Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals — *December 2017*

A Word From The Practice Chair

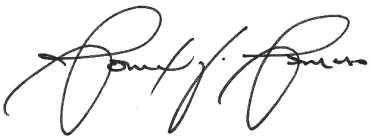
Happy Holidays to our friends and their families! I do hope this December edition of our newsletter finds you in good spirits and ready to celebrate. I cannot believe we are wrapping up another year. Looking back, it has been blessed for me and the Heyl Royster family. I want to thank each and every one of you for the chance to work alongside you and the privilege of being considered part of your team in our never-ending battle of claims handling and management of workers' compensation cases. We would not want it any other way. We love the battles we wage and are proud to work with you.

Speaking of battles...

This month we target and discuss Section 8.7 Utilization Reviews. Many years ago, Heyl Royster was shouting loudly and clearly for all to hear (especially at our annual Claims Handling Seminar) that the specific language contained in the Utilization Review statute passed as part of the 2011 Workers' Compensation amendments might lead to claimant attorneys taking the approach that, if the employer wanted to dispute "reasonable and necessary" medical care, they must have a valid utilization review report (and not just a records review/IME report). Well, it seems we have been proven right. That is exactly what we are seeing in the trenches these days. Petitioners' attorneys are trying to play the "gotcha" card by making this argument when unprepared defense attorneys don't have a utilization review report in place at the time of trial.

We will discuss the *Parisi* case, which is relied on by the petitioner's bar as the basis of this argument, and how to combat it. But, it is important to point out the case is a Commission-level decision only. I am stressing "only" because although they are free to cite it, the case is not legal precedent. Therefore, it is instructional only, and not a case that has to be followed by the courts for its precedential value. If you have an attorney citing this case you have every right to turn around and tell them it is only a Commission decision and, therefore, it has no precedential value and does not have to be followed.

This issue highlights yet another example of the value we strive to bring to our clients. When we see trends like this developing, we want to talk about them, explain the law, and provide you with the tools to help your claims handling in the future. After all, we are in this together and we want to make sure your 2018 is the best it can be. Thank you all again for the trust you have shown by allowing us to work with you.



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

Save The Date: Heyl Royster's 33rd Annual
CLAIMS HANDLING SEMINAR
ITASCA: MAY 3 & BLOOMINGTON: MAY 10

EFFECTIVELY USING UTILIZATION REVIEW (UR) REPORTS IN YOUR CASE

By: John Langfelder and Brett Siegel, Springfield Office

The 2011 amendments to the Illinois Workers' Compensation Act gave employers more options for controlling and challenging past and future medical treatment with the use of a utilization review (UR). The amendments, however, also created potential pitfalls for employers challenging medical treatment without a utilization review. While we highlighted these potential pitfalls in our newsletters and seminars following the 2011 amendments, we would like to take an opportunity now to address how claimants' attorneys are utilizing the amendments and a 2013 Commission decision on UR reports to their benefit. We will also discuss how claimants' attorneys have argued that Section 8.7 of the Act requires the respondent to obtain a utilization review to challenge whether medical treatment is reasonable and necessary.

Medical treatment is denied for a variety of reasons and the basis of the denial helps determine what evidence will be necessary to support that denial. There are two general ways to attack medical treatment. The medical treatment at issue may be excessive or not reasonable and necessary, which implicates a utilization review, or the treatment may not be causally related to the accident, which implicates an IME. Thus, the denial of requested medical treatment can involve the use of a utilization review or an IME, or in some instances, the use of both.

UR Reports – Section 8.7

Section 8.7 of the Act defines a 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 ... based on medically accepted standards." 820 ILCS 305/8.7(a). Utilization techniques include prospective review, second opinions, concurrent review, discharge planning, peer review, independent medical examinations, and retrospective review.

Section 8.7(i)(3) states that "[a]n employer may only deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section." 820 ILCS 305/8.7(i)(3). While a utilization review is not dispositive and does not address causation, if it is admissible at trial, the Commission shall consider it along with all other evidence.

The purpose of a section 8.7 utilization review is to determine if the recommended medical treatment is excessive or unreasonable. The utilization review does not address the issue of causation. Again, an employer may only deny payment or refuse to authorize payment of services rendered or proposed to be rendered on the ground that the extent and scope of the treatment are excessive and unnecessary if such opinion is in compliance with an accredited utilization review.

