Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *July 2014*

A Word From The Practice Group Chair

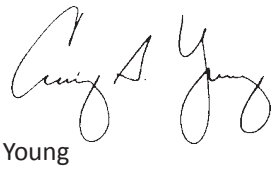
As the calendar moves into August, and students begin preparing for the new school year, we are reminded there is always much to learn in the workers' compensation world. With this in mind, we highlight in this issue some new legislation that may have a significant impact on workers' compensation claims in this state. Earlier this year the General Assembly passed and Governor Pat Quinn signed into law the Compassionate Use of Cannabis Pilot Program Act, which allows for the use of cannabis in certain medical situations. How this new law will impact the workplace is not yet clear, but Brett Siegel's article outlines some of the anticipated implications of the new Act on employers and work place injuries.

Brett is an associate in our Springfield office, and we would also like to take this opportunity to formally announce Dan Simmons as head of the Springfield office workers' compensation practice. Dan took over earlier this year for Gary Borah who will retire at the end of the year after a long and distinguished career with our firm. Dan has been a partner since 1996 and will do a great job managing your workers' compensation cases venued in Springfield and throughout zone 2 of the Workers' Compensation Commission.

This issue also recognizes some of our Heyl Royster attorneys in the news. Most notably, Bruce Bonds of our Urbana office was recently recognized at the National Workers' Compensation & Occupational Medicine Conference as one of "50 Most Influential People in Workers' Compensation" nationally. Bruce also was a keynote speaker at that conference with a presentation on defense of the catastrophic claim. We congratulate Bruce on this accomplishment.

Finally, we provide a short summary of a new "arising out of" decision, which seems to push the line even further towards compensability for injuries in the work place. Our brief discussion of the recent *Young* decision addresses this continued disturbing trend from the appellate court. Please feel free to contact any of our attorneys as you manage your comensability decisions in this increasingly difficult environment.

We wish you the best as the summer winds down and fall approaches.



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In this issue . . .

BONDS RECEIVES NATIONAL RECOGNITION

Bruce Bonds (Urbana) was recently recognized at the National Workers' Compensation & Occupational Medicine Conference as one of "50 Most Influential People in Workers' Compensation." Individuals were selected as a result of polling thousands of attorneys, case managers, disability specialists, nurses, physical therapists, physicians, rehabilitation counselors, rehabilitation nurses, and workers' compensation specialists.

MEDICAL MARIJUANA LEAVING A CLOUD OF UNCERTAINTY OVER EMPLOYERS

By: Brett Siegel
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The Illinois Compassionate Use of Medical Cannabis Pilot Program Act, Public Act 098-0122 ("Act"), went into effect on January 1, 2014. The Act, now codified at 410 ILCS 130, allows registered users to use cannabis for medical purposes for the next four years. On January 1, 2018, the pilot program is scheduled to be repealed unless there is legislative intervention to keep it in place. The Act places Illinois among more than twenty states that have similar statutes allowing cannabis to be used for medical purposes despite federal law prohibiting the use of cannabis. The Act includes an explanation that approximately 99 out of every 100 cannabis arrests in the U.S. are made under state law, rather than under federal law. Further, the federal government has not been active in enforcing its cannabis law against registered users in states allowing its use.

Importantly, the National Council on Compensation Insurance, Inc. has highlighted medical cannabis as one of the top emerging workers' compensation issues to watch in 2014. That is especially true in Illinois, as the Act offers limited guidance on the effect medical cannabis will have on workers' compensation claims.

Illinois medical cannabis use highly regulated

Illinois has one of the most stringent set of rules governing the implementation of medical cannabis in the country. While some states allow cannabis to treat broad conditions such as pain, Illinois requires patients to have their doctors certify they have one of over thirty-five debilitating conditions. Among the listed debilitating conditions that are commonly seen in workers' compensation claims are:

- Muscular dystrophy;
- Spinal cord injury;
- Traumatic brain injury and post-concussion syndrome;
- Regional Pain Syndromes Type I;
- Reflex Sympathetic Dystrophy; and
- Residual limb pain.

