Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

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

A Word From The Practice Chair

Summer is in full swing. Temperatures are up, kids are out of school, and Heyl Royster just wrapped up our Claims Handling Seminars held in Normal, IL and Itasca, IL this year. It was great seeing those of you who could join us. If you missed the seminars, then I would invite you to go to our website (www.heylroyster.com) and download the seminar materials. Also, if you and your company are interested in an in-house presentation on some or all of those seminar topics, please contact me. We do make house-calls!

Brad Antonacci, who has been working in our Rockford office for the past fifteen years has moved. I am excited to announce that Brad will be stationed at our Chicago office and head-up our Chicago matters for the Heyl Royster workers' compensation team there. Kevin Luther will still be working out of both Rockford and Chicago as well. We are very proud of our deep bench and the experience and expertise we can bring to bear on behalf of our clients in Chicago, and all of our offices for that matter.

In this issue, Lindsey D'Agnolo of our Rockford office has put together an analysis of the *Johnston* case wherein a fireman suffered a heart-attack. We have good news arising out of this claim, from a defense perspective, wherein the appellate court found the fireman failed to meet his burden of proof as to accident and medical causation. It reminds us that all of the facts, and your investigation of the claim to collect those facts, are vitally important in laying the necessary groundwork and ultimately defenses to a claim.

Steve Getty of Rockford has outlined the issues that should be focused on when you are dealing with a wage differential claim, or at least a claim that has the potential for such an exposure for the employer. Please take a look at the analysis of the *Crittenden* case and the helpful reminders Steve has provided when dealing with such claims.

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Antonacci to Manage Firm's Chicago Workers' Compensation Practice

Effective May 5, 2017, Brad Antonacci has relocated permanently from our Rockford office to Chicago and is now managing the firm's extensive workers' compensation practice from that location.

Heyl Royster has always had a robust presence in Cook County workers' compensation, and our Dearborn Street office, located just two blocks from the Commission, will add to that strength.

Fireman's Heart Attack Claim Fails

By: Lindsey D'Agnolo, ldagnolo@heylroyster.com

In *Johnston v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160010WC, the claimant was a 43-year-old firefighter who had been employed as a firefighter for approximately 15 years. In February of 2014, the claimant weighed 265 pounds and was six foot one inch tall. He smoked a pack and a half of cigarettes per day since the 1990s. Although the accident description testimony varied, the evidence generally showed the claimant went outside the firehouse on the morning of February 5, 2014, intending to shovel or snowblow the snow around his car. Whether he had actually performed any snow removal was debated. The claimant suffered a heart attack and was found outside by his co-workers. He had no memory of the events that took place.

The claimant alleged that he suffered an injury while shoveling snow from the fire department parking lot. The treating cardiologist testified that the claimant had severe preexisting coronary artery disease which was aggravated by the activity he was performing. He also testified generally that, based on his limited research, there appeared to be a correlation between coronary artery disease and a firefighter's occupational exposure. Thus, he testified that being a "firefighter" was a risk

continued on next page...

factor for coronary artery disease in addition to claimant's obesity, family history of coronary artery disease, and smoking history.

The employer's Independent Medical Exam (IME) physician testified that the claimant suffered from preexisting undiagnosed severe triple vessel coronary disease and that any activity on February 5, 2014, could have caused the heart attack. He testified that, among other risk factors, the claimant's 20 year history of smoking probably was the major cause of developing advanced atherosclerosis and that the underlying disease was caused by several risk factors, not his work as a firefighter.

The arbitrator determined that claimant's work as a firefighter did not accelerate or aggravate his underlying coronary artery disease. On appeal, the Commission and circuit court affirmed.

Section 6(f) of the Act provides that any condition or impairment of health of an employee employed as a firefighter, EMT, or paramedic which results from any bloodborne pathogen, lung or respiratory condition, heart or vascular condition, hypertension, tuberculosis or cancer resulting in any disability shall be *rebuttably presumed* to "arise out of" and "in the course of" the employment. For this section to apply, the employee must have been employed as a firefighter, EMT, or paramedic for at least five years at the time he or she files a claim.

The Appellate Court, Workers' Compensation Commission Division, mutually considered the amount of evidence necessary to rebut the presumption provided in section 6(f) that the firefighter's coronary artery disease "arose out of" and "in the course of" his employment. In determining whether section 6(f) involved a "strong rebuttable presumption," requiring "clear and convincing evidence" in order to rebut the presumption, the court determined it did not and that a respondent is only required to offer *some* evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition. Once the employer rebuts the presumption, the trier of fact should consider the evidence as if the presumption never existed.

