Below the Red Line

HEYL ROYSTER

Workers' Compensation Update

"We've Got the State Covered!"

A Newsletter for Employers and Claims Professionals — *April 2015*

A Word From The Practice Group Chair

Welcome to our April edition of Below the Red Line, our firm's workers' compensation update. As you read, I hope you are finally enjoining the full effects of spring.

Along with changes in the weather, we at Heyl Royster have implemented some changes intended to help us serve you even better.

First, we have had some exciting personnel changes. Many of you know Dana Hughes who has practiced for many years in our Rockford and Chicago offices. Dana has relocated to our Peoria office, and while she will remain in service to many of you throughout the State, her move to Peoria will bolster our presence in the venues throughout Central Illinois. Also, Jessica Bell recently joined us in our Peoria and Springfield offices. Jessica has extensive workers' compensation experience and will also be available to represent your interests throughout the Central Illinois area. Jessica is the author of this month's feature article, which highlights a recent appellate court decision involving permanency benefits. Lastly, Steve Getty has joined our firm and will be assisting the strong team managed by Kevin Luther practicing out of our Rockford and Chicago offices. You will find pictures and short bios of these attorneys in this newsletter.

Also, we are pleased to announce the release of the IICLE handbook on Civil Appeals. This comprehensive analysis of all issues related to appeals in Illinois was co-edited by Brad Elward, our workers' compensation appellate counsel and the editor of this newsletter. In addition to chapters authored by several Heyl Royster attorneys, the volume includes Brad's chapter on workers' compensation appeals in Illinois.

Lastly, we bring your attention again to our annual Heyl Royster Workers' Compensation seminar scheduled for May 28 in Bloomington, Illinois. You should have received your invitation by now and there is additional information contained in this newsletter. We are busy preparing an interesting and important presentation addressing some of the new and developing workers' compensation issues as seen in today's headlines. At the same time, we are keeping our eye on developing legislative issues in Illinois which could require some analysis on or before the date of the seminar. We hope many of you can attend, and if you need assistance with registration please do not hesitate to contact me or any of our attorneys.

Happy spring! We hope to see you on May 28 in Bloomington, Illinois. As always, if we can be of assistance in any way please do not hesitate to contact me or any of our attorneys throughout the State.

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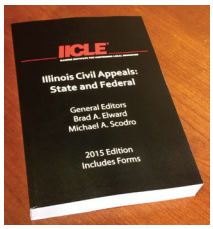
IICLE Civil Appeals



We are pleased to announce the release of the 2015 edition of the IICLE Civil Appeals, which features a lengthy chapter devoted to workers' compensation appeals authored by Heyl Royster's Brad Elward. Brad also served as general editor of the publication.

In this issue . . .

APPELLATE COURT HOLDS WAGE DIFFERENTIAL MUST BE EXPLICITLY WAIVED OR ELSE CLAIMANT ELIGIBLE

By: Jessica Bell, jbell@heylroyster.com

The Appellate Court, Third District, Workers' Compensation Commission Division, recently handed down a decision addressing a claimant's entitlement to permanent, total disability benefits on an odd-lot theory, and the applicability of a wage differential award when the claimant does not request a wage differential award at any point in the proceedings. In *Lenhart v. Illinois Workers' Compensation Comm'n,* 2015 IL App (3d) 130743WC, the court affirmed the Commission's determination that the claimant had not proved his entitlement to permanent and total disability benefits, but remanded the case to the Commission for a further determination regarding his entitlement to a wage differential award.

The Facts

In *Lenhart*, the claimant worked as a truck driver and dock worker. In December 2004, he was driving a forklift over a dock plate when the dock plate buckled, causing a jarring injury to his low back. He immediately experienced low back pain and underwent a course of medical treatment that ultimately resulted in two back surgeries. The claimant's evidence included an opinion from his treating physician, Dr. DePhillips, who concluded that the claimant was permanently and totally disabled from work as a result of the original work injury. Dr. DePhillips opined that the claimant was obviously capable of working, but that his restrictions rendered him unemployable, noting that he determined the claimant's restrictions based on the claimant's own subjective reporting of his condition. The claimant's second opinion came from a psychiatrist, Dr. Hawley, who opined the claimant had chronic pain disorder with depression and impulse control disorder, but did not note any restrictions stemming from that diagnosis.

