

# BELOW THE RED LINE

HEYL...  
ROYSTER

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

*A Newsletter for Employers and Claims Professionals*

*August 2016*

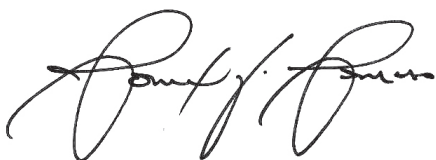
### A WORD FROM THE PRACTICE GROUP CHAIR

With summer flying by, I hope you are taking time to enjoy the nice warm weather. Before we know it, we will be shoveling snow! But before any snow hits the ground, we will be bringing a workers' compensation seminar to an area near you that will give practical tips and strategies for tackling issues affecting governmental employers. Details soon!

The theme of this month's newsletter is "Never judge a book by its cover." This old adage rings true with the appellate court's recent decision in *Chlada*. Certainly the "CliffsNotes" version of the *Chlada* decision would scare any employer or insurance adjuster: A claimant can be awarded 8(d)(1) wage differential benefits and permanent total disability (PTD) benefits at the same time.

Brad Elward and Dana Hughes of our Peoria office have dissected the case and explain how the court followed the law and applied it correctly. We want to ensure you do not simply rely on a case summary you find online, because we anticipate that claimants' attorneys will try to make more of this decision than truly exists. We want you to be informed and educated so no claimants' attorney can use this case to push you for more permanency than a claim is really worth.

On its face, this decision is a tough pill to swallow, which is why we have gone a bit farther to break this case down and explain the real impact of the decision on various scenarios you may face in your claims. You can rely on us to continue to guide you through the workers' compensation jungle in Illinois. If you have any questions about *Chlada* or anything else affecting your claims, please feel free to contact any one of our workers' compensation attorneys.



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### NEW CASE ON PPD PRESENTS OPPORTUNITY FOR MISUNDERSTANDINGS

The following provides an overview and assessment of the recent appellate court decision in *Chlada v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150122WC, issued July 8, 2016. The decision warrants discussion because on its face, it creates the impression that a claimant in a similar circumstance is entitled to more benefits than were actually awarded.

#### Case Fact Summary

The claimant sustained a compensable injury to his low back on July 15, 1999. As a result, he could not return to his pre-accident employment as a beer truck delivery driver for the employer, Burke Beverage. He did return to work for the employer after the accident, however, in its warehouse earning less than pre-accident wages. He was ultimately awarded weekly 8(d)1 wage differential benefits for life, calculated based on two thirds of what he would have been earning as a beer delivery truck driver less his post-accident earnings as a warehouseman.

While working as a warehouseman, the claimant sustained a compensable injury to his cervical spine in October of 2002. On January 13, 2003, the treating physician completely restricted him from work and he never returned. At the conclusion of medical treatment, including surgery, the treater released the claimant to return to work with permanent restrictions the employer did not accommodate. The claimant then contacted 1000 companies for job opportunities, but never secured any employment. The claimant was found to be permanently and totally disabled as a result of the cervical spine injury. (That claim was not part of the appeal in the instant case.) Permanent total disability benefits were awarded for life based on the claimant's wage as a warehouseman.

## HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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Editors, Brad Elward and Dana Hughes

### Court Ruling and Analysis

This is a case of first impression as to the interplay between wage differential benefits and PTD benefits. According to the court, the question is:

Whether a claimant may be entitled to collect both types of benefits simultaneously when his earning capacity is diminished by a work-related injury and he subsequently suffers a second work-related accident that renders him total unable to work.

The appellate court answered this question in the affirmative and upheld the claimant's wage differential award and reversed the Commission's determination that the wage differential award terminated when the claimant was no longer able to work due to the second injury. Moreover, the court found that the claimant was, at the same time, entitled to PTD benefits for his subsequent injury.

The case presented the following underlying question: (1) Did the claimant's entitlement to a wage differential end as of January 13, 2003, which was the time the Commission determined the claimant's PTD benefits commenced? The court concluded it did not, finding that a wage differential benefit does not terminate *unless* the claimant's disability ceased or lessened. The subsequent disabling injury did not end the prior disability.