Section 8.7(i)(5) states that nothing in this section may be construed to diminish the rights of employees to reasonable and necessary medical treatment or employee choice of health care provider under Section 8(a), or the rights of employers to medical examinations under Section 12. If a utilization review is obtained, it should be reviewed by the IME physician (if the case warrants a Section 12 exam) as the IME opinion could enhance the credibility of the utilization report. Having the IME physician comment on the utilization review may also eliminate the need for a deposition of the UR physician.

Parisi v. Gem Construction Co. – The Commission's View

The Commission's decision in *Parisi v. Gem Construction Co.,* 13 I.W.C.C. 489 (May 3, 2013), highlights the risks one may encounter in the use (or non-use) of utilization reviews and independent medical examinations (IME) in denying medical treatment in disputed cases and defending that denial at trial. Decisions such as *Parisi* are frequently cited by claimant attorneys in negotiations, pre-trial arguments, and in proposed decisions to oppose an employer's efforts to contain medical expenses in cases where no UR report is offered.

In *Parisi*, the claimant was a working foreman who had been employed by the respondent for over 21 years. His job duties consisted of operating a Bobcat for 75-80 percent of the work week with additional job duties that included lifting and using a jackhammer and saw. On the day of the accident, the claimant reported that he was lifting a cast iron catch basin and felt a big pop in his back, and experienced immediate pain. The claimant denied any prior injury or problem with his back, although it was shown the claimant had a workers' compensation injury and settlement 15 years earlier. Accident was not in dispute.

Following the injury, the claimant underwent conservative treatment before undergoing a Section 12 IME. The IME physician opined the described event was sufficient to cause a muscle strain, but said that the subjective complaints were not supported by the diagnostic testing and clinical evaluation. The IME physician opined that the claimant was at maximum medical improvement, did not need further medical care, and that any ongoing complaints and recommended medical treatment were not causally related to the accident. The claimant's treating physician had recommended a work hardening/strengthening program in order to return claimant to full time employment. In reliance on the IME, this treatment was denied and TTD benefits were terminated as of the date of the IME.

At trial, the claimant sought authorization of the recommended work hardening program. The claimant's treating physician opined that the mechanism of injury caused the back pain complaints and that the work hardening program was reasonable and necessary in order to return the claimant to full duty. The respondent argued that the claimant was at MMI and that no further medical treatment was necessary based on the IME opinions rendered. It also argued that the claimant spent 75 to 80 percent of the time in a sitting position while operating a Bobcat. Questions were also raised as to the claimant's credibility.

The Commission found in the claimant's favor and found his testimony and reports of injury were consistent and credible. The IME physician's report said the described mechanism of injury was sufficient to cause a back injury such as a muscle strain despite the MRI report not showing any specific disc abnormality. The IME physician also wrote that causality was uncertain based on the medical records and the claimant was at MMI. The Commission agreed that the claimant was sitting 75 to 80 percent of the time, but acknowledged that meant the other 20 to 25 percent required lifting. The Commission referenced the treating physician's opinion that the work hardening program was reasonable and necessary to return the claimant to full duty and noted there was no offer of light duty by the respondent. Of significance, the Commission pointed out that the respondent had failed to obtain a utilization review to provide proof or evidence that the medical treatment requested (work conditioning) was excessive or unreasonable. The Commission concluded that, without a utilization review issuing a non-certification of the proposed

work conditioning program, the claimant was entitled to participate in such program.

In *Parisi*, the treating and IME physicians stated that the mechanism of injury was sufficient to cause the claimant's back injury. The IME physician stated there were no MRI abnormalities except for age-related changes, but also stated that causality was uncertain based on the records. Given the stipulation to accident and the fact that the claimant's duties were not 100 percent sitting, the work hardening recommendation was reasonable and necessary to relieve the effects of the claimant's injury. The Commission found that this treatment was denied as not needed or necessary based on the IME opinions and the amount of time the claimant spent in a seated position. The Commission held that the medical evidence showed such treatment was reasonable and necessary and there was no utilization review to provide evidence that this treatment was excessive as required by Section 8.7.