The employer did not dispute a workplace injury occurred and that the claimant's low back injury, and subsequent treatment, were related to the workplace accident. However, over the course of approximately three years during the duration of the claimant's treatment, the employer conducted surveillance, which revealed the claimant engaging in a variety of activities, including riding a motorcycle, attending a football game, and some lifting and bending activities. Overall, these activities showed that the claimant was acting beyond his reported limitations. The employer's independent medical examination (IME) physician, Dr. Fransisco Espinosa, opined the claimant was ready to work and capable of working with light to medium duty restrictions. Further, after reviewing the surveillance conducted, Dr. Espinosa noted the claimant's activities in the surveillance did not correlate with his alleged symptoms.

At the employer's request, the claimant was also examined by Dr. Gahellen, a clinical psychologist, who reviewed the surveillance and concluded the claimant's "self-reported limitations in functioning may be misleading and exaggerated." Dr. Gahellen also noted the claimant behaved at the examination in a manner that suggested he appeared "invested in remaining in a role as an invalid due to medical problems," and that he responded in a guarded, self-favorable manner and made an effort to control the impression formed of him.

To further complicate matters, two functional capacity evaluations (FCE) were completed, approximately one month apart from each other. The first FCE determined the claimant could work at the very light physical demand level, while the second determined he could work sedentary duty, with walking and standing restrictions. The second administering therapist also noted the claimant had significant nonorganic components to his level of pain and disability.

There was no dispute that the claimant could no longer perform at the same physical demand level as prior to the accident and that his position as a truck driver with the employer was not a match for his restrictions, regardless of whether light duty or sedentary per the conflicting FCEs. Consequently, the employer solicited the assistance of a vocational rehabilitation company, E.P.S. Rehabilitation. E.P.S. Rehabilitation conducted a sampling of potential employers, returning 16 possible jobs within the claimant's restrictions, with two actual openings reported. In turn, the claimant hired his own vocational specialist, Ron Malik, who opined that the two jobs located by E.P.S. Rehabilitation were outside the claimant's restrictions. Mr. Malik further noted the claimant would require a job with low stress, simple and repetitive tasks, and limited contact with the public, coworkers, and supervisors, despite no medical

opinion suggesting such restrictions, and that no such jobs were available for the claimant.

A specialist with E.P.S. Rehabilitation testified at his deposition that the claimant was employable in the current labor market, even in light of his restrictions. In so opining, the specialist considered the claimant's prior experience, age, physical capabilities, level of education, and acquired skills and knowledge and determined a stable labor marked existed in which he could earn between $8 to $33.65 per hour, but qualified that range by noting that the more likely median was in the $10-$15 per hour range. The specialist also testified that he assisted the claimant in a job search and during that time, the claimant sabotaged any realistic chance of employment by telling potential employers "inappropriate information regarding his available physical capabilities."

Arbitration Results – PPD Awarded

At arbitration, the claimant argued he was permanently and totally disabled, in reliance on the opinions of his treating physicians, as well as his vocational specialist, and sought benefits in accordance therewith. The employer argued against such a finding and asserted permanency would be more properly awarded as a wage differential under section 8(d)(2) of the Illinois Workers' Compensation Act. The employer presented the evidence of its vocational rehabilitation experts to argue for a wage differential calculated based on claimant securing a job earning $33.65 per hour. The claimant did not request a wage differential in the alternative if it was determined he was not permanently and totally disabled and presented no evidence on the issue, other than the vocational reports to support his claim for PTD benefits.

The arbitrator determined the claimant met his burden and proved he was permanently and totally disabled as a result of the compensable work-related accident under an odd-lot theory and awarded benefits accordingly.

On appeal, the employer asked the Commission to reverse the PTD award and enter judgment on a wage differential basis, assuming the claimant secured the $33.65 per hour job E.P.S. Rehabilitation testified he would be capable of earning. The Commission reversed the arbitrator's benefits award based on an odd-lot theory of permanent total disability claim, but also denied the employer's argument for a wage differential. In denying the claimant's PTD benefits, the Commission found that the claimant's medical opinions were contradicted by the surveillance showing he was far more physically and mentally capable than his treating physicians were led to believe. The Commission found the most reliable opinions to be that of employer's IME physicians, Drs. Espinosa and Gahellen, and concluded the claimant was capable of working with the restrictions outlined by Dr. Espinosa. The Commission neglected to analyze and address the employer's wage differential argument and instead awarded permanent partial disability (PPD) benefits of 75 percent loss of use of the whole person.

The circuit court confirmed the Commission's decision and the claimant appealed to the appellate court, raising two alternative arguments on appeal. First, he argued the Commission's finding that he failed to prove that he was entitled to PTD benefits was against the manifest weight of the evidence. Second, he argued, in the alternative, that the Commission erred in failing to consider his right to receive a wage differential award upon denying his claim for PTD benefits.

