Reed, the claimant in *Chicago Bridge & Iron*, was not a permanent employee, but he had worked exclusively for the employer- for 19 years. Both workers were reimbursed for mileage expenses and were "required" to travel to a remote location for the position, and both were held by the court to be traveling employees, unlike the claimants in *Wright* and *Chicago Bridge & Iron*.

According to the majority, the claimant Daugherty was not a permanent employee of Venture-Newberg and was not working on a long-term exclusive basis. Moreover, there was nothing in Daugherty's contract required him to travel out of his union's territory to take the position with Venture. At arbitration, Daugherty acknowledged he made a personal decision that the benefits of the pay outweighed the personal cost of traveling. The Court observed, "Daugherty was hired to work at a specific location and was not directed by Venture Newberg to travel away from this work site to another location." Daugherty merely traveled from the premises to his residing location, as did all other employees. Finally, the Court noted Venture did not reimburse Daugherty for his travel expenses, nor did it assist Daugherty in making his travel arrangements.

The majority concluded that Daugherty made the personal decision to accept a temporary position with Venture Newberg at a plant located approximately 200 miles from his home. Venture did not direct him to accept the position at Cordova, and Daugherty accepted this temporary position with full knowledge of the commute involved. As such, Daugherty was not a traveling employee.

In addition to concluding that the claimant did not qualify for the traveling employee exception, the majority noted that Daugherty's course or method of travel was not determined by the demands and exigencies of the job. "Venture [Newberg] did not reimburse Daugherty for travel expenses or time spent traveling. Venture [Newberg] did not direct Daugherty's travel or require him to take a certain route to work." Instead, the majority observed, "Daugherty made the personal decision to accept the position at Cordova and the additional travel and travel risks that it entailed."

The appellate court majority decision was reversed and the circuit court's decision, which reinstated the arbitrator's denial of benefits, was reinstated.

What this decision means for your traveling employee cases?

As most of us know, the appellate court has been very active in the traveling employee arena over the past few years, as evidenced by its rulings in *Venture-Newberg*, *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2103 IL App (3d) 120411WC and *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d)

120252WC, as well as a number of unpublished Rule 23 decisions. Today, the pressing question for employers is how does the Court's ruling in *Venture-Newberg* impact these cases and the overall traveling employee doctrine?

At one end of the spectrum, the recent *Venture-Newberg* decision establishes an outer limit on what actions fall within the traveling employee doctrine. The decision clarifies the existing law as to employees who are hired temporarily to perform a specific job at a distant location and makes it clear that these individuals are not subject to the traveling employee doctrine and are instead judged by the traditional "coming and going" test, which precludes recovery for accidents while coming and going to work. Moreover, *Venture-Newberg* highlights several factors which employers can seize upon in hiring temporary employees – avoid specific instructions on travel routes, avoid payment of travel wages or *per diem* expenses, and avoid any involvement in decisions related to overnight stays.

The *Venture-Newberg* decision also seems to define the employer's premises as that location where the employee is working. Indeed, this definition would be consistent with how the appellate court dissenting opinion viewed the case. Recall that the appellate court dissent advocated the following rule: "where an employee is hired on a temporary basis only and is assigned by the employer to work at one specific jobsite other than the employer's premises, the assigned location becomes the employer's premises for the purposes of applying the traveling employee rule." *Venture-Newberg*, 2012 IL App (4th) 110847WC, at ¶ 16.

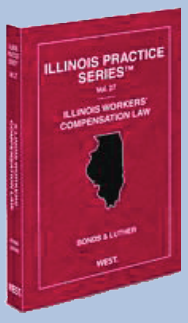
The Supreme Court's decision certainly suggests a more limited application of the traveling employee doctrine to the facts presented. Somewhat as expected, *Venture-Newberg* does not significantly overhaul the traveling employee doctrine and does not overrule other appellate court decisions not before the court. Several recent traveling employee decisions from the appellate court, such as *Kertis* and *Mlynarczyk*, have also strayed from the doctrine's original purpose and expand the doctrine to encompass areas not originally intended–i.e., traveling between two office locations or preparing for work. While these decisions inappropriately expanding the doctrine are not specifically overruled by *Venture-Newberg*, we hope the spirit of the decision–to draw a line based on common sense–will influence the appellate court in future traveling employee cases and result in a broader limitation on application of the traveling employee doctrine.