Parisi in Practice

Claimants' attorneys have used the Commission's *Parisi* decision and the language of the 2011 amendments to argue that an employer cannot challenge treatment as unreasonable or unnecessary unless they obtain and present an admissible utilization review report at trial. Medical expenses under Section 8(a) of the Act are limited to those which are *"reasonably required to cure or relieve the effects of his or her injury."* 820 ILCS 305/8.7(i)(4) (emphasis added).

The Commission's decision in *Parisi* shows the risk of attempting to attack the reasonableness and necessity of treatment based on a Section 12 IME opinion only. Although the Commission found that the IME opinion did not definitively deny causation, the decision raises the question of whether a utilization review and an IME are both necessary. If the medical treatment is believed to be excessive or unreasonable, a utilization review addresses that issue. If that utilization review is in compliance with accredited utilization review standards, that determination is to be considered at trial with all other medical evidence. The medical treatment may be reasonable and necessary, but not necessarily causally related, in which case that issue must be addressed by an IME.

Although *Parisi* is a Commission decision and is non-binding on the courts, it nevertheless does provide some insight into how the Commission may view the Act's UR provision and its operation.

Recommendations for URs

In a seminar conducted by Heyl Royster shortly following the 2011 amendment to the Act, we made several observations regarding utilization reviews.

1. Utilization reviews are useful in cases involving prolonged chiropractic care and physical therapy treatment, or other such prolonged care or treatment.
2. Utilization reviews are not likely to prevail where surgery or other invasive treatments are recommended and there is credible evidence of chronic pain or other disability. If causation is in dispute, an IME opinion addressing that issue is necessary.
3. Utilization reviews cannot address causation, which requires an IME.

Based on our collective knowledge and experience since that time, these continue to hold true.

An employer is required to pay necessary medical expenses reasonably required to cure or relieve the effects of the accidental injury. 820 ILCS 305/8(a). If there is a dispute as to recommended medical treatment, the basis of the denial will determine the evidence needed in support. Denial of treatment that is excessive or unreasonable must be supported by a utilization review while a denial

based on the treatment not being causally related to the accident requires an IME.

In certain cases it may not be appropriate to obtain a utilization review from a cost or strategy standpoint. The Commission's decision in *Parisi*, while not precedent and distinguishable from many of our cases, highlights the importance of considering a utilization review whenever a denial of medical benefits is being contemplated.

As always, please do not hesitate to contact any member of our statewide workers' compensation team if you would like to discuss this further.

It is important to use high quality utilization reviews performed by doctors who are of the same qualification as treating doctors, well versed in treatment standards, and who write thorough reports.

John Langfelder – Springfield

John practices in the areas of personal injury and property loss defense, workers' compensation, trucking litigation, toxic tort litigation, and governmental law. John has defended clients in civil matters through trial and at mediations in Central Illinois and has defended clients and employers in workers' compensation cases at the arbitration level and in appeals before the Illinois Workers' Compensation Commission and Illinois circuit courts.

John began his legal career with Heyl Royster after a year in private practice in Columbus, Ohio, where he concentrated on personal injury and medical malpractice. Prior to becoming an attorney, John was a Liability Specialist with Country Companies Insurance (now, Country Insurance & Financial Services) for more than 20 years. In that capacity, John handled personal injury claims of all types, making daily decisions on coverage issues, liability and comparative fault, and settlement value, negotiating directly with claimants and attorneys to resolve these claims. John continues to effectively use the knowledge, experience and negotiating skills he gained in his claims and legal careers in the defense of clients. John received his J.D., *cum laude*, from Capital University Law School and his B.S. in Chemistry from Western Illinois University.

Brett Siegel – Springfield

Brett defends clients in tort litigation and employers in workers' compensation and employment law cases. He has taken several cases to trial and has argued multiple cases on appeal before the Workers' Compensation Commission. As part of his employment law practice, Brett counsels and defends clients against retaliatory discharge claims. Brett also regularly handles depositions of expert witnesses and treating physicians in both civil and workers' compensation matters.

Brett is actively involved in the American Bar Association and its Young Lawyers' Division. Brett is currently the YLD's Liaison to the ABA's Tort Trial & Insurance Practice Section – Ethics and Professionalism. Brett has also been a contributing author to the Illinois Association of Defense Trial Counsel's quarterly publication and the National Law Review.