The appellate court first addressed the argument that the Commission erred in denying the claimant PTD benefits. To prove a PTD award, an employee must prove he can make no contribution to industry sufficient to earn a wage. *Westin Hotel v. Industrial Comm'n,* 372 Ill. App. 3d 527 (1st Dist. 2007). One is not entitled to PTD benefits if he is qualified for and capable of obtaining gainful employment without seriously endangering his health or life. *Interlake, Inc. v. Industrial Comm'n,* 86 Ill. 2d 168 (1981). More specifically, a claimant is entitled to PTD benefits under an "odd-lot"theory of compensability when his disability is limited in nature such that he is not obviously unemployable, or there is no medical evidence to support a claim of total disability, but that there is no available employment to persons in his circumstance. *Valley Mould & Iron, Co. v. Industrial Comm'n*., 84 Ill. 2d 538 (1981). This is proved by showing: (1) a diligent but unsuccessful attempt to find work, or (2) he will not be regularly employed in a well-known branch of the labor market because of his age, skills, training, and work history. *Westin Hotel*, 372 Ill. App. 3d at 544. If proved, the burden then shifts to the employer to prove the claimant is employable and that a stable labor market exists.

The appellate court appeared to place significant weight on the surveillance submitted at arbitration, not

only for the physical proof that the claimant had physical capabilities beyond what he reported but also for the effects of the surveillance, namely the ultimate determination that claimant was not credible based on the inconsistencies. Because the claimant was determined to not be credible, the opinions of his treating physicians were determined to be unreliable, as they relied on claimant's subjective reporting as the basis. The claimant technically met his burden and established he fell into the odd-lot category, shifting the burden to the employer to essentially disprove a PTD award. Because the employers' IME physicians were found more reliable and credible than the claimant and his physicians, the employer was able to prove the claimant was employable and that a stable labor market existed with work within claimant's restrictions, thereby disproving his entitlement to PTD benefits.

The claimant next argued he was entitled to a wage differential in lieu of PPD benefits for man as a whole. Although the employer did not cross-appeal the award for PPD benefits, recall they had initially argued for a wage differential at the arbitration level. The Appellate court agreed with the claimant that the Commission erred in failing to address that argument, but remanded the case back for a determination as to that entitlement. Interestingly, the appellate court pointed out that the Illinois Supreme Court has expressed a preference for wage differential awards whenever possible, noting it is often easier to calculate a wage differential than to assign a percentage partial loss of use. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721 (3d Dist. 2000). Moreover, the appellate court referred to *Gallianetti* in stating that an award for percentage of the person as a whole is actually prohibited when a claimant presents sufficient evidence to show a loss of earning capacity.

To prove a wage differential award, a claimant must prove: (1) partial incapacity which prevents him from pursuing his usual and customary line of employment; and (2) an impairment in earnings. 820 ILCS 305/8(d)(1). In *Lenhart*, the parties stipulated that the claimant was unable to return to his pre-injury employment as a result of the permanent work restrictions, thus satisfying the first prong of the test. Testimony from E.P.S. Rehabilitation specialists that there was a readily available and stable labor market for the claimant wherein he could earn $10-$15 per hour met the second requirement, as his pre-injury average weekly wage (AWW) was $1339.66. The appellate court, therefore, found the claimant met the requirements to be entitled to a wage differential award, but went on further to say the Commission's award for PPD benefits under section 8(d)(2) was in error as section 8(d)(2) of the Act is applicable only when "the employee *elects* to waive his right to recover" a wage differential.

The claimant never requested, argued, or presented evidence to support a wage differential award. Rather, he always argued, until reaching the appellate court level, for an award for PTD benefits. Despite never requesting a wage differential, the court found the claimant had waived his right to such an award, even pointing out that, if anything, the record for a potential wage differential award was preserved by the employer requesting it. Although prior case law established that a claimant implicitly waives his right to a wage differential award by failing to present evidence regarding his entitlement to same, the court distinguished this case by noting the record did contain evidence relevant to the claimant's entitlement to a wage differential award, even if said evidence was not submitted by claimant himself.

Implications of *Lenhart*

So what does *Lenhart* mean for us moving forward?