In addition, epilepsy has been added to this list since the Act was first passed (P.A. 98-0775). Further, the Act includes any other debilitating medical condition or its treatment that is added by the Department of Public Health. Any citizen may petition the Department of Public Heath to add debilitating conditions or treatments to the list. Therefore, this list will continue to grow, as it already has over the past months.

Individuals diagnosed with one of the required debilitating medical conditions who seek the use of medical cannabis must obtain "written certification." Written certification is defined as a document dated and signed by a physician stating that in the physician's professional opinion the patient is likely to receive therapeutic or palliative benefits from the medical use of cannabis to treat or alleviate the patient's debilitating medical condition or associated symptoms. The physician must further specify the condition and document that the physician is treating the patient for that condition. Patients must also apply for and obtain a registry identification card in order to be eligible for medical cannabis. On July 15, 2014, the Illinois Joint Committee on Administrative Rules ("JCAR") approved a complex set of rules for the medical cannabis pilot program from the Departments of Agriculture, Financial and Professional Regulation, Public Health, and Revenue. JCAR's approval of the rules is expected to make patient applications for the registry identification card available this September. That card, along with the written certification, will allow the patient to obtain medical cannabis as soon as it becomes available in the spring of 2015.

The Act specifies several categories of employees that may not use medical cannabis, including:

- Active duty law enforcement officers, correction officers, probation officers, firefighters;
- Anyone with a school bus permit;
- Anyone with a Commercial Driver's License (CDL); and
- Anyone convicted of a felony under the Illinois Controlled Substance Act, Cannabis Control Act, or the Methamphetamine Control and Community Protection Act.

NOTE: For those who employ or insure those specific categories of people who are not allowed to "use" medical cannabis, there are additional considerations and a potential conflict with the definition of qualifying patient.

Additionally, there are a number of regulations for cultivation centers and dispensing organizations, which must be located in Illinois.

While the Act, on its face, is not focused on workers' compensation, it has the potential to have a profoundly wide-ranging impact on workers' compensation claims. At least 100,000 to 200,000 Illinois patients are currently estimated to be eligible for medical cannabis just based on medical conditions. Again, the list of medical conditions that allow patients to become eligible for medical cannabis is expected to grow, likely increasing the number of patients that may become eligible in the future. Colorado, a state with less than half the population of Illinois, currently has more than 116,000 patients registered to use medical cannabis. Thus, the number of patients expected to eventually be registered to use medical cannabis in Illinois is significant. It is important to understand some of the consequences medical cannabis may have for workers' compensation claims despite the lack of guidance provided thus far by the legislature and the Illinois Workers' Compensation Commission.

How are employers impacted by the Act?

It is necessary to be aware of the Act's provisions directed to employers, as they provide some insight on how to handle workers' compensation claims. First, employers may not discriminate against an employee because he or she is a medical cannabis patient. Merely possessing a medical cannabis registration card is not a cause for an adverse employment action. Treating an employee, including an employee who filed a workers' compensation claim, differently may lead to a claim of unlawful discrimination.

Employers may continue to develop and enforce anti-drug policies. "Nothing in this Act shall prevent a private business from restricting or prohibiting the medical use of cannabis on its property." 410 ILCS 130/30(h). Employers may continue to adopt reasonable regulations concerning consumption, storage or timekeeping requirements for qualifying patients.

Can employers continue to require drug tests for employees who report work accidents?

Many employers require their employees to take a drug test upon reporting a work accident. This is often a requirement for two reasons. First, a drug test can be a deterrent to employees filing frivolous workers' compensation claims. Second, the employer needs to know if the employee was intoxicated or impaired at the time of the injury, which may allow it to assert an intoxication defense.

