

# BELOW THE RED LINE

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

February 2023

## A WORD FROM THE PRACTICE CHAIR

Who is ready for Spring Break? I know it is just around the corner, so I hope your plans are either set or in high gear so that you can enjoy some rest and relaxation. If your plans include warmer weather, then on behalf of all of us, I will ask for you to please bring some of that warmth back with you and share it with all of us here. I should probably not complain as the last few months have provided us with some mild, winter weather. I even managed in the month of February, in central Illinois, to take my daughter out for a round of golf (her idea, really!). If I have now made the weather gods mad or jinxed us by mentioning a mild winter, I want to apologize.

I am looking forward to a few upcoming events. March Madness 2023, Spring Training and, most importantly, the Heyl Royster Claims Handling Seminar. In the immortal words of Jake and Elwood Blues (think Blues Brothers, the movie), "We are putting the band back together!" I will stop short and not call our upcoming claims seminar a "mission from God." But I can report it will be in person and it will fill your tank up with workers' compensation fuel to complete your mission of adjusting claims, defending your company from out-of-control employees, and assist you in moving your cases forward in a meaningful fashion. Oh, and cookies! There will be cookies at the seminar because who doesn't love cookies.

Over the past few months, the concept of TEAM has come up often. I have been giving it a great deal of thought recently. Being part of a team sometimes requires sacrifice. You do it for the betterment of the team and the goals you and the team have set for yourselves. Team requires you look past yourself, and your immediate desires or wants. It is our job at Heyl Royster to make sure we fit into your team concept and pull in the direction you ask of us. We take great pride in being called good teammates or an integral part of your team that you simply do not want to do without. For our insureds out there, we know you may, from time to time, need to change workers' compensation insurance carriers. The team at Heyl Royster make it our mission to make sure when you change carriers one of the thoughts you have is, can we continue to use our preferred and excellent attorneys at Heyl Royster. Establishing a long-lasting relationship and development of the team concept is vital to great outcomes. No one likes to feel like they are on an island. Having a team by your side to help guide and aid you in your everyday endeavors is a must. I want you to consider us that ally, that teammate. We may not wear the same uniform as you, but when we enter our appearance or you sign on with us as a client, we are here for you, and we promise to make your team better with a commitment to your goals and mission. At the end of the day, that is who we are at Heyl Royster.

OK. Soapbox speech over. Let's talk about this month's article. I am pleased to announce [Joe Moore](#) joined our team recently and is working out of our Peoria office under the excellent guidance and mentoring of [Jessica Bell](#). Joe has an abundance of workers' compensation experience and an abundance of energy that he has brought to the Heyl Royster team. We are excited to have him roll up his sleeves and get to work with our Heyl Royster family. Joe's topic this month is on the subject of what theory of permanency an injured worker is going to push for in a claim. Will it be PPD, a wage differential, a loss of occupation theory? Joe breaks down the recent case of *Haepf v. Illinois Workers' Compensation Comm'n*, 2022 IL App (1st) 210634 WC. In order to determine exposure in any one case and set your reserves just right, it is always best to know what direction the injured worker is likely going to push in, and what we can do to try and mitigate those damages.



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## FEATURE ARTICLE



### **DISTINGUISHING BETWEEN PERMANENT PARTIAL DISABILITY CASES: LOSS OF TRADE OR WAGE DIFFERENTIAL.**

By [Joseph Moore](#)

Unfortunately, there are times an employee will not be able to return to his/her job after medical treatment has concluded stemming from a work injury due to permanent restrictions that cannot be accommodated by the employer. In permanent partial disability (PPD) cases, it is important to understand the possible exposure for an employer.

Wage differential benefits are paid to a petitioner who demonstrates he/she is only able to obtain a new job that pays less than the pre-injury employment. Labor market surveys and reports prepared by vocational rehabilitation counselors can be used to show what a petitioner could earn, if petitioner has not yet obtained a new job at the time of trial. A wage differential award pays 66 2/3% of the difference between the amount petitioner earned pre-injury and post-injury. The benefits will be paid until the petitioner reaches 67 years old, or for five years, whichever is later in time. 820 ILCS 305/8(d)(1).

... Illinois courts have expressed a preference for wage differential awards, and have held that the Commission must issue a wage differential award when there is sufficient evidence that Petitioner has sustained a loss of earning capacity.

*Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶49.

PPD benefits for a "loss of trade" can be awarded to a petitioner who is unable to return to his/her prior job, but for factors discussed below, does not qualify for a wage differential award.