Brett earned his B.A. in Economics and Communication (with Distinction) at the University of Illinois, and his Juris Doctor degree from Chicago-Kent College of Law. As a law student, Brett concentrated his studies on litigation and trial advocacy. He earned the "Best Advocate" award in an intensive trial advocacy course. In 2011, as a member of the Chicago-Kent Trial Advocacy Team, he competed in the American Bar Association Labor and Employment Trial Competition in Chicago, Illinois. In 2012, he competed in the American Association of Justice Student Trial Advocacy Competition in St. Louis.

HEYL ROYSTER

Workers' Compensation Group
"We've Got You Covered!"

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

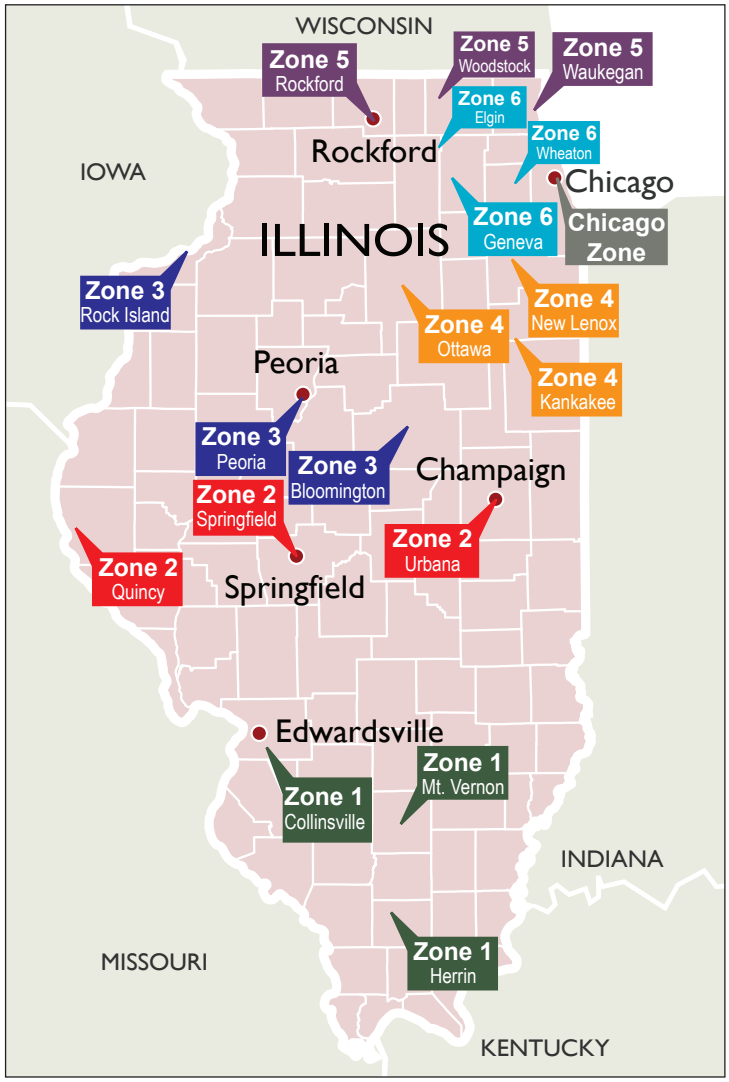
Zone 4
Dockets Covered:
Kankakee • New Lenox • Ottawa
Contact Attorney:
Kevin J. Luther
kluther@heylroyster.com
815.963.4454

Zone 3
Dockets Covered:
Bloomington • Rock Island • Peoria
Contact Attorney:
Craig S. Young
cyoung@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

ILLINOIS ZONE MAP



Statewide Workers' Compensation Contact
Contact Attorney:
Toney Tomaso - ttomaso@heylroyster.com
217-344-0060

Statewide Appellate
Contact Attorney:
Brad A. Elward - belward@heylroyster.com
309-676-0400

State of Missouri
Contact Attorney:
Toney Tomaso - - ttomaso@heylroyster.com
217-344-0060

State of Wisconsin
Contact Attorney:
Kevin J. Luther - kluther@heylroyster.com
815-963-4454

Jones Act Claims
Contact Attorney:
Ann Barron - abarron@heylroyster.com
618-656-4646

