

# BELOW THE RED LINE

HEYL...  
ROYSTER

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

*A Newsletter for Employers and Claims Professionals*

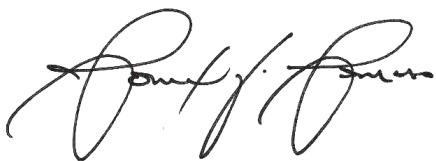
*October 2016*

### A WORD FROM THE PRACTICE GROUP CHAIR

Welcome to Fall 2016! The leaves are changing, the mornings have become cool and crisp, and my kids are talking about what they are going to be for Halloween. We hope you get time to enjoy the fall weather before the winter cold.

In this edition of *Below the Red Line* my partner Brad Peterson (Urbana office) provides an important update on Medicare thresholds. My partner Brad Elward (Peoria office) also dissects a new appellate decision, *Allenbaugh v. Illinois Workers' Compensation Commission*. While the holding in *Allenbaugh* seems obvious, you will find it interesting because it represents a reversal from prior appellate court decisions that have sought to further extend the traveling employee doctrine. Hopefully this marks a trend and the expansion of that doctrine will end.

You will also note in this edition we are promoting Heyl Royster's Employer's Day 2016 offered in Naperville on November 3 and Peoria on November 10. This seminar is a joint effort of our firm's Workers' Compensation, Employment Law, and Governmental Practice Groups. We are truly excited about this effort and the nexus of all these practice areas. We will present fact patterns and discussions to help you minimize your exposure by recognizing risks beyond the workers' compensation claim. I hope to see you there!



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### CMS LOWERS SCHIP REPORTING THRESHOLD FOR WORKERS' COMPENSATION CASES

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 implemented mandatory reporting requirements for Medicare beneficiaries who had settlements, judgments, awards or other payments for non-group health plans such as liability insurance, no fault insurance or workers' compensation. Thereafter, Section 202 of the SMART Act required that settlement thresholds be established wherein settlements falling below the threshold would not have to be reported to CMS and conditional payments would not need to be reimbursed. The initial settlement threshold for both workers' compensation and liability cases was established at \$1,000.

On September 26, 2016, CMS issued a memorandum lowering the workers' compensation submission threshold to \$750. The threshold applies when cases are resolved and the employer's Ongoing Responsibility for Medical (ORM) is extinguished as a result of settlement. This results in insurers being required to report an additional number of settlements to CMS in accordance with SCHIP. The reduction was warranted according to CMS based upon the average cost of recovery incurred by CMS in recovering conditional payments. According to the September 26, 2016, memorandum, the \$750 threshold was established based upon CMS having an average conditional payments demand in workers' compensation of \$499 with an associated cost of recovery to CMS of \$421.

Where a nuisance settlement is a viable option with a Medicare beneficiary, the \$750 threshold should be kept

*continued on next page...*

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in mind. Where cases can be settled for \$750 or less and Medicare made conditional payments, the settlement can proceed without the need for SCHIP reporting nor conditional payments reimbursement.



### **Brad Peterson - Urbana Office**

Brad's practice is divided between workers' compensation, civil litigation and Medicare Secondary Payer Act compliance. He is experienced in the defense of construction and motor carrier liability, insurance coverage, workers' compensation, and Medicare Secondary Payer Act compliance. For over a decade Brad has had a special interest in Medicare Set-Aside Trusts and the Medicare Secondary Payer Act and has written and spoken extensively on these issues. Brad is a member of the ISBA Workers' Compensation Section Council where he served as Chairman in 2012-2013 and he is a past editor of the Workers' Compensation Section Newsletter. He currently serves as the contributing editor of the Workers' Compensation Report for the *Illinois Defense Counsel Quarterly*.

### **TRAVELING EMPLOYEE DOCTRINE DOES NOT ENCOMPASS TRAVEL "TO AND FROM" NORMAL WORKPLACE**

In *Allenbaugh v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150284WC, the appellate court affirmed the Commission's decision finding the claimant, a police officer en route to the police station before heading to a training session, was "merely commuting" at the time of his accident and was not a traveling employee. In *Allenbaugh*, the claimant was a police officer employed by the City of Peoria as a patrol officer; he typically worked second shift, reporting at 2:45 p.m. His job required him to be driving for at least 65 percent and up to 75 percent of a shift.

On March 5, 2013, the claimant was ordered to report at 8:00 a.m. for mandatory training to take place at police headquarters and at the Expo Gardens Opera House. While the claimant was en route to police headquarters, it was snowing, and there was ice and slush on the road. An oncoming vehicle crossed the center line and struck the left front side of claimant's truck, forcing him into a ditch, where he struck several trees and sustained neck and back injuries.

The arbitrator found the claim compensable and awarded benefits. According to the arbitrator, the claimant, a patrol officer who typically worked second shift, was ordered to perform mandatory training outside his usual duty hours. He was directed to bring various items of police gear to the training session. Moreover, when he left his house to attend training at 7:45 a.m. on March 5, 2013, the roads were hazardous. According to the testimony, police officers were on duty 24 hours per day. Based on these facts (and without explaining the legal basis for his ruling), the arbitrator found that claimant sustained an accident "arising out of" and "in the course of" his employment.