Recently, in *Haep v. Illinois Workers' Compensation Comm'n*, 2022 IL App (1st) 210634 WC, the Illinois Appellate Court reiterated the factors to be weighed when deciding to award a "loss of trade" or wage differential benefits.

The Illinois Workers' Compensation Act (the Act) allows a petitioner who has been found to have sustained a permanent partial disability to receive an award for either a wage differential or a "loss of trade." "Loss of trade" may be awarded at a percentage loss of the person as a whole for petitioner being unable to return to his/her prior line of work. 820 ILCS 305/8(1)-(2). For a "loss of trade" claim, the permanency award does not correspond to the body part injured, such as an arm value of 253 weeks under Section 8(e) of the Act. As an example, if a petitioner is unable to return to his/her prior job as a result of an arm injury, the "loss of trade" award will be for a loss of the person as a whole and will not be for the loss of the use of the arm. The purpose of a wage differential award is to compensate the petitioner for reduced earning capacity. *Haep v. Illinois Workers' Compensation Comm'n*, 2022 IL App (1st) 210634 WC, ¶62. To prove entitlement to a wage differential award, the court described a petitioner must show:

- (1) he is "partially incapacitated from pursuing his usual and customary line of employment" and
- (2) there is a "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 which he is earning or is able to earn in some suitable employment or business after the accident."

*Haep v. Illinois Workers' Compensation Comm'n*, 2022 IL App (1st) 210634 WC, ¶61.

The court in *Haep* described when a "loss of trade" or PPD award should be given:

... claimant is entitled to a PPD award based on a percentage-of-a-whole under three circumstances: (1) when his injuries do not prevent him from pursuing the duties of his employment but he is disabled from pursuing other occupations or is otherwise physically impaired; (2) when his "injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity;" or (3) when he suffers an "impairment of earning capacity" but he "elects to waive his right to recover under [8(d)(1)]."

*Id.* at ¶61.

In *Haep*, the court awarded petitioner 20% loss of the person as a whole under Section 8(d)2 because, while

petitioner did show he was partially incapacitated from pursuing the duties of his usual and customary line of employment, he failed to prove a diminished earning capacity. *Id.* at ¶164. The court did note the issue of whether a petitioner suffered a diminished earning capacity is not determined simply by comparing pre- and post-injury income. Instead, the court is to consider other factors, including the nature of the post-injury employment in comparison to wages the claimant can earn in a competitive job market. *Id.* at ¶167. In other words, consideration is given to whether the petitioner's ability to earn higher wages in the future has been diminished by the workplace injury. In *Haepf*, the court found no evidence of diminished earning capacity because petitioner was still working as a carpenter for his employer, who was accommodating his restrictions, and he was earning the same rate of pay he would have earned absent his injuries.

Special attention needs to be paid to determine if a petitioner potentially can prove a diminished earning capacity. A recent case Commission case shows how to limit exposure for a potential wage differential award. In *Credit v. American Red Cross*, 22 I.W.C.C. 0131 (April 11, 2022), respondent was able to show that despite petitioner's limited restrictions, he did not suffer a diminished earning capacity. Petitioner, due to his permanent work restrictions, was no longer able to work as a phlebotomist. However, petitioner did find work as a supervisor at Wal-Mart within his restrictions and there was no evidence of a loss of income. It is important to identify potential diminished earning capacity situations and, depending on the facts of the case, engage vocational rehabilitation services, or initiate a diligent job search plan of action.

Oftentimes, the monetary value of a case is less with a "loss of trade" award, compared to a wage differential award. To illustrate this point, a 50-year-old petitioner earns \$50,000.00 a year prior to an injury to her right leg that prevents her from returning to her prior work. This petitioner is found to have suffered a "loss of trade" and is awarded 40% loss of the person as a whole, which equals \$115,384.00 (PPD rate \$641.02 X 200 weeks). Now, if that same petitioner was awarded a wage differential, because she was unable to earn the same wage she did prior to the accident, she would likely receive substantially more compensation. If this same petitioner was able to find a job post-injury paying \$31,200.00 a year there is now a yearly reduction in earnings of \$18,800.00. Wage differential benefits pay 66 2/3% of the difference in wages until petitioner is 67 years old, or for five years, whichever is longer. 66 2/3% of the difference of \$18,800.00 equals \$12,533.21, and because petitioner is 50 years old, she would receive the benefits for 17 years. Benefits of

\$12,533.21 paid for 17 years totals \$213,064.57, which is substantially more than the \$115,384.00 for the "loss of trade." However, if petitioner was 62 years old, then she would only receive five years of benefits for a total of \$62,666.05, and if petitioner was younger than 50 years old at the time of injury, the wage differential award would be substantially higher. As you can see with this example, it is important to consider the petitioner's age and earning capacity when assessing the exposure for a possible wage differential case.