Brad Elward - Peoria Office

Brad concentrates his work in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 275 briefs and argued more than 200 appellate court cases, resulting in more than 80 published decisions.

Brad is the current President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law.

Brad was most recently published in Volume 101, No. 12, of the Illinois State Bar Journal, where he wrote on the subject of the Supreme Court's recent mailbox rule decision and its application to workers' compensation judicial reviews.



New Edition in Print!!

The Third Edition of ILLINOIS WORKERS' COMPENSATION LAW, 2013-2014 (Vol. 27, Illinois Practice Series, West) is now available. Authored by Heyl Royster partners Kevin Luther and Bruce Bonds, this work can be purchased at store.westlaw.com.

Heyl Royster

Workers' Compensation Practice Group

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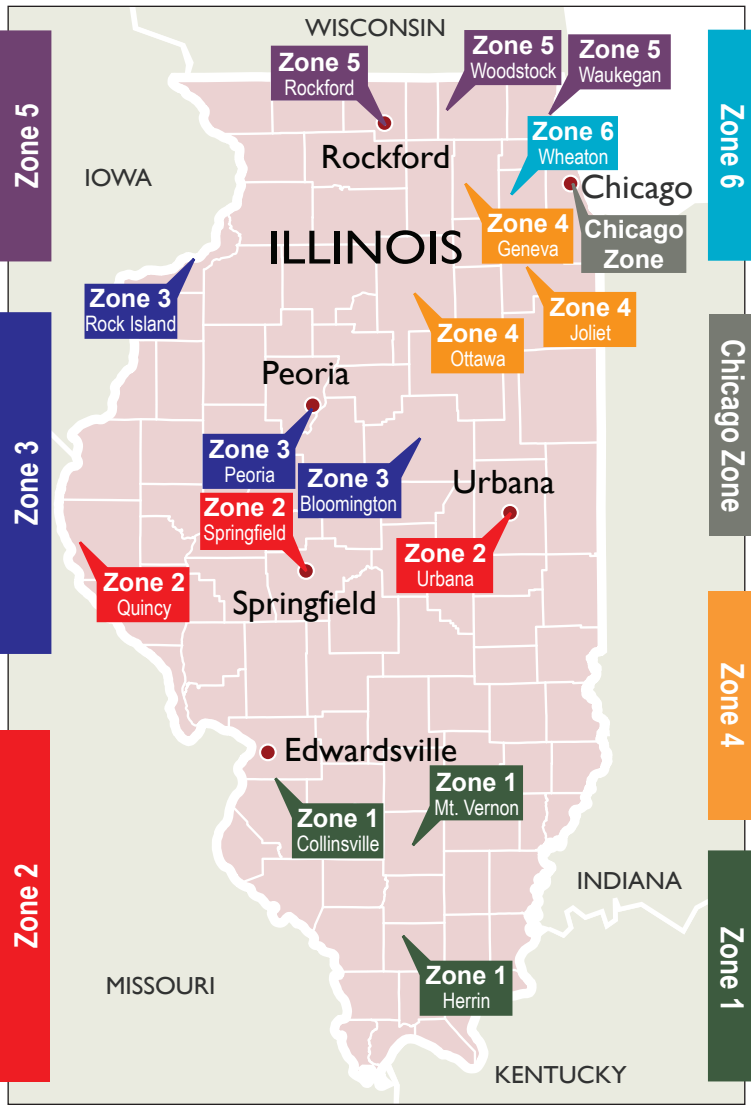

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