The Commission reversed, noting that at the time of the accident, the claimant was not responding to unlawful conduct and was not responding to an emergency. The claimant was not on duty at all times and had no general obligation to intervene if he observed unlawful behavior

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while off duty. And while the respondent did employ people on an on-call basis, the claimant was not assigned to such duty.

According to the Commission, the mere fact that the training claimant was required to attend occurred outside his usual duty hours was not sufficient to avoid the general rule that an "employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest." *Allenbaugh*, 2016 IL App (3d) 150284WC, ¶ 6. It noted claimant was not required to drive any particular route and that "he was not performing any activities of employment at the time of the accident." *Id.* It agreed that, in other cases, police officers had been compensated while commuting where their employer retained control over them; this was not the case here. The Commission stated that the traveling-employee doctrine did not apply where claimant was simply driving his personal vehicle to his normal workplace. The dissenting commissioner believed that the traveling-employee doctrine applied because claimant was not commuting to his normal shift and the roads were hazardous. The circuit court of Peoria County confirmed.

On appeal, the appellate court affirmed. First, the court rejected the argument that the employer police department had retained or exerted any control over the claimant at the time of his accident. In support of this argument, the claimant relied heavily on *City of Springfield v. Industrial Comm'n*, 244 Ill. App. 3d 408 (4th Dist. 1993), where a police officer was injured in an automobile accident while returning to the police station from lunch. The officer had been assigned an unmarked police car for 24 hours per day and was required to monitor the radio while using the car at all times and to respond to any calls he received, even if he was off duty. He drove the car home to eat lunch on most days, and on the day of the accident, he was returning to work from lunch when a motorist ran a stop sign and collided with him. At the time of the accident, he was not responding to a call or emergency situation.

Arguing for application of *City of Springfield*, the claimant contended that the respondent maintained

similar control over him because he was "ordered to report to the police station in a winter storm" and that the "roads were dangerous." *Allenbaugh*, 2016 IL App (3d) 150284WC, ¶ 11. According to the appellate court, while the officer in *City of Springfield* presumably was required to return to work after lunch just as claimant was ordered—and hence required—to attend training, the *City of Springfield* court made no mention of the officer's obligation to return to the stationhouse after lunch in announcing its holding. The appellate court said that "all employees are required to go to work. Thus, we fail to see how the fact that claimant was going someplace he was required to go for work distinguishes his situation from normal commuting." *Id.*

Second, the court rejected the argument that the claimant was a traveling employee at the time of his accident. The claimant had argued that he was required to drive for much of his usual shift. The court responded, "However, that is not what claimant was doing at the time he was injured, and he cites no authority that holds that where an employee regularly drives as part of his duties, his or her commute is brought within the scope of the employment." *Id.* ¶ 16. The court noted that its own research "has uncovered no support for this proposition as well." *Id.*

The court then dismissed the claimant's argument that he was required to travel to the police station and then to the Expo Gardens on the day he was injured. "While true, it is undisputed that at the time he was injured, he was driving from his home to the police station." *Id.*

Finally, the court rejected the claimant's assertion that his employer required him to drive in hazardous conditions. "We fail to see how this distinguishes claimant's situation from that of any other commuter in the northern half of this country." *Id.*

In closing, the appellate court said it agreed with the Commission's conclusion of the case – "We do not believe that the traveling employee doctrine should be extended to include any claimant who is involved in an accident on the way to their normal workplace, driving their personal

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vehicle without any additional compensation and not performing any duties incidental to their employment when the only basis for finding so is a department order that the claimant's regular work shift was different for that particular day." *Id.* ¶ 17.



### Brad Elward - Peoria Office

Brad concentrates his work in appellate practice and has a significant sub-concentration in workers' compensation appeals. He has authored more than 300 briefs and argued more than 225 appellate court cases, resulting in more than 100 published decisions. Brad is Past President of the Appellate Lawyers' Association. He has taught courses on workers' compensation law for Illinois Central College as part of its paralegal program and has lectured on appellate practice before the Illinois State Bar Association, Peoria County Bar, Illinois Institute for Continuing Legal Education, and the Southern Illinois University School of Law. Brad is the Co-Editor-In-Chief of the IICLE volume on *Illinois Civil Appeals: State and Federal*, and authored the chapter on Workers' Compensation appeals.