Employers may continue to enforce policies concerning drug testing, zero-tolerance, or a "drug free workplace" provided the policy is applied in a non-discriminatory manner. Thus, employers administering drug tests to employees who report work injuries must administer drug tests for all employees and avoid singling out employees with medical cannabis registration cards. Further, employers may continue disciplining employees for violating workplace drug policies, assuming such discipline is applied in a non-discriminatory manner. Fortunately, the Act, unlike similar statutes in other states, gives employers defined guidance on actions and practices they can continue.

So we can continue to drug test, but is intoxication still a defense?

Under section 11 of the Illinois Workers' Compensation Act, employers do not owe any compensation to the employee if (1) the employee's intoxication is the proximate cause of the employee's accidental injury or (2) at the time the employee incurred the accidental injury the employee was so intoxicated that the intoxication constituted a departure from the employment. 820 ILCS 305/11. Admissible evidence of the concentration of cannabis shall be considered in any workers' compensation hearing to determine whether the employee was intoxicated at the time the employee incurred the accidental injuries. The difficulty remains that cannabis is not like other drugs. It stays in one's system for up to thirty days and a positive test does not mean the person recently used cannabis or was under the influence of cannabis at the time of the injury. A "zero tolerance" policy may still be enforced; however, employers may not want to do so if they believe the cannabis usage by a registered user only takes place outside of work hours and the employee is not impaired at work.

When asserting the intoxication defense for cannabis use, impairment, not a positive drug test, is regarded to be the most important consideration. The Act states the following regarding impairment:

> An employer may consider a registered qualifying patient to be impaired when he or she manifests specific, articulable symptoms while working that decrease or lessen his or her performance of the duties or tasks of the employee's job position, including symptoms of the employee's speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, negligence or carelessness in

> operating equipment or machinery, disregard for the safety of the employee or others, or involvement in an accident that results in serious damage to equipment or property, disruption of a production or manufacturing process, or carelessness that results in any injury to the employee or others. If an employer elects to discipline a qualifying patient under this subsection, it must afford the employee a reasonable opportunity to contest the basis of the determination. 410 ILCS 130/50(f).

Whether an employee is impaired is clearly a subjective determination by the employer. As long as the employer uses "good faith" in making the assessment, an employer's finding of an employee's impairment should allow for disciplinary action. Prior to administering disciplinary action, however, the employer must afford the employee a reasonable opportunity to contest the basis of the determination. This can be done by meeting with the employee privately, having a third party present, discussing the employer's observations, and finding out if there is a valid explanation. The employer should document its observations and the discussion had with the employee.

The Illinois Workers' Compensation Act, however, requires more than an impairment finding for the intoxication defense to be successful. 820 ILCS 305/11. The employer asserting the defense must prove that any impairment rose to the level of intoxication. At this point, it is still unclear if those two standards can be treated similarly or if it will be more difficult to prove intoxication. Nevertheless, even if the employee was intoxicated or impaired at the time of the work accident, the employer must prove that the employee's intoxication was the proximate cause of the injury or that the employee was so intoxicated that the intoxication constituted a departure from the employment. Therefore, in order to assert the intoxication defense for medical cannabis users, it will be extremely important for the employer to obtain detailed documentation of any impairment that was observed at or around the time of the accident.

With the differences or lack thereof between impairment and intoxication, we may see clarification from either the General Assembly or the Illinois Workers' Compensation Commission. For now, employers asserting the intoxication defense can attempt to intertwine impairment and intoxication to their benefit. Petitioner's attorneys are likely to take the position that medical cannabis is a lawful medication certified by a licensed physician and because the employee was legally entitled to take it, and even if it were a cause of the accident, the accident is still compensable. Based on the impairment definition in the Act, it is likely that petitioner's attorneys will lose that argument. The causation element, however, will be difficult for employers to prove because cannabis only stays in one's system for up to 30 days. It will continue to be a challenge to prove the use of cannabis was the proximate cause of the work accident, but certainly not insurmountable.

Are employers required to pay for workers to get high?