A thorough review of each case is important to ensure all avenues of reducing exposure are explored. One such avenue is to know if a petitioner is receiving other income, such as pension benefits. The Commission in *Krantz v. City of Rockford*, 23 I.W.C.C. 0021 (Jan. 12, 2023), recently upheld an arbitrator's award for "loss of trade" and denied the higher valued wage differential benefits due to, in part, petitioner receiving pension benefits. It was noted that claims involving "loss of trade" are often assessed higher disability values than injuries that result in petitioner returning to his/her job, because of the possibility of financial distress on petitioner. Similarly, in *Torrez v. Naylor Pipe*, 22 I.W.C.C. 0224 (June 22, 2022), it was noted the petitioner had applied for, and was receiving, social security disability as a factor weighing against a wage differential award, as it blunted any financial distress experienced by the petitioner. A pension, or other source of income, is appropriately considered to determine the potential financial distress of a petitioner. The more income that can be identified prior to a case going to trial, the less likely a petitioner will be awarded the typically higher valued wage differential award.

Please feel free to contact any of our workers' compensation attorneys should you have any questions on this topic or any other workers' compensation issues.



## ABOUT THE AUTHOR



**Joseph Moore**

Associate in Peoria, IL

*Joe has tried hundreds of workers' compensation cases, believing in strengthening the client's bargaining position by preparing every matter to be ready for trial, earning him a reputation as a "details" person and for 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 with workers' compensation claims.

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.



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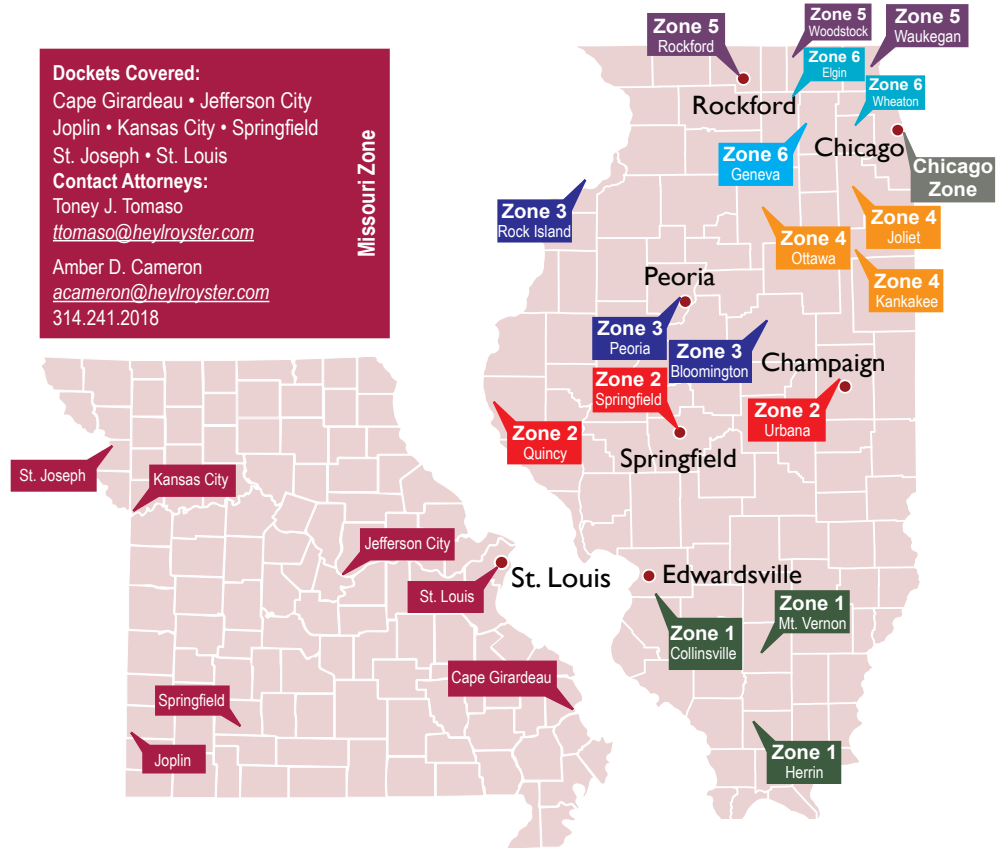
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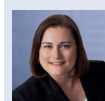
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