The Value of Surveillance

First of all, this case highlighted how influential and persuasive surveillance can be in appropriate circumstances. Employers often want to conduct surveillance in the hopes of "catching" a claimant behaving in a manner that suggests his abilities are beyond what he claims. It is important to keep in mind that surveillance showing the claimant's disability, or lack thereof, while often helpful, can be strengthened by having it reviewed by physicians involved in a claim. Sometimes surveillance is something we keep in our back pockets until trial, not wanting to share it with the other side for fear that they will have an opportunity to explain away whatever the surveillance shows, thereby diminishing its significance. In certain circumstances, however, the surveillance can actually be a more powerful tool when it is reviewed by an involved physician who indicates the surveillance footage suggests the claimant's subjective complaints are not consistent with the surveillance footage, even if revealing it before trial takes away that "gotcha" moment. The employer in *Lenhart* enjoyed the benefit of having the surveillance reviewed by

a licensed physician as the court ultimately determined the claimant lacked credibility and his physicians' opinions were unreliable, in part because of the surveillance and the IME opinions regarding it. The determination that the claimant's treating physicians' opinions were unreliable resulted in the determination that the claimant was capable of working with some restrictions and that a stable job market existed for those restrictions, which was fatal to his claim for PTD benefits.

Sua Sponte Awards?

The *Lenhart* case also suggests that an arbitrator could, and in fact should, award a wage differential *sua sponte*, provided the evidence is there to do so. The opinion regarding the fact that a plain language reading of the Act requires an arbitrator to consider and prefer a wage differential to PPD benefits is not new. It is, however, an interesting reminder of how many more wage differential awards we may be seeing in future trials. The employer in *Lenhart* argued for a wage differential, but requested the court use the highest potential hourly rate they could in that calculation. Presumably, such a calculation would have been a more favorable result to the employer than what they thought an appropriate PPD award would be, and naturally, more favorable than the more realistic potential hourly rate also discussed. Although the claimant never requested a wage differential and, apparently, never submitted any evidence in support of one either, the evidence submitted by the employer regarding the claimant's AWW at the time of trial and the potential earnings with a return to work provided sufficient evidence of the potential for a wage differential award.

In this case, while attempting to mitigate permanency by submitting evidence of a stable job market and the possibility of a $33.65 per hour job, the employer could have made the claimant's case for a wage differential for him. Until his appeal to the appellate court, the claimant was completely silent on his entitlement to a wage differential, yet not only was that not considered to be a waiver but the claimant may actually end up with a higher award based on the evidence the employer submitted.

Lenhart on Remand?

What will happen next is unclear. Although the case was remanded to the Commission to make a determination regarding the claimant's entitlement to a wage differential award, The appellate court essentially already completed that analysis and determined the claimant was entitled to a wage differential award. Thus, under the present circumstances it appears the only thing left for the Commission to do is to determine the amount of the award.

How that will be done remains a mystery. It appears to be left to the Commission's discretion as to whether they will make that determination based on the information presented at arbitration initially, have a new hearing on the issue, or even allow new evidence to be presented. If they allow new evidence to be presented, the claimant could theoretically secure a minimum wage job, present evidence to show that, despite the testimony of the vocational experts initially presented, this was the only job available in the current job market, and receive a substantial wage differential award, substantially more than one would have been using the $33.65 per hour calculation the employer had requested. Alternatively, if the Commission denies rehearing, they have evidence of a stable job market wherein the claimant could earn anywhere from $8-$33.65 per hour, and would calculate a wage differential award accordingly.

If the Commission somehow comes to a different conclusion that the claimant is *not* entitled to a wage differential, the 75 percent man as a whole (MAW) award was affirmed, which should not be overlooked. This case involved a compensable back injury resulting in two surgeries. The court determined the claimant had permanent restrictions of no lifting greater than 25 pounds and was capable of returning to work in some capacity. As he could not return to his pre-injury employment, the evidence is clear that the claimant had a loss of occupation. For this, the Commission awarded 75 percent MAW. Perhaps the claimant will *now* waive his entitlement to a wage differential award and elect the section 8(d)(2) benefits that were previously awarded as they are sizeable.

As this case shows, defending future cases involving potential wage differentials will be more challenging. Should you have any questions concerning *Lenhart* or a wage differential in your case, please feel free to contact any of our Heyl Royster attorneys statewide.

Dana Hughes

Peoria Office

Born and raised in Rockford, Dana joined the firm's Rockford office as an associate in 2006, and has since defended the rights of employers in workers' compensation claims before arbitrators and commissioners at the Illinois Workers' Compensation Commission and protected their interests in state courts in third party claims. She was an active member in the Winnebago County Bar Association, serving on its Board of Directors and Diversity Committee, and as past Chair of the Association's Workers' Compensation Section. Dana also served as an arbitrator for the Seventeenth Judicial Circuit's Court-Annexed Arbitration System.