The court held the employer had successfully rebutted the presumption that the claimant's coronary artery disease arose out of and in the course of his employment as a firefighter when it offered evidence that claimant's smoking history was a major cause of the coronary artery disease.

Further, the court ultimately held that the claimant did not suffer a work accident. Although the claimant argued that his coronary artery disease arose out of his employment with regard to section 6(f) presumption, he argued in the second part of his appeal that the cardiac event on February 5, 2014, was caused by his work activities on that day. Because there was inconsistent testimony on whether the claimant was actually shoveling/snowblowing snow on that day, the court determined the arbitrator's decision that claimant did not sustain a work accident was not against the manifest weight of the evidence. Of note here, the claimant did not present any evidence or argument that his occupational exposure over the years was a cause of his underlying coronary artery disease, and thus, the court did not consider that argument.

Interestingly, the lone dissenting justice argued that the section 6(f) presumption meant that the claimant's employment was a contributing factor to the underlying coronary artery disease. In order to rebut the presumption, the dissent argued that an employer must show that the employment was not a contributing cause of the coronary artery disease, i.e., that it did not aggravate or accelerate the condition. The dissent argued the employer had failed to rebut the section 6(f) presumption.

However, according to the majority, an employer who employs a firefighter, EMT, or paramedic who alleges that a certain condition named in section 6(f) was caused by their employment, has a lesser burden to rebut this presumption by presenting some evidence that the employee's condition could have been caused by something other than the job. If the presumption is rebutted, the case is tried as if no presumption ever existed. The burdens outlined in *Johnston* must be remembered when defending any case violating section 6(f). Moreover, employers must be aware of the additional risks faced by firemen.

Please feel free to contact any of our workers' compensation attorneys across the state should you have any questions concerning the application of this case to your file. Heyl Royster's workers' compensation attorneys work closely with our governmental lawyers to help find solutions for our municipal clients.

Lindsey D'Agnolo - Rockford

Lindsey has handled all aspects of litigation including initial assessment, pleading, discovery, motion practice, and trial preparation. While in law school, she gained significant litigation experience when she spent her last semester interning in the Winnebago County State's Attorney's Office as a 711 intern. Lindsey also gained valuable research and writing skills when she served as judicial extern for the Honorable Judge Frederick J. Kapala in the U.S. District Court, Northern District of Illinois. Lindsey is currently serving as Treasurer of the Winnebago County Bar Association, Young Lawyers Division.

WAGE DIFFERENTIALS AND THE CHALLENGE TO FIND SUITABLE EMPLOYMENT

By: Steven Getty, sgetty@heylroyster.com

The courts have had limited discussions regarding the exposure and procedures for determining the amount a claimant may be awarded in a wage differential scenario, and the specific requirements for calculating the figures where the claimant has not returned to work at the time of the calculation. Largely, claimants relied on the results of their vocational rehabilitation assessments to determine the employment opportunities and the wages they could potentially earn. Here, we will explore the wage differential statute as contained in the Illinois Workers' Compensation Act (the Act), the effect and application of the recently decided *Crittenden* case and practice pointers for future claims.

The Act addresses wage differential scenarios in 820 ILCS 305/8(d)1. Specifically, the statute requires that after a claimant has sustained an accidental injury, and, as a result of the accidental injury has become partially incapacitated from pursuing his usual and customary line of employment, he shall receive compensation for the duration of his disability. The compensation is equal to 66 2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount he is earning or is able to earn in some suitable employment or business after the accident.

As we know all too well, the claimant's expected recovery for a claim significantly increases when the issue of a wage differential is brought into play. To curtail this, the use of a labor market survey can help determine the availability of jobs within an area of a claimant's home that not only comply with the restrictions placed upon the claimant, but provide a snapshot of the wages the claimant could earn in this new capacity. The courts have previously established how to address the average amount which a claimant earned in full performance of his duties in the occupation in which the claimant was engaged at the time of his accident. However, until recently, the courts had not yet addressed the average amount that an employee would be able to earn in some suitable employment after the accident, if the claimant has not yet returned to work. The Appellate Court, First District, Workers' Compensation Division, has recently tackled this issue in the in case of *Crittenden v. Illinois' Workers' Compensation Commission,* 2017 IL App (1st) 160002WC.

