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# BELOW THE RED LINE

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

October 2023

## A WORD FROM THE PRACTICE CHAIR

I hope you are enjoying the changing of the season. Cooler temperatures have been pushing through, and all my neighbors have been hard at work over the past few weeks putting up their Halloween decorations. I am sure you have your costumes all squared away and trick-or-treat candy ready to go (and if you have taste-tested some, that is OK in my book.) If you are like me, you look forward to the parade of kids coming by your house with their costumes and smiling faces on the hunt for free candy. Enjoy the season and Happy Halloween!

I do not usually share or include any sad news in my introduction for this newsletter, but I will break from that this month. Some of you have had the opportunity over the years to talk with my secretary, Dianne Lockwood, or at least got to know her through email. She was the driving force to keeping me organized and on top of things (well, almost everything). Dianne passed away unexpectedly this month, and this paragraph is yet another way I get to celebrate her. Not a day goes by that I walk through my office, and I expect to see her sitting at her desk reminding me what I need to get done that day or what we still need to talk about to wrap up a project. I guess this is that reminder to tell those you love how much they mean to you because no one is assured a tomorrow. I miss and love you, Dianne. Thank you for taking care of me all these years.

I know it's tough to transition from that, but we do need to get to why you are here after all. [Leah Nolan](#), an associate in our Chicago office, is this month's author. Leah's workers' compensation training has come under the guidance of [Brad Antonacci](#). I have had the opportunity to work with Leah over the last few years, and I can report that I have found her to be extremely detail-oriented and a great attorney. She thoroughly outlines the differences between independent medical examinations (IME's) and Section 8.7, Utilization Reviews (UR's). The takeaway from this article is the existing case law on the value of these defense tools and how the Courts weigh in on the level of credibility which is to be given to evidence presented in a case. Understanding how the Court approaches the weight of medical opinions in the defense of a case for the employer is always helpful when deciding the defense plan for your case.

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BY LEAH NOLAN

**A**n Independent Medical Examination (“IME”) is a critically useful tool because it affects the availability of defenses of the Respondent. Under Section 12 of the Act, a Petitioner must present themselves for an IME if requested by the Respondent. 820 ILCS 305/12. Pursuant to the Act, the purpose of the IME is to determine the nature, extent, and probable duration of the injury. *Id.* An examination of the Petitioner is conducted by a qualified physician who provides a written report outlining their findings regarding causation, reasonable and necessary medical care, and other questions presented. *Id.*

An IME differs from another tool sometimes used to evaluate the reasonableness and necessity of medical care: a utilization review (“UR”). Section 8.7 of the Act defines utilization review as “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 a patient, including evaluation of their efficiency, efficacy, and appropriateness of treatment, hospitalization, or

office visits based on medically accepted standards.” 820 ILCS 305/8.7. The UR provider does not meet with the Petitioner; they simply review the medical records and determine whether the treatment (prospective, concurrent, or retrospective) is reasonable and appropriate based on uniform standards. *Id.*

In a workers’ compensation claim, whether a medical expense is reasonable or necessary is a question of fact to be resolved by the Commission. *Montgomery v. Illinois Workers’ Comp. Comm’n*, 2022 IL App (3d) 210604WC ¶ 34. The same is true for whether a causal relationship exists between a Petitioner’s employment and his or her work-related injury. *Id.* ¶ 39.

