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# BELOW THE RED LINE

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

July 2023

## A WORD FROM THE PRACTICE CHAIR

These are the days of the year I feel very fortunate to have a job where I work indoors. And bless the person who invented modern air conditioning (per Google: Willis Carrier). We here in the Midwest are getting a little taste of what the South has been dealing with for a majority of the summer months. On behalf of all of us here in the Midwest, "Yuck." I can report that I am giving this heat and humidity "no stars." I hope you are staying cool and not lamenting how badly you wanted the summer to be here when it was March, and you were wondering when it was going to warm up.

In my past newsletter introductory paragraphs, I have consistently extended an invitation to our friends and colleagues to contact me, or any Heyl Royster workers' compensation attorney for that matter, to set up a time when me, or a team of Heyl Royster attorneys, come to you for a visit. Our in-person meetings were put on hold during COVID, but now that we are past the pandemic, we are excited to hit the road again and visit our clients. These visits may be just to see how you and your team are doing, and in other cases, we come prepared to present on workers' compensation topics you chose. In either case, as my mother taught me early on, never show up empty-handed when visiting friends. So, I promise to bring some goodies. Simply getting together for a meal and talking about business, how we are performing for you, and what else you need from Heyl Royster can be the simple and easy agenda for a visit. Or, we can have a live presentation ready to go on the topics your team wants a bit of a refresher on for 2023. Remember, we are here for you, and enjoy getting together with friends. Call or email me and tell me when would be a good time for a visit. This is simply part of the outstanding services we provide to our clients in this workers' compensation world.

This month's newsletter is brought to you by Joe Moore. Joe is by no means a new attorney, but he did recently join Heyl Royster in the Peoria office. He has been a welcome addition to the team, and he brings many years of experience in the field of workers' compensation, where he worked at the Illinois Attorney General's office. Joe, fresh off an arbitration victory in these last few weeks, talks to us about his trial and a topic that does not come up that often: hearing loss cases. I suggest you tab this article or print it out and save it. It is not often we deal with hearing loss cases, but when you do, this article will undoubtedly be a helpful resource to walk you through the proof required by the Petitioner, the process of defending the claims and determining possible exposure points.



Toney Tomaso



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## FEATURE ARTICLE

### PROVING A HEARING LOSS CASE DUE TO NOISE EXPOSURE

**BY: JOE MOORE**

Occupational hearing loss claims under Illinois workers' compensation law are complex and exacting. Section 8(a) of the Illinois Workers' Compensation Act provides specific thresholds for hearing loss frequencies and decibels and how to calculate the loss. The Act specifies the period of time an employee must be exposed to noise levels in excess of a threshold to bring a claim for loss of hearing due to industrial noise. Further, a petitioner must offer evidence causally connecting the documented hearing loss to the noise exposure at the workplace.

Our office recently secured a decision in favor of a respondent-employer in a hearing loss case. The petitioner alleged he suffered permanent hearing loss due to noise exposure at his workplace. The arbitrator found that the petitioner failed to prove that noise exposure at his workplace caused his hearing loss, providing us with an excellent example of the burden of proof required for a hearing loss case due to workplace noise exposure.

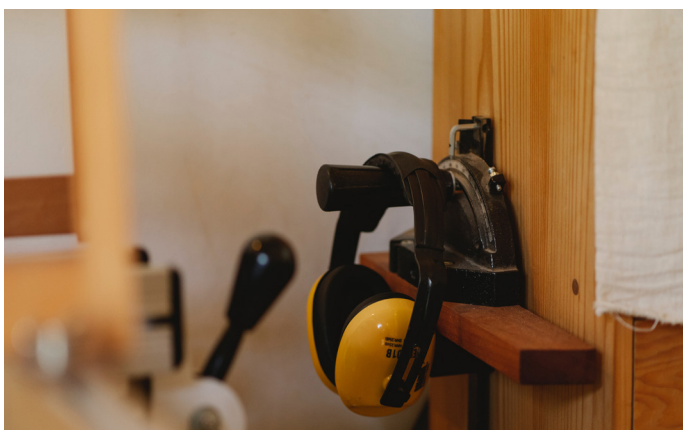
In this case, the petitioner worked in a factory, and his primary job involved packaging products for shipment. The evidence offered at trial showed the petitioner was exposed during his 19-year employment with the respondent to noise levels with decibels (dBA) in the lower 80s. Testimony at trial confirmed petitioner wore employer-supplied earplugs while working. Evidence of the employer's