Recent Appellate Court Decision Regarding the Calculations of Wage Differentials

In *Crittenden*, the claimant, Carl Crittenden, filed an application for benefits alleging an injury to his low back 'arising out of' and 'in the course of' his employment with respondent, the City of Chicago. The claimant alleged that on April 11, 2008, he bent over while lifting a bag of compost and threw it onto a garbage truck causing an injury to his low back. After undergoing a course of medical treatment, the petitioner was referred for a functional capacity evaluation which was conducted on October 17, 2009. Pursuant to the functional capacity evaluation, the claimant could only perform with 20 pounds of lifting on an occasional basis, 13 pounds of lifting on a frequent basis, and limitations on bending or standing (among other limitations), placing him in the light physical demand category. Further, the functional capacity evaluation indicated that the claimant was at maximal functional improvement. These were corroborated by an independent medical examination. The claimant's treating physician also agreed the claimant was at maximum medical improvement and opined that

the claimant could not return to his regular job due to his permanent physical restrictions.

On July 27, 2010, the claimant met with Steven Blumenthal who conducted a vocational rehabilitation assessment. Although Mr. Blumenthal did not testify at the hearing before the Commission, his report was entered into evidence. The report indicates that the claimant advised that he lost his driving privileges due to a DUI, but expected to have his license reinstated in December 2010. Further, the claimant advised that he graduated high school in 1980.

Included in the report completed by Mr. Blumenthal was the claimant's prior work history which included a part-time cleaning position, earning $12/hour, and a part-time customer service supervisor earning $11/hour. Further outlined in the report are several occupations that Mr. Blumenthal finds suitable for the claimant with his current physical capabilities. However, he does note that some positions, such as customer service or cashiering, would require specific accommodations by the employer.

The report drafted by Mr. Blumenthal concluded that the claimant would earn between $8.25/hour and $13.78/hour. The wage of $13.78/hour reflected the median wage for a school bus driver. An employee of MedVoc Rehabilitation testified at hearing that the claimant was not fully compliant with their program and this non-compliance continued to increase over time. Further, she testified that the claimant advised her that he did not have his high school diploma or GED and that he would not be getting his driver's license reinstated anytime soon. The claimant was required to submit his own job searches, but further investigation into his logs revealed inconsistencies and false statements.

Following a hearing, the Arbitrator concluded the claimant did sustain an injury arising out of and in the course of his employment on April 11, 2008. The arbitrator further found that the claimant was partially incapacitated from pursuing his usual and customary line of employment as a result of the accident, and therefore was entitled to wage differential benefits pursuant to the Act. Following this finding, the Arbitrator calculated the amount of the wage differential award using the undisputed prior wage of $32.79/hour. This amount reflects the claimant's earnings had he continued to work for his employer after the accident. Next, the Arbitrator selected $11.00/hour as a reasonable wage the claimant would make in suitable employment following the accident. Footnotes from the appellate court indicate the Arbitrator's calculation may have been based on an average in the range between $8.25/hour (minimum wage) and $13.78/hour (the median wage for a bus driver).

Following issuance of the Arbitrator's decision, the City of Chicago filed a review before the Commission. The Commission found that the claimant had shown that he was entitled to a wage differential. The court indicated that although the respondent could have provided more assistance to the claimant than they did, it did not absolve the claimant from exerting a full effort in his job search. The Commission found the calculation of the claimant's earning capacity following the accident should be based on $13.78/hour, the maximum rate of pay identified in the report authored by Mr. Blumenthal.

The claimant appealed the Commission's decision to the Circuit Court of Cook County. The circuit court affirmed the decision of the Commission. The claimant then appealed to the Illinois Appellate Court. The Illinois Appellate Court reversed the decision and remanded the case to the Commission.

It is important to note that whether the claimant was entitled to a wage differential was not an issue on appeal. What was at issue was the method of determining the average amount the claimant is able to earn in a suitable position after the accident. Specifically, the court has yet to establish precedent on the average amount an employee may earn in some suitable employment or business after the accident in the event the employee has not yet returned to work.

It is well-established that the claimant, if he is working at the time of the wage differential calculation, must provide his actual earnings for a substantial period after he returns to work. The Commission may then apply his average weekly wage to the calculation for wage differential benefits. However, if the claimant is not working at the time of the calculation, the Commission has to rely on the information provided through a vocational rehabilitation expert as well as the functional capacity evaluation. Further, it cannot go without mention that pursuant to the Act, the average weekly wage should be determined based upon suitable employment which the claimant is both able and qualified to perform.

The appellate court, in issuing its ruling, held that in order to calculate the wage differential award the Commission must identify, based on evidence presented and located within the record, an occupation the claimant is able and qualified to perform. The burden of proof rests on the claimant to introduce evidence sufficient for the Commission to identify this position as well as the average weekly wage.