Dana is an annual contributor to the firm's claims handling seminar publication and the firm's monthly publication devoted to workers' compensation issues, Below the Red Line. She has contributed to in-house newsletters for clients and has presented before the ISBA's Insurance Law Section. She has been a guest speaker to local community college and high school students on topics such as leadership and the practice of law. In 2015, Dana co-authored an extensive survey of Illinois Workers' Compensation Law published in the Southern Illinois University Law Journal, "Survey of Illinois Law: Workers' Compensation," Southern Illinois University Law Journal (2015).

.Jessica Bell

Springfield & Peoria Offices

Jessica focuses her practice on the defense of insurance clients and employers in workers' compensation matters. She joins the firm with extensive workers' compensation defense experience, having appeared before the Illinois Workers' Compensation Commission representing employers and insurance companies across the state. Jessica has also spoke with businesses directly to help assist in their understanding of the Workers' Compensation system, as well as the handling of claims within their business.

Jessica is a member of the Workers' Compensation Lawyers' Association, Peoria County Bar Association, and Illinois State Bar Association. She is a past treasurer and vice-president of the Tazewell County Bar Association and former Tazewell County Assistant State's Attorney. As an ASA, she appeared before Judges in the 10th Circuit, handling matters ranging from petty offenses to felonies. Jessica is a 2009 graduate of Saint Louis University School of Law, where she concentrated her studies in employment and labor law, taxation, and business transactions. She is a 2006 graduate of Duquesne University, graduating magna cum laude, with a B.S. in political science, psychology, and sociology.

Steve Getty

Chicago & Rockford Offices

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 continued his practice in the public sector most recently as an Assistant State's Attorney in the McHenry County State's Attorney's Office where he focused on the prosecution of Domestic Violence cases and the Mental Health Court. 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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Workers' Compensation Group

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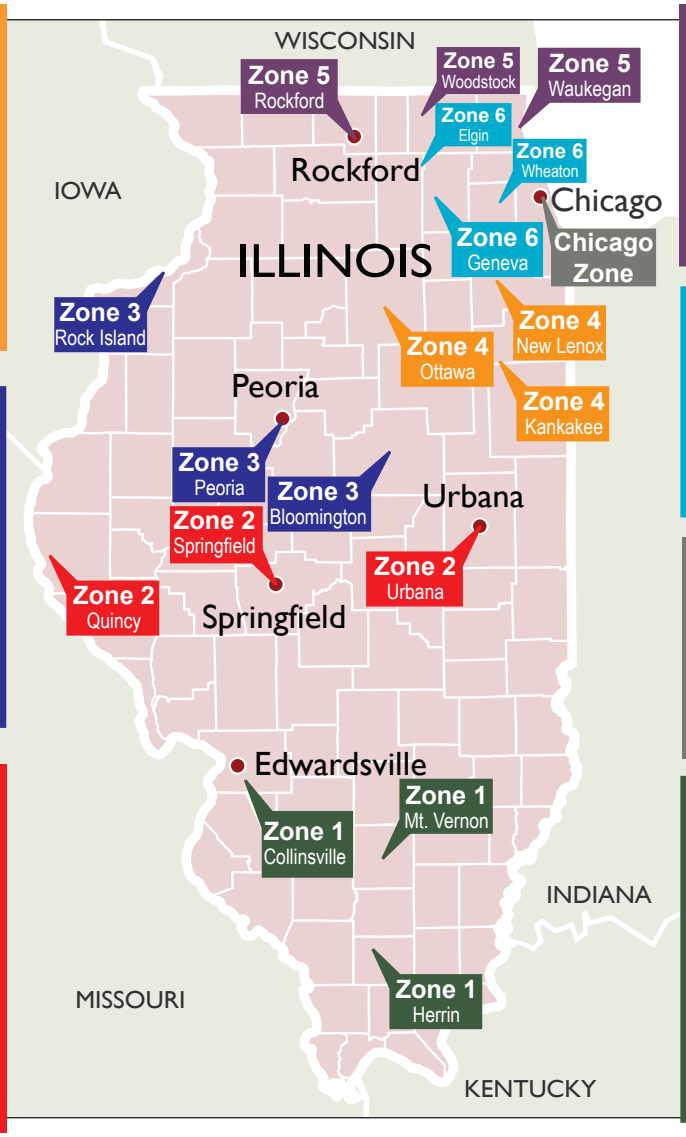

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