Several states with medical cannabis statutes specifically contain language that employers do not have to pay for medical cannabis. The Illinois Act remains silent on this issue. In those states that do not specify if employers must pay for medical cannabis, some employers have successfully argued that the lack of approval from the U.S. Food and Drug Administration and a federal law banning its use precludes workers compensation insurers from paying for medical cannabis as a treatment for injured workers. While it is unclear whether workers' compensation insurers in Illinois will be required to pay for medical cannabis, the likely bet is that they will be forced to do so if all of the requirements of the Act are met. Employers can attempt to fight authorizing medical cannabis by arguing it is not reasonable and necessary.

The Illinois Workers' Compensation Act requires the employer to pay reasonable and necessary medical expenses. It specifically states that the following:

> The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to the fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all necessary first aid, surgical and hospital services thereafter incurred, limited, however to that which is reasonably required to cure or relieve from the effects of the accidental injury… The employer shall also pay for treatment, instruction and training necessary for the physical, mental, and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. 820 ILCS 305/8(a).

The Act, likely in anticipation of various attacks on the medical evidence supporting the use of medical cannabis, goes to great lengths to justify its use for the wide array of debilitating medical conditions. The Act states the following:

> The recorded use of cannabis as a medicine goes back nearly 5,000 years. Modern medical research has confirmed the beneficial uses of cannabis in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions, including cancer, multiple sclerosis, and HIV/AIDS, as found by the National Academy of Sciences' Institute of Medicine in March 1999. 410 ILCS 130/5(a).

The Act relies on the American Academy of HIV Medicine, the American College of Physicians, the American Nurses Association, the American Public Health Association, and the Leukemia & Lymphoma society, to support the medical utility of cannabis. The Act's provisions regarding the reasonableness and necessity of medical cannabis seemingly offer a convenient tool for arbitrators in Illinois to rule in favor of the authorization of medical cannabis.

On the face of the Act, it is clear that an employer can successfully challenge the request for payment for medical cannabis if the employee is not a registered user or if a written certification has not been issued by a medical provider for one of the listed debilitating medical conditions. Assuming those requirements have been met, there are two primary ways employers can challenge the reasonableness and necessity of medical cannabis use among injured workers.

First, an employer can obtain a utilization review for the use of medical cannabis. "Utilization review" means the evaluation of proposed or provided health care services to determine the appropriateness of both the level of health care services medically necessary and the quality of health care services provided to the patient, including evaluation of their efficiency, efficacy, and appropriateness of treatment. A utilization review denying the reasonableness or necessity of medical cannabis as a treatment for the employee's injuries will give the employer a basis to deny payment and avoid penalties.

Second, an employer can obtain an Independent Medical Examination ("IME") under the appropriate circumstances. A physician may provide an employee with written certification for one of the over thirty-five debilitating conditions covered under the Act. If the employer does not believe that the employee actually has that condition, it can obtain an IME to determine whether the employee has that debilitating medical condition. While the proper method of determining whether medical treatment is reasonable and necessary is through a utilization review, the IME can also address that issue.

Remember, the Act does not create a prescription for medical marijuana; rather, it creates a certification that the patient might benefit from the cannabis.

Do employees have any causes of action against the employer under the Act?

Fortunately, the Act provides some protections for employers if they engage in actions based on good faith beliefs regarding the employee's cannabis use. The Act does not provide employees with a cause of action against their employer for (1) actions based on a good faith belief that the employee used or possessed cannabis on the employer's premises; (2) actions based on a good faith belief that the employee used or possessed cannabis during employment hours; and (3) injuries or losses to third parties, if the employer did not know or have reason to know that the employee was impaired.

How to prepare for medical cannabis usage coming in the spring of 2015

While the Act provides limited guidance for the effects it will have on workers' compensation claims, employers retain significant rights under the Act. Employers can continue to prohibit employees from using cannabis at work and they can continue to administer drug tests. Employers, insurance companies, and third party administrators can take the following steps to position themselves for the implementation of medical cannabis.