In *Crittenden,* the Commission used $13.78/hour as the average amount the claimant was able to earn. The court noted that the Commission failed to identify a suitable occupation for the claimant and further, failed to identify that $13.78/hour was the amount the claimant could earn in a suitable position.

The court found that the position of a bus driver, which reflected the wages of $13.78, was not a suitable occupation for the claimant. The claimant did not, at the time of the Arbitrator's calculation, possess a driver's license and therefore did not qualify for the position of bus driver as he was not able and qualified. Consequently, the case was reversed and remanded to the Commission with direction to recalculate the wage differential in accordance with an occupation that is suitable, meaning an occupation in which the claimant is able and qualified to perform.

The Impact of *Crittenden* and the Steps Needed to Protect the Employers Interest in Wage Differentials

This case provides much needed direction in regards to calculating a correct wage differential figure when the claimant has not yet returned to work. Pursuant to the Act, it is the claimant's burden to submit evidence regarding a lower potential earning capacity. This evidence provides them with the potential to increase their wage differential award. However, diligent and thoughtful case preparation can assist in reduction of the respondent's potential exposure in such a case. This includes using a well-prepared functional capacity evaluation as a defense in these types of claims.

A functional capacity evaluation is the backbone of a claimant's demand for a wage differential scenario. To ensure full efforts are being put forth by the claimant, functional capacity evaluations include validity testing. Unfortunately, without proper and well-controlled validity testing, a claimant's physical ability can be severely underestimated. The respondent can ask for an independent functional capacity evaluation to ensure high-quality results. The completed functional capacity evaluation report is presented to the claimant's treating physician, just as it was in *Crittenden*.

Treating physicians tend to rely on the findings from physical therapists as well as their own opinions in regards to a claimant's physical limitations. Respondents have the ability to protect their interests and obtain an objective assessment of the claimant's physical limitations through an independent medical examination to ensure that the opinions authored by both the physical therapist as well as the claimant's treating physicians reflect a true and accurate assessment. This safeguard is of upmost importance when preparing a claim for a wage differential assessment.

An aggressive, detailed and closely-monitored approach must be taken when searching for potential, suitable jobs for the claimant post-accident. The *Crittenden* case provides that any calculation of a wage differential claim where the claimant has not yet returned to work must be based on a position that the claimant is able and qualified to perform.

Steven Getty - Rockford

Steve focuses his practice in the representation of employers in Workers' Compensation claims. He began his practice as an Assistant State's Attorney in the Winnebago County State's Attorney's Office. Steve has extensive jury trial experience in both first-chair positions and second-chair positions. He also assisted smaller communities in Winnebago County by serving as a liaison between the State's Attorney's Office and their respective police departments. Steve received his Juris Doctor from the Thomas M. Cooley Law School in 2011 and his Bachelor of Arts from Western Illinois University in 2008.

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TTD, DEATH, PERM. TOTAL & AMP. RATES

ACCIDENT DATE	MAX. RATE TTD, DEATH, PERM. TOTAL, AMP.	MIN. RATE DEATH, PERM. TOTAL, AMP.
7/15/11 to 1/14/12	1261.41	473.03
1/15/12 to 7/14/12	1288.96	483.36
7/15/12 to 1/14/13	1295.47	485.80
1/15/13 to 7/14/13	1320.03	495.01
7/15/13 to 1/14/14	1331.20	499.20
1/15/14 to 7/14/14	1336.91	501.34
7/15/14 to 1/14/15	1341.07	502.90
1/15/15 to 7/14/15	1361.79	510.67
7/15/15 to 1/14/16	1379.73	517.40
1/15/16 to 7/14/16	1398.23	524.34
7/15/16 to 1/14/17	1428.74	535.79
1/15/17 to 7/14/17	1435.17	538.19

MINIMUM TTD & PPD RATES

# of dependents, including spouse	7/15/07-7/14/08	7/15/08-7/14/09	7/15/09-7/14/10	7/15/10-7/14/17
0	200.00	206.67	213.33	220.00
1	230.00	237.67	245.33	253.00
2	260.00	268.67	277.33	286.00
3	290.00	299.67	309.33	319.00
4+	300.00	310.00	320.00	330.00