### CAN THE FINDINGS OF AN IME BE USED TO DISPUTE WHETHER MEDICAL TREATMENT IS REASONABLE AND NECESSARY?

The Appellate Court recently determined that all evidence must be considered in determining the reasonableness and necessity of medical treatment. In *Montgomery*, the Petitioner sought a review of the Commission’s interlocutory (non-final) and final findings that denied payment of past and future medical expenses based on the Petitioner’s failure to prove a causal connection. *Id.* ¶¶ 28-29.¶

In affirming the Commission on this issue, the Court considered the conclusiveness of a utilization review on whether a medical expense is reasonable or necessary. *Id.* ¶ 30, ¶ 34. In assessing questions of fact, the Court opined that “the appropriate test [was] whether there [was] sufficient evidence in the record to support the Commission’s determination.” *Id.* ¶ 39. In stating that the results of a utilization review were not binding on the Commission, the Court opined that whether a medical expense is reasonable or necessary is determined through the consideration of all evidence. *Id.* ¶ 30. In evaluating

the evidence, the Commission must consider each piece of evidence in the same manner to determine the reasonableness and necessity of the medical bills and treatment. *Id.*

The Court provided that it was “the function of the Commission to resolve conflicts in evidence, including medical testimony; assess the credibility of the witnesses; assign weight to the evidence; and draw reasonable inferences from the evidence.” *Id.* ¶ 40. In considering such evidence, the Court found the Commission correctly determined that the Petitioner failed to prove a causal connection and that a denial of an award of expenses associated with the Petitioner’s condition was appropriate. *Id.*

From the Court’s explanation of its reasoning, we can conclude that one piece of evidence, such as a utilization review, should be considered in the same manner as an independent medical examination and/or corresponding medical deposition testimony. The Commission must then assess how much weight to give each piece of evidence. One piece of evidence does not begin on a higher footing than another piece of evidence. As such, an independent medical examination and any medical testimony given by the independent medical examiner can be used to determine the reasonableness and necessity of medical bills and treatment.

### **CAN RECOMMENDED TREATMENT CONTAINED WITHIN AN IME AND PETITIONER’S REFUSAL TO COMPLY WITH THE SAME BE USED TO TERMINATE BENEFITS?**

Recommended treatment contained within an independent medical examination report may be used to terminate benefits where the Respondent can prove the recommended treatment was reasonably essential to promote the Petitioner’s recovery or where the Petitioner’s refusal to attend or participate

in the recommended treatment is in bad faith or outside the bounds of reason. *Kawa v. Illinois Workers’ Comp. Comm’n*, 2013 IL App (1st) 120469WC ¶ 113, ¶ 117. If the recommended treatment does not meet either standard, refusing to attend or participate in such treatment is not a basis for terminating TTD or medical benefits. *Id.*

In *Kawa*, the Petitioner presented to an IME where the examining physician recommended conservative care, including the use of a sling for a right shoulder injury. *Id.* ¶ 7-8. Eventually, he underwent surgery but continued to have extreme pain. *Id.* ¶ 10. He was referred to pain management and physical



therapy. *Id.* ¶ 10-11. The Petitioner was seen again for an IME and was noted to be taking high doses of Norco. *Id.* ¶ 12, ¶14. The Petitioner was referred for a second surgery, after which he presented for another IME. *Id.* ¶ 17, ¶ 20. At that time, the IME physician recommended that the Petitioner undergo a psychiatric evaluation and continue aggressive physical therapy in a multidisciplinary approach. *Id.* ¶ 21. Shortly thereafter, the Petitioner’s surgeon recommended a psychiatric or psychological evaluation. *Id.* ¶ 25.

The Petitioner’s treating surgeon also recommended a multidisciplinary approach as opposed to an anesthesiology-based program. *Id.* The Petitioner was sent to a rehabilitative institute (“the institute”)

where it was found that his pain problems were affected by psychosocial factors, and the institute recommended that this problem be addressed with psychological intervention. *Id.* ¶ 27. The institute recommended that the Petitioner attend their pain program, which had a multidisciplinary approach. *Id.* ¶ 28.

An appointment was made for the Petitioner at the institute and, according to Petitioner, was made without his input or consent. Ultimately, the Petitioner decided he was uncomfortable with the institute because it was too far from his home, and the institute asked too many job, salary, and lawsuit-related questions. *Id.* ¶ 29. The Petitioner's surgeon and vocational rehabilitation specialist discussed the referral to the institute and determined that an alternative program should be considered. *Id.* ¶ 30.