### HEYL ROYSTER PRESENTS:

## Employers' Day 2016

### Minimizing Exposure While Protecting Your Workplace Environment

Please join us for Heyl Royster's combination Employment & Labor/Governmental/Workers' Compensation Seminar on

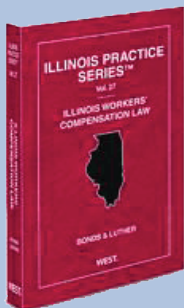
**November 3rd in Naperville, IL &**

**November 10th in Peoria, IL.**

#### You can expect up-to-date information on issues such as:

- Workplace Stress Claims (including PTSD)
- Freedom of Information Act Compliance
- Retaliation: Religious, Transgender
- FMLA, ADA, and Workers' Compensation Leave Issues
- 2016 FLSA Amendments: DOL New Overtime Rules
- Sexual Harassment Awareness and Prevention
- Plus much, much more

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### New Edition in Print

**Bruce Bonds** and **Kevin Luther** are co-authors of the updated "Illinois Workers' Compensation Law, 2016 Edition," the 27th volume of the Illinois Practice Series published by Thomson Reuters. This publication provides an up-to-date assessment of Illinois workers' compensation law in a practical format that is useful to practitioners, adjusters, arbitrators, commissioners, judges, lawmakers, students, and the general public. It also contains a summary of historical developments of the Illinois Workers' Compensation Act.

Mr. Bonds concentrates his practice in the areas of workers' compensation, third-party defense of employers, and employment law. He is a member of the Illinois Workers' Compensation Commission's Rules Review and Revisions Committee and an adjunct professor of law at the University of Illinois College of Law, where he has taught workers' compensation law to upper-level students since 1998. Mr. Luther supervises the employment law, employer liability, and Workers' Compensation practices in the firm's Rockford and Chicago offices. He has represented numerous employers before the Illinois Human Rights Commission, arbitrated hundreds of workers' compensation claims, and tried numerous liability cases to jury verdict.

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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 7/14/17.....	1428.74.....	535.79.....

### 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- 7/14/16
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.....

### 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.....

### SCHEDULED LOSSES (100%)

Effective 2/1/06 (and 7/20/05 to 11/15/05)	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Person as a whole.....500 wks	Leg.....215 wks
Arm.....253 wks	Amp at hip joint.....296 wks
Amp at shoulder joint.....323 wks	Amp above knee.....242 wks
Amp above elbow.....270 wks	Foot.....167 wks
Hand.....205 wks	Great toe.....38 wks
Repetitive carpal tunnel claims.....190 wks	Other toes.....13 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.	Hearing
Thumb.....76 wks	Both ears.....215 wks
Index.....43 wks	One ear.....54 wks
Middle.....38 wks	Eye
Ring.....27 wks	Enucleated.....173 wks
Little.....22 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 54¢ per mile.

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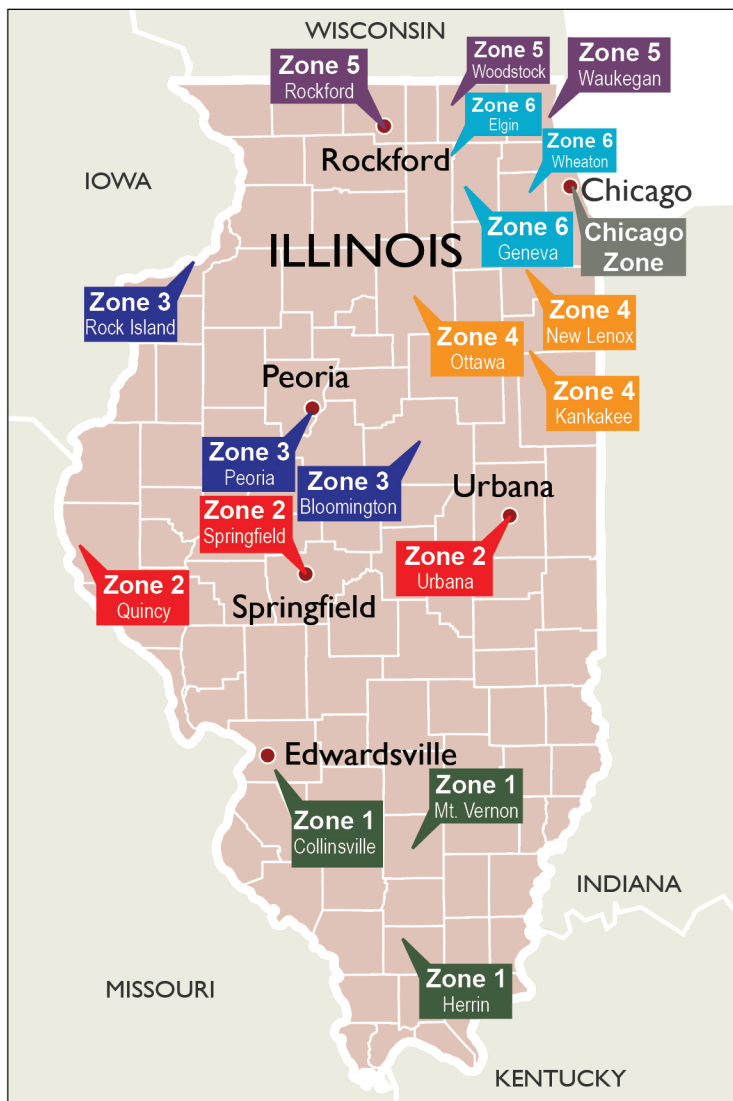
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