The disability (*i.e.*, the reduced earning capacity) the claimant suffered as a result of the July 1999 back injury did not end merely because he suffered a second, more disabling work injury. The claimant's entitlement to wage differential benefits would end if and only if he later became able to earn the salary he formerly earned as a delivery truck driver. That never happened in this case.

*Chlada*, 2016 IL App (1st) 150122WC, ¶ 35.

The court further explained:

Here, the claimant suffered a diminished earning capacity due to the July 1999 work accident, which rendered him unable to work as a delivery

truck driver and forced him to work in the employer's warehouse at a lower salary. The fact that the claimant subsequently suffered an unrelated and even more disabling work injury to his neck did not alter the fact that his July 1999 back injury reduced his earning capacity. Once the claimant established an entitlement to wage differential benefits as a result of his July 1999 back injury, he was entitled to collect such benefits "for the duration of his disability."

*Id.*

To explain how the claimant could continue to receive a wage differential benefit while simultaneously receiving a PTD benefit, the court noted that the claimant suffered two economical disabilities:

The first economic disability is compensated by paying the claimant a wage differential benefit equal to 2/3 of the difference between what he was able to earn as a beer truck driver at the time of arbitration and what he was actually earning as a warehouseman at the time of arbitration (subject to the statutory cap in existence at the time, which was \$485.65 per week).

*Id.* ¶ 38.

The court also said:

The second economic disability is compensated by paying the claimant PTD benefits in the amount of 2/3 of the salary he was earning as a warehouseman at the time of the second injury subject to the statutory cap, which amounts to \$446.40 per week. *Id.*

Thus, the court concluded, "in order to be fully compensated under the Act for both of these work-related economic injuries, the claimant should receive both wage differential benefits of \$485.65 per week indefinitely, and PTD benefits of \$446.40 per week indefinitely." *Id.*

To better understand the appellate court's ruling, consider the case in this manner:

- The first injury resulted in the claimant's inability to return to his former employment

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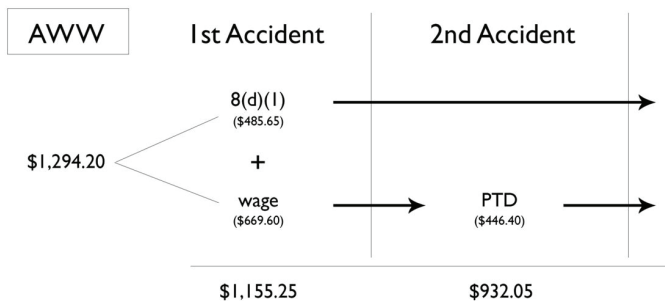
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and necessitated him accepting restricted work for less pay.

- As a result of his new employment, which paid a lower wage, he was entitled to a wage differential.
- Thus, as a result of his first work accident, to make him whole under the Act he received his new wage plus his wage differential rate.
- The second injury occurred in the course of his employment for the same employer in his restricted employment at his new wage.
- The PTD benefit replaces that lost wage.
- Together, the wage differential and the PTD benefit place the employee back at his original AWW, subject to the applicable max rates.

Hopefully this diagram provides an additional explanation:



The claimant receives the wage differential benefit to ensure he meets his first full wage as a beer truck driver and delivery person; and he receives the PTD benefit to protect his new wage at the restricted employment.

## Implications

There are a number of interesting aspects of this case to consider:

*(1) How will this scheme work if there are two employers or two carriers involved?*

If there had been two employers or two carriers in this case, the original employer or carrier would continue to

pay the wage differential award and the second employer or carrier would pay the adjusted PTD benefit award.

*(2) Would the appellate court have reached a different conclusion had the wage differential award been made pursuant to the recent amendments, which ends a wage differential at the end of five years or age 67, whichever is later?*

This is an unknown at this time. However, a strong argument can be made that the General Assembly's amendment means the employee should no longer receive the wage differential; the PTD benefit would then be based on the wage from the second employment.

*(3) What if the low back condition improved and the claimant could be shown to not be disabled or not disabled as severely, but yet he could not work because of the second injury?*

Here, a strong argument could be made that the wage differential benefit should be decreased. However, a petition to decrease that benefit would be subject to the time constraints of section 19(h) and may not, in certain cases, be available.