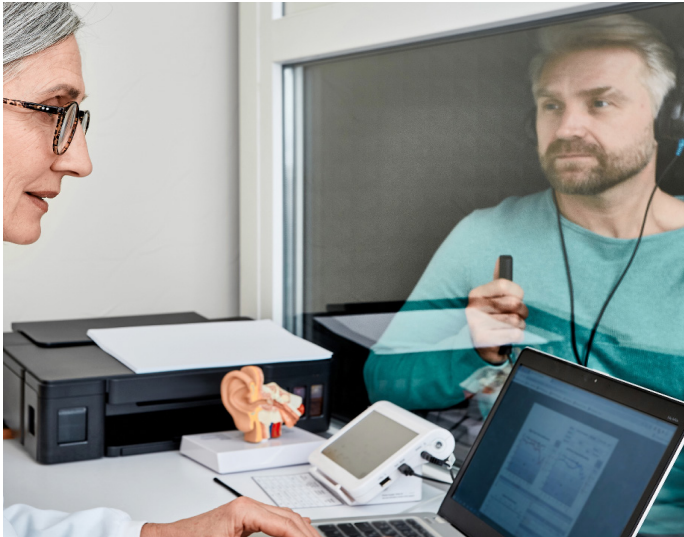
yearly hearing tests was entered into evidence, showing the petitioner did have some hearing loss, especially to the right ear. However, the petitioner's treating audiologist declined to offer a causation opinion when he testified at trial as he did not know the length of time the petitioner was exposed to the workplace noise, nor did he know what the specific noise levels were. The arbitrator correctly found the petitioner had not met his burden of proof and failed to prove his hearing loss was due to noise exposure at work.

#### **Burden of Proof:**

Formal testing conducted at the workplace typically proves the noise levels in a work environment. Hearing loss can be acute or gradual and proven with hearing tests given by a medical provider. The hearing loss claim filings are under the Occupational Diseases Act or the Workers Compensation Act. And while the requirements for proof of hearing loss are generally the same under both Acts, typically, hearing loss caused by exposure to noise levels will be an Occupational Diseases Act case, while hearing loss caused by an acute injury, such as a sudden loud noise or explosion, would be pursued under the Workers Compensation Act.

The Illinois Workers' Compensation Commission (IWCC) has issued hearing loss guidelines for gradual hearing loss. 50 Ill. Adm. Code tit. 50, §7130.10 (2009). The IWCC formula requires an audiogram (hearing test) to determine what percentage of hearing loss occurred. Normally, the test, given in a soundproof room, playing different tones at different frequencies, tasks the petitioner with pressing a button once they can no longer hear the tone. The graphed results utilizing the three frequencies are used to calculate the hearing loss under the formula described in the statute. The Workers' Compensation Act considers 1000, 2000, and 3000 cycles, while using a hearing aid to restore hearing is not considered. The amount noted at the 1000, 2000, and 3000 cycles is averaged to calculate the hearing loss. Under the Act, the petitioner must experience an average of 30 decibels for loss of hearing to be compensable. The percentage of hearing loss noted on the audiogram graph is used





to calculate the loss of hearing, and this percentage of hearing loss is then compared to the schedule described in the Act to determine the amount of compensation, if any, due to the petitioner.

Section 7(f) of the Occupational Disease Act states, “[n]o claim for loss of hearing due to industrial noise shall be brought against an employer or allowed, unless the employee has been exposed for a period of time sufficient to cause permanent impairment to noise levels in excess of the following:”

Sound Level DBA	
Slow Response	Hours Per Day
90	8
92	6
95	4
97	3
100	2
102	1.5
105	1
110	0.5
115	0.25

In the arbitration decision recently secured by our office, the petitioner testified he was required to use hearing protection, including employer-provided earplugs, and did so during his employment with the respondent. There was no evidence that the petitioner failed to utilize the hearing protection provided or that the employer’s hearing loss prevention program

was not enforced. Moreover, the petitioner was unable to prove that his exposure to noise levels reached the 90 dBA level and could not prove any period of time he would have been exposed to that threshold noise level. Without the required proof of noise exposure and without the treating audiologist offering a causation opinion linking the petitioner’s hearing loss to his workplace noise exposure, the petitioner was unable to meet his burden of proof for a compensable claim under the Act.