Employers:

1. Review your drug, alcohol, anti-smoking policies.
2. Add provisions to your policies for registered qualified patients. Make it clear that they cannot be under the influence at work, even if they are legally using medical cannabis.
3. Make employees overly aware of your policies, especially if you decide to continue using zero tolerance policies.
4. If using a zero tolerance policy, it must be enforced non-discriminately. Avoid enforcing it selectively.
5. Be cautious about bringing medical cannabis users back to work where job safety is a concern. It may be necessary to sit down with that employee to discuss how the transition back to work will be navigated.

6. Train supervisors regarding the warning signs of intoxication or impairment from cannabis. Supervisors' testimony on the level of the employee's impairment will be necessary to assert a successful intoxication defense.

Insurance Companies and Third Party Administrators:

1. Determine if you want to challenge requests for payment of medical cannabis.
2. Be prepared to obtain a utilization review or IME when medical cannabis is prescribed.
3. Understand the drug policies of your employers and how that may affect the compensability of claims.
4. Evaluate whether an intoxication defense may be used prior to accepting a claim.

In addition to these points, it will also be necessary to determine just how the cost of medical cannabis, if awarded by the Commission, will be paid. The Act designates this as a cash-only business; how an employer will accommodate this aspect has yet to be determined.

The issues addressed herein only scratch the surface of the potential implications the Act may have on workers' compensation claims. Medical cannabis may turn out to be a less addictive and less costly medication than more potent medications, such as opioids. On the other hand, medical cannabis may turn into a major cost driver for workers' compensation claims if there are side effects that necessitate other medications or prevent employees from quickly returning to work. It is too early to accurately determine the overall effect of medical cannabis on workers' compensation claims and the position the Commission will take regarding its use.

We will monitor activity on the medical cannabis front and keep you advised of any new developments that will affect the way you handle your workers' compensation claims. If you encounter a claim involving medical cannabis, feel free to contact any of our workers' compensation attorneys to further discuss the issues and possible defenses.

A native of Buffalo Grove, Illinois, Brett Siegel joined Heyl Royster shortly after graduating from Chicago-Kent College of Law in 2012. Brett practices in the firm's Springfield office and represents clients in tort litigation and defends employers in workers' compensation cases. He regularly handles depositions of expert witnesses and treating physicians in both civil and workers' compensation matters, and has tried many cases before the Illinois Workers' Compensation Commission.

RECENT DECISIONS

Arising Out Of -

The Appellate Court, Workers' Compensation Commission Division, issued a 5-0 opinion reversing a Commission majority decision that had **denied** benefits to a worker who had injured his shoulder while reaching. In *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, the claimant worked as a parts inspector and was reaching into a box to obtain a clip. He stated, "I was in the process of checking some parts and I removed approximately eight of them from a box, and I was reaching for the last spring clip in the bottom of the box and as doing so I reached in and I felt a snap or a pop in my shoulder. …" *Young*, 2014 IL App (4th) 130392WC, ¶5.

The box measured about 36 inches deep and 16 by 16 inches. The clip he was reaching for measured roughly 14 inches in diameter and weighed between 12 and 20 lbs. The claimant said the box was not large enough to fit both of his hands and shoulders in at the same time. The claimant submitted into evidence a photograph recreating his action, albeit using his non-injured right shoulder.

The arbitrator denied the claim, finding that the act of reaching for an item, without more, does not constitute an increased risk of injury particular to the claimant's employment. He further said, it is a movement consistent with normal daily activity, and was not repetitive. The Commission affirmed, 2-1, also concluding the mere act of reaching down did not constitute an increased risk. The circuit court confirmed.

The appellate court, in an opinion authored by Justice Harris, reversed in a published 5-0 opinion. According to the court, the record showed the claimant was injured while performing his job duties – *i.e.*, inspecting parts. The "evidence unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question." *Id*. at ¶22. Finally, the appellate court noted, "[a]lthough the act of 'reaching' is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the time of injury. His action in reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment." *Id*. at ¶28.