OFFICE LOCATIONS

Peoria
300 Hamilton Blvd.
PO Box 6199
Peoria, IL 61601
309.676.0400

Champaign
301 N. Neil Street
Suite 505
PO Box 1190
Champaign, IL 61824
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
PO Box 467
Edwardsville, IL
62025
618.656.4646

Rockford
120 W. State St.
Second Floor
PO Box 1288
Rockford, IL 61105
815.963.44542

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822

WWW.HEYLROYSTER.COM

WORKERS' COMPENSATION PRACTICE GROUP

Practice Group Chair
Toney Tomaso
ttomaso@heylroyster.com

Peoria Office

Contact Attorney:
Craig Young
cyoung@heylroyster.com

Bradford Ingram
bingram@heylroyster.com

Dana Hughes
dhughes@heylroyster.com

James Manning
jmanning@heylroyster.com

Jessica Bell
jbell@heylroyster.com

Brad Elward
belward@heylroyster.com

Vincent Boyle
vboyle@heylroyster.com

Champaign Office

Contact Attorney:
Bruce Bonds
bbonds@heylroyster.com

John Flodstrom
jflodstrom@heylroyster.com

Joseph Guyette
jguyette@heylroyster.com

Bradford Peterson
bpeterson@heylroyster.com

Toney Tomaso
ttomaso@heylroyster.com

Chicago Office

Contact Attorney:
Brad Antonacci
bantonacci@heylroyster.com

Kevin Luther
kluther@heylroyster.com

Bide Akande
bakande@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Mohit Khare
mkhare@heylroyster.com

Edwardsville Office

Contact Attorney:
Toney Tomaso
ttomaso@heylroyster.com

Amber Cameron
acameron@heylroyster.com

Dirk Hennessey
dhennessey@heylroyster.com

Rockford Office

Contact Attorney:
Kevin Luther
kluther@heylroyster.com

Lynsey Welch
lwelch@heylroyster.com

Patricia Hall
phall@heylroyster.com

Mohit Khare
mkhare@heylroyster.com

Jordan Emmert
jemmert@heylroyster.com

Springfield Office

Contact Attorney:
Daniel Simmons
dsimmons@heylroyster.com

John Langfelder
jlangfelder@heylroyster.com

Brett Siegel
bsiegel@heylroyster.com

Jessica Bell
jbell@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
Craig Unrath
cunrath@heylroyster.com

Arson, Fraud and First-Party Property Claims
Dave Perkins
dperkins@heylroyster.com

Business and Commercial Litigation
Tim Bertschy
tbertschy@heylroyster.com

Business Organizations & Transactions
Deb Stegall
dstegall@heylroyster.com

Civil Rights Litigation/Section 1983
Keith Fruehling
kfruehling@heylroyster.com

Class Actions/Mass Tort
Patrick Cloud
pcloud@heylroyster.com

Construction
Mark McClenathan
mmcclenathan@heylroyster.com

Employment & Labor
Brad Ingram
bingram@heylroyster.com

Governmental
John Redlingshafer
jredlingshafer@heylroyster.com

Insurance Coverage
Jana Brady
jbrady@heylroyster.com

Liquor Liability/Dramshop
Nick Bertschy
nbertschy@heylroyster.com

Long Term Care/Nursing Homes
Mike Denning
mdenning@heylroyster.com

Mediation Services/Alternative Dispute Resolution
Brad Ingram
bingram@heylroyster.com

Product Liability
Rex Linder
rlinder@heylroyster.com

Professional Liability
Renee Monfort
rmonfort@heylroyster.com

Railroad Litigation
Steve Heine
sheine@heylroyster.com

Toxic Torts & Asbestos
Lisa LaConte
llaconte@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 Boulevard
PO Box 6199
Peoria, IL 61601
309.676.0400

Champaign
301 N. Neil St.
Suite 505
PO Box 1190
Champaign, IL 61824
217.344.0060

Chicago
33 N. Dearborn Street
Seventh Floor
Chicago, IL 60602
312.853.8700

Edwardsville
105 West Vandalia Street
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 West State Street
PNC Bank Building
2nd Floor
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Ave.
PO Box 9678
Springfield, IL 62791
217.522.8822