An alternative program was never recommended by the employer. *Id.* ¶ 32. Based on the Petitioner's failure to attend the program at the institute, the employer suspended benefits. *Id.* Petitioner's surgeon recommended the Petitioner to an alternative pain management program. *Id.* ¶ 33. However, it was an anesthesiology-based program and not a multidisciplinary program. *Id.* Since it was an anesthesiology-based program, the treatment was not approved by the claims representative. *Id.* ¶ 34.

Eventually, the Petitioner presented for an additional IME, where the IME physician determined a multidisciplinary pain approach would no longer help the Petitioner and recommended weaning the Petitioner off medications. *Id.* ¶ 37. However, in an additional subsequent IME, the IME physician determined that the Petitioner should pursue the psychological evaluation previously recommended. *Id.* ¶¶ 4950.

The Commission affirmed the Arbitrator's finding that

the Petitioner should not be entitled to TTD benefits unless he elected to participate in and complete a multidisciplinary pain management program. *Id.* ¶ 112. However, the Court reversed, noting that the Commission failed to prove the institute's program was "reasonably essential to promote the claimant's recovery or that the claimant's refusal to attend [the institute's] program was in bad faith or outside the bounds of reason." *Id.* ¶ 113. The Court held that the Petitioner's refusal to participate in the institute's program could not be a basis for denying TTD or medical benefits. *Id.* The Court also commented on the fact that the employer had never suggested or approved any other multidisciplinary program following the Petitioner's expression of distaste for the institute. *Id.*

Thus, if a Petitioner refuses to participate in treatment recommended by an IME physician or their own treating physician, an employer cannot terminate benefits unless the employer can show the treatment is reasonably essential to promote recovery or that the Petitioner refused to receive the treatment in bad faith or outside the bounds of reason. If an alternate but comparative treatment is available, the employer should also take steps to find and approve such treatment. However, we note that a Petitioner's refusal to attend an IME is grounds for termination of benefits under the Act, regardless of their reason for failing to attend.

## CONCLUSION

A UR can be a useful tool to provide the Commission with evidence for consideration that specific recommended treatment is not reasonable or required to cure or relieve the effects of the work injury based on the standard of care. An IME is a useful tool that can be utilized in any workers' compensation claim where the nature, extent, and duration of the injury are at issue. While refusal to comply with the

recommendations of an IME does not result in the ability to terminate benefits automatically, an IME can be used to dispute the reasonableness and necessity of medical treatment and can be used to terminate benefits under the appropriate circumstances.

An Independent Medical Examiner can opine whether a particular course of treatment, such as post-surgical injections or physical therapy, is needed and provide an expert opinion and basis for denying the same.

Sometimes, an IME is preferable to a Utilization Review because the examining physician can meet with and examine the patient and give a more rounded view of an overall medical plan as opposed to the necessity of a specific recommended treatment.

Please feel free to contact any of our experienced workers' compensation attorneys if you have any questions about this topic or any other workers' compensation issues. We look forward to hearing from you.





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### [Leah Nolan](#)



#### **Associate in Chicago, IL**

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- Professional Liability
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***Leah brings her leadership skills, creative drive, and a keen eye for detail to her law practice.***

Leah won her first case before she stepped foot into law school. After a foray in the courtroom as a pro se litigant, she knew she wanted to be an attorney.

Loving the challenge of complex litigation, she has focused her practice on medical & legal malpractice, casualty/tort litigation, construction, product liability, toxic tort, and Workers' Compensation since becoming an Associate attorney with the firm in 2021. Less than one year into her practice, she second-chaired a trial in a medical malpractice case. She successfully defended a pain management doctor against a \$2.5 million medical malpractice verdict, receiving a favorable outcome.