This ruling further limits the distinction of performing a common act equally performed by the general public where the employee is otherwise engaged in the performance of his or her job duties. The overriding focus of the court is on whether the employee is performing some aspect of the employment or whether the action is one the employer might reasonably expect the employee to perform in the furtherance of those job duties.

HEYL ROYSTER WORKERS' COMPENSATION LAWYERS IN THE NEWS

Brad Peterson (Urbana) published an article entitled, "Are All Workplace Stairway Falls Now Compensable in Illinois?" in the 2014 Volume 4, No. 2 edition of the Illinois Association of Defense Trial Counsel's *Quarterly* publication. Brad's article discussed the recent line of appellate court cases interpreting the "arising out of" requirement, and specifically discussed the court's decision in *Village of Villa Park*.

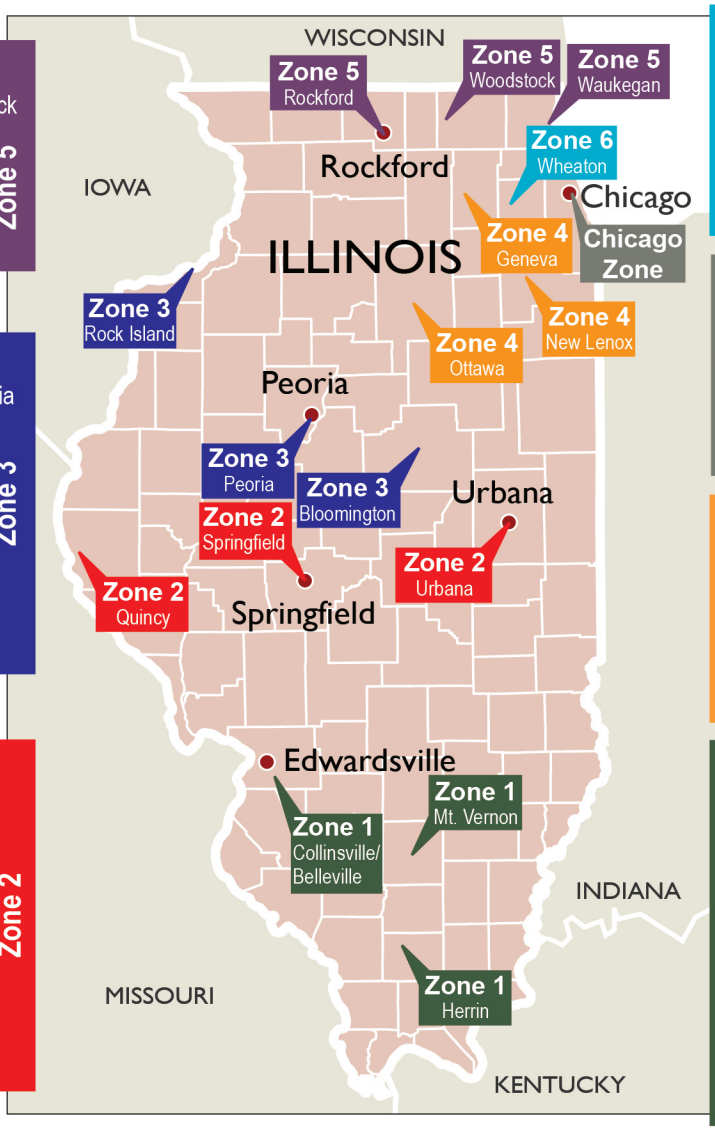
Brad Elward (Peoria) published a feature article in the same *Quarterly* volume, discussing recent cases interpreting section 19(f)'s judicial review provisions and calling for legislative change to correct various procedural loopholes.

On July 7, **Craig Young** (Peoria) was installed as President of the Peoria County Bar Association.

Workers' Compensation Group

"We've Got the State Covered!"

ILLINOIS ZONE MAP



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