The case law is clear that a petitioner must be able to prove both the noise exposure and the length of time exposed to meet the required burden of proof successfully. As described in *United States Steel Corp. v. Industrial Com’n*, 132 Ill. App. 3d 101, 106, 477 N.E.2d 237, 240 (1st Dist. 1985), the appellate court held that it was proper to infer that an employer would not have given an employee ear protection if it did not serve the purpose of eliminating excessive noise. As the petitioner admitted using hearing protection from the start of his employment with the respondent and provided no evidence that the hearing protection was inadequate, it cannot be found that he was exposed to sufficient noise levels to cause permanent impairment as described by statute. In *United States Steel*, the petitioner was unable to show he was exposed to noise levels in excess of the statutory levels due to the use of hearing protection, nor was any evidence offered by the petitioner of faulty hearing protection.

Conversely, in *Wagner Castings Co. v. Indus. Com’n*, 241 Ill. App. 3d 584, 598, 609 N.E.2d 397, 407 (4th Dist. 1993), the court found sufficient evidence to support a causal connection between the claimant’s hearing loss and his exposure to excessive noise at work. In this case, the treating doctor found the petitioner’s hearing loss was a combination of age-related hearing loss and noise exposure in the workplace. The court found persuasive the fact the petitioner’s hearing loss was noted to progressively worsen at each hearing test until the petitioner left his employment and then experienced no significant additional hearing loss. The petitioner only needed to show that employment was a causative factor in the resulting injury, *not the sole* causative factor.

Citing *Johns–Manville Corp. v. Industrial Com’n*, 60 Ill.2d 221, 226, 326 N.E.2d 389, 391 (1975).



As the *United States Steel Corp.* case described, even if the petitioner in the recent case defended by our office could prove that he was exposed to noise levels in excess of those described in Section 7(f), he still had the burden of proving that his condition is causally related to his employment. The petitioner’s treating audiologist declined to link the noise exposure to his hearing loss due to the uncertainty of what the petitioner’s noise level exposure was and for what length of time he had exposure. Causation can be established by a chain of events as opposed to a doctor’s testimony; however, in this case, there was insufficient evidence to establish causation through a chain of events. The petitioner admitted he used employer-provided earplugs for hearing protection during the entire time of his employment. Further, no medical provider, or other evidence offered at trial, described a causal connection between noise exposure and hearing loss. For example, there was no reason given for the disproportionate hearing loss between the petitioner’s left and right ear. Even if the petitioner could show the noise levels met the statutory requirements, causation still needed to be established.

If a petitioner has suffered hearing loss and attributes it to workplace noise exposure, the amount of hearing loss must be established and documented. The petitioner has the burden of showing what noise levels the exposure totaled and proving the length of exposure to the noise levels. The petitioner must also establish a causative connection between the noise exposure and the petitioner’s hearing loss. If the petitioner can show documented hearing loss with documented noise exposure to the levels and length of time required in the statute, as well as establish a causative connection between the hearing loss and the noise exposure, then the petitioner will meet his burden of proof to establish a compensable claim for hearing loss due to noise exposure.

The recent hearing loss case we defended at arbitration with a favorable defense verdict is a good roadmap to follow when defending a hearing loss case due to noise exposure. We welcome you to contact any of our Heyl Royster attorneys specializing in Workers’ Compensation defense if you have any questions on this topic or any other workers’ compensation issues.



## ABOUT THE AUTHOR



### [Joe Moore](#)

#### **Associate in Peoria, IL**

- Workers' Compensation

***Joe has tried hundreds of Workers' Compensation cases and believes in strengthening the client's bargaining position by preparing every matter to be ready for trial, earning him a reputation as a "details" person by focused handling of cases.***

An Associate attorney practicing in central and southern Illinois, Joe has over a decade of experience handling Workers' Compensation claims. He has frequently taken cases to trial, appeared before the Illinois Workers' Compensation Commission, and handled cases as a petitioner's attorney representing injured workers.