Before Leah attended law school, she called Chicago home for eight years but moved to the quieter western suburbs when she began law school in 2018. Before entering the legal world, Leah spent six years working as a content editor, brainstorming and implementing creative digital design solutions for the world's first online luxury consignment brand. Leah brings her leadership skills, creative drive, and a keen eye for detail to law practice.

She excelled at Northern Illinois College of Law and graduated *summa cum laude*, ranked second in her class. While in school, she won numerous awards, including the Lenny B. Mandell Moot Court Competition Triple Crown Award (Champion, Best Oralist, and Best Brief), the Daniel S. Reynolds Achievement Award, the Hellene & Edward Fioretti Award, the Justin Pettway Scholarship Award, the Hope Moller Scholarship Award, and the Outstanding Women & Gender Advocacy Student Award. Additionally, she took second place in the American Bar Association's Regional Client Counseling Competition while in school.

As someone who is never afraid to be the first to try something new, Leah worked as the first-ever in-house law clerk at the Animal Legal Defense Fund before joining Heyl Royster as a Summer Associate in 2020. In her free time, she enjoys dining out and spending time with her husband and her dog, Clue.

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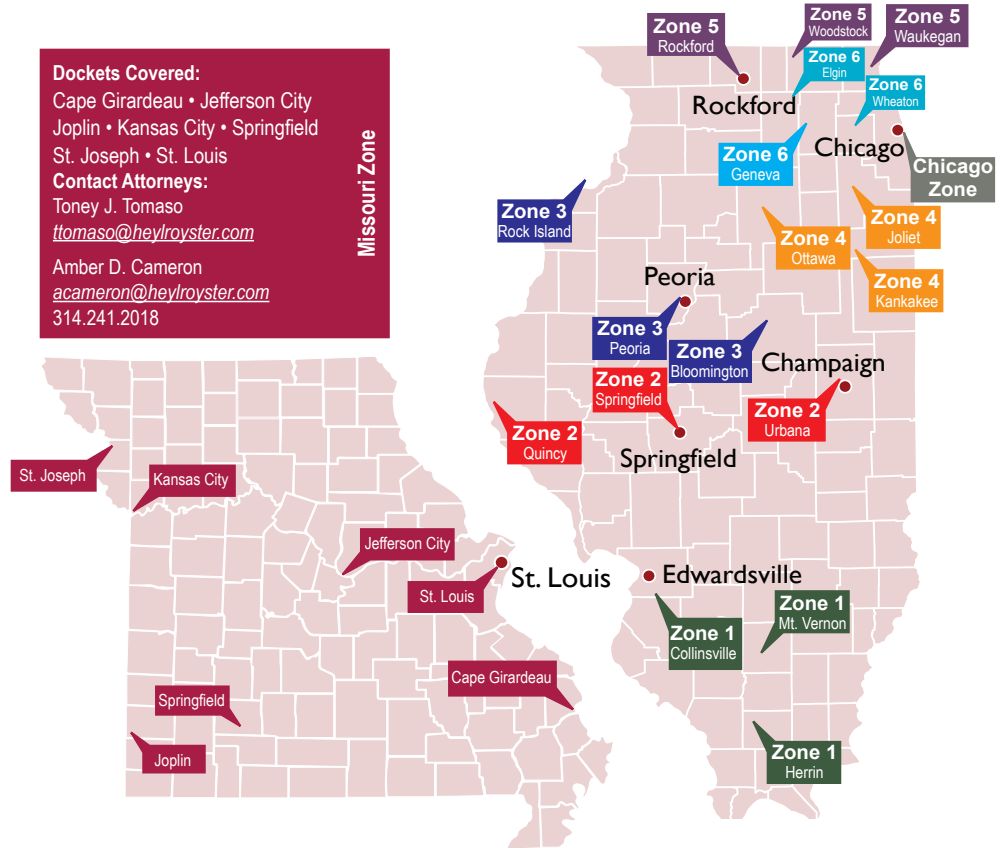
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