MAXIMUM PERMANENT PARTIAL DISABILITY RATES

ACCIDENT DATE	MAXIMUM RATE
7/1/08 to 6/30/10	664.72
7/1/10 to 6/30/11	669.64
7/1/11 to 6/30/12	695.78
7/1/12 to 6/30/13	712.55
7/1/13 to 6/30/14	721.66
7/1/14 to 6/30/15	735.37
7/1/15 to 6/30/16	755.22
7/1/16 to 6/30/17	775.18

MAXIMUM 8(D)(1) WAGE DIFFERENTIAL RATE

ACCIDENT DATE	MAXIMUM RATE
7/15/13 to 1/14/14	998.40
1/15/14 to 7/14/14	1002.68
7/15/14 to 1/14/15	1005.80
1/15/15 to 7/14/15	1021.34
7/15/15 to 1/14/16	1034.80
1/15/16 to 7/14/16	1048.67
7/15/16 to 1/14/17	1071.58
1/15/17 to 7/14/17	1076.38

SCHEDULED LOSSES (100%)

	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Person as a whole	500 wks
Arm	253 wks
Amp at shoulder joint	323 wks
Amp above elbow	270 wks
Hand	205 wks
Repetitive carpal tunnel claims	190 wks
Benefits are capped at 15% loss of use of each affected hand absent clear and convincing evidence of greater disability, in which case benefits cannot exceed 30% loss of use of each affected hand.	
Thumb	76 wks
Index	43 wks
Middle	38 wks
Ring	27 wks
Little	22 wks

	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Leg	215 wks
Amp at hip joint	296 wks
Amp above knee	242 wks
Foot	167 wks
Great toe	38 wks
Other toes	13 wks
Hearing	
Both ears	215 wks
One ear	54 wks
Eye	
Enucleated	173 wks
One eye	162 wks
Disfigurement	162 wks

Death benefits are paid for 25 years or $500,000 whichever is greater.

As of 2/1/06, burial expenses are $8,000.

The current state mileage rate is $0.535 per mile.

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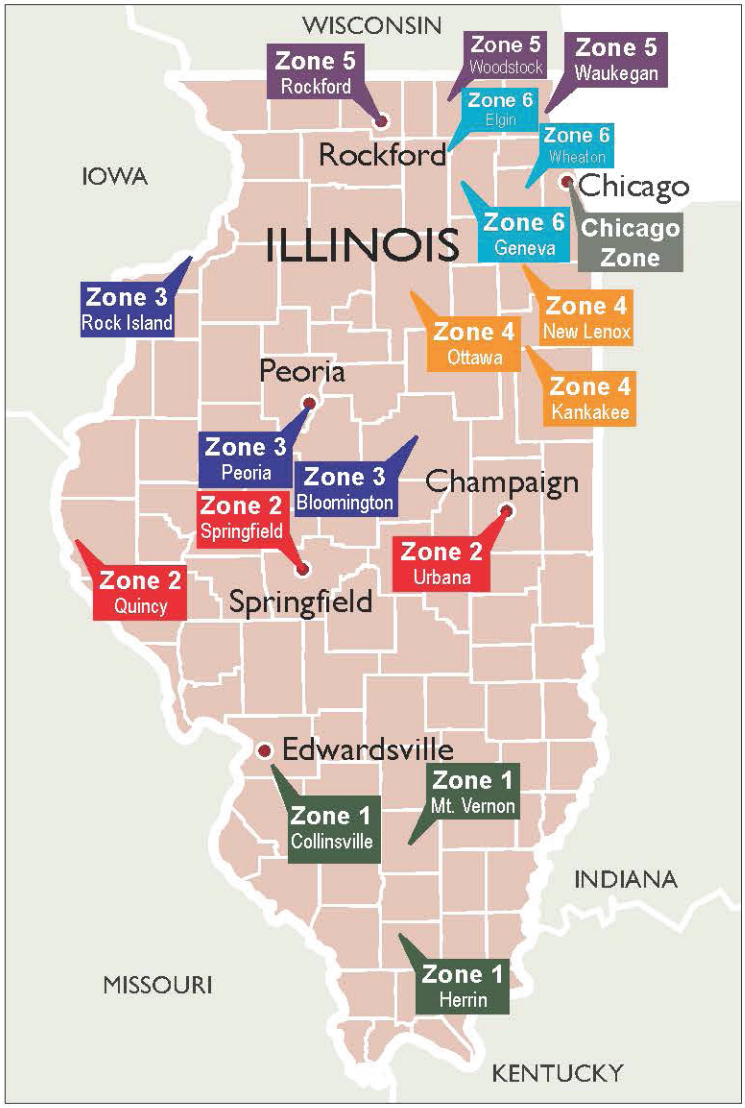

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