*(4) How will the petitioner's bar likely present this case?*

The problem for employers is the rather loose wording of the opinion, which on its face implies that the claimant can receive both a section 8(d)(1) wage differential award and a section 8(f) PTD award. On closer examination, however, the decision limits the PTD award to the amount of the employee's wage in his or her new employment, not the wage in the original employment. Thus, the decision does not award a full wage differential and a full PTD benefit based on the *original* AWW. Indeed, no employer should consider paying a PTD award on any amount above the wage earned in the second job.

Please feel free to contact any of our workers' compensation attorneys statewide should you have a question on this case or any other workers' compensation matter.

# HEYL ROYSTER WORKERS' COMPENSATION UPDATE

*August 2016*

*Editors, Brad Elward and Dana Hughes*

## **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.

## **Dana Hughes - Peoria Office**



Dana started in our Rockford office and moved to the Peoria office in 2015. She represents employers in workers' compensation claims. Dana frequently speaks and writes on Workers' Compensation law, including co-authoring *Southern Illinois University Law Journal's* "Survey of Illinois Law:

Workers' Compensation." She is a graduate of Northern Illinois University College of Law and received her undergraduate degree at NIU. In 2016, Dana was named to the Leading Lawyers *Emerging Lawyers* list.

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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.
7/15/10 to 7/14/11.....	1243.00.....	466.13.....
7/15/11 to 7/14/12.....	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.....

### 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
1/15/13 to 7/14/13.....	990.02.....
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.....

### 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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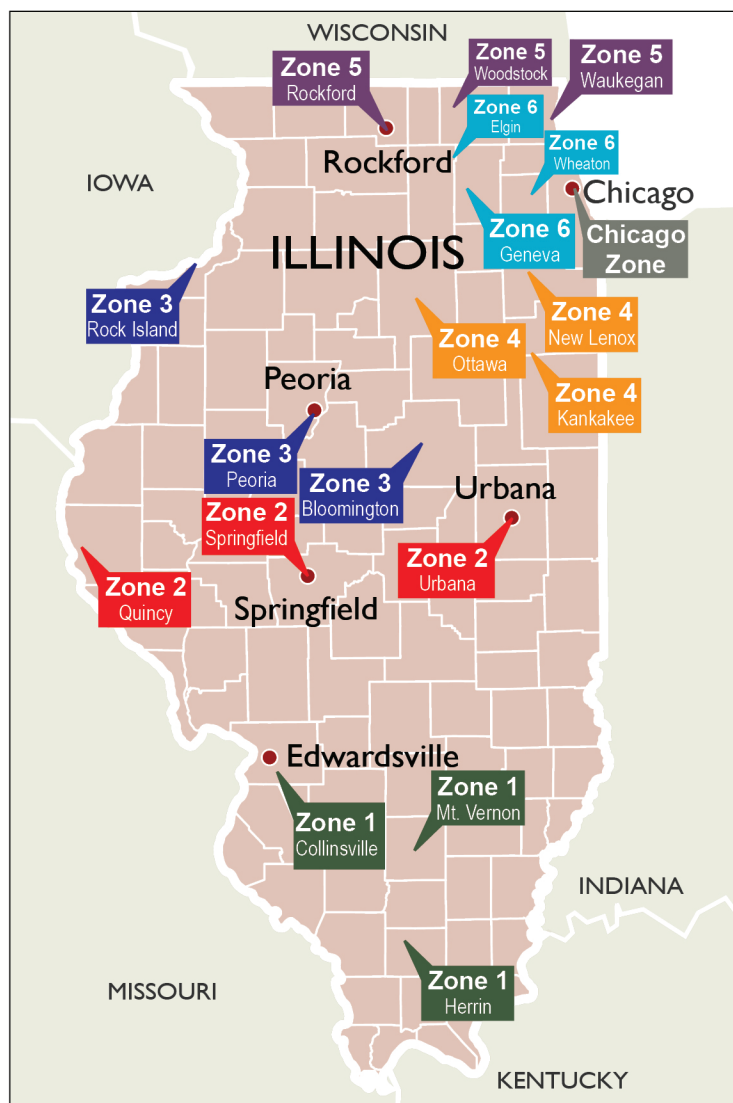
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