Prior to joining Hey Royster, Joe served as an Assistant Attorney General II for the Office of the Illinois Attorney General, representing the State of Illinois in Workers' Compensation cases. While representing the State of Illinois, he handled a wide range of industries, including construction, laboratory, corrections, law enforcement, office workers, and peripatetic employees. Additionally, after appointment by the Governor of Illinois and confirmation by the Illinois Senate, Joe served on the Southern Illinois Economic Development Authority to promote industrial, commercial, and residential development, services, transportation, and recreational activities. The agency is authorized to issue bonds, enter into loans, contracts, agreements, and mortgages.

While in law school, Joe completed a Law School Independent Research & Writing project on the 2011 Illinois Workers' Compensation Act amendments. Also, Joe completed an externship with 5th District Illinois Appellate Court Judge Bruce Stewart.

Joe previously was elected and served his community as a Township Assessor and is a Certified Illinois Assessing Officer (CIAO).

Joe is a little league coach for his son's baseball team. He, his wife, and two sons enjoy traveling and hiking.

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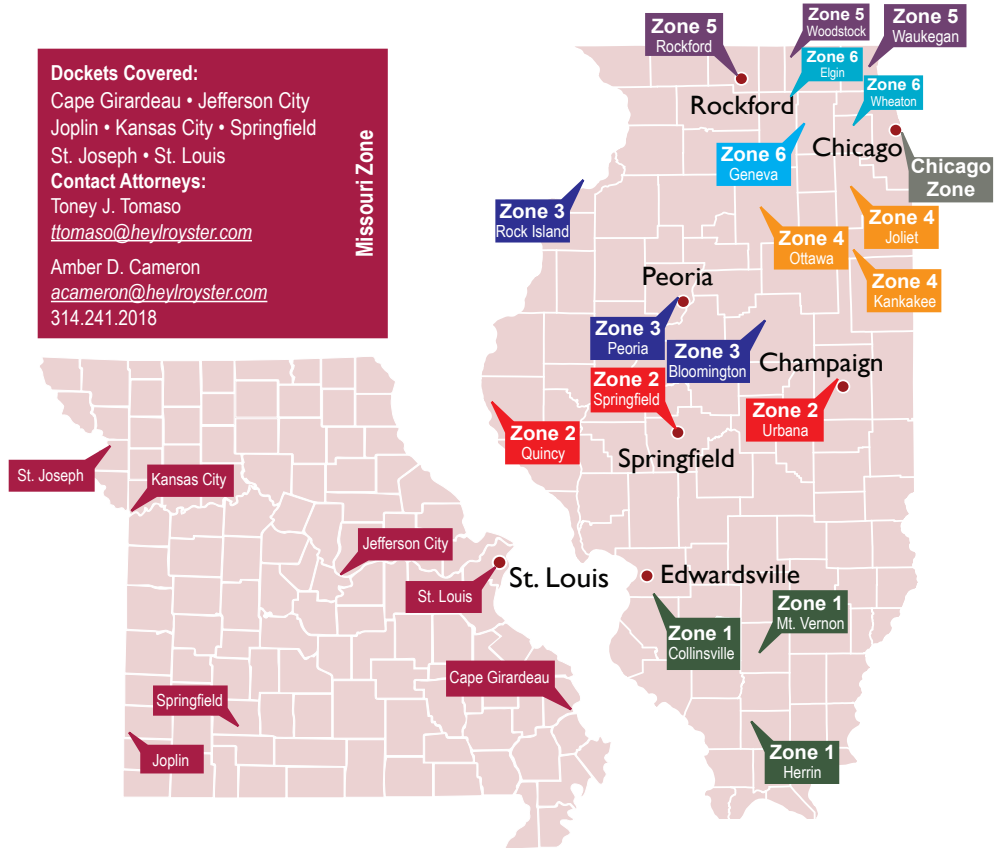
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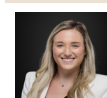
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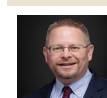


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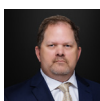
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