

# BELOW THE RED LINE

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

*A Newsletter for Employers and Claims Professionals*

*March 2016*

### A WORD FROM THE PRACTICE GROUP CHAIR

Spring has sprung and I hope you have found some time to experience some beautiful weather to get you out of those winter doldrums. In our first Newsletter this Spring, we are happy to invite you to our upcoming Workers' Compensation Claims Seminar on Thursday, May 19, 2016, in Bloomington, Illinois. Please note we are also holding an identical seminar in Chicago on June 16. We take great pride in tailoring our Seminar to provide our clients with timely educational materials and guidance on issues we face on the "battlefront." Simply put - this Seminar is for you. We very much want to see your bright, smiling faces and look forward to having you as our guests at the Seminar. Invitations with registration and agendas will be coming soon.

Our focus this month is on wage differential benefits. Joe Guyette, one of our Urbana partners, has outlined the *Jackson Park Hospital* case dealing with an interesting wage differential claim under Section 8(d)(1) of the Act. While ultimately not a good result for this employer, the case has potential to help employers as a whole. *Jackson Park Hospital* stands for the proposition that a worker's "earning capacity" determines whether a wage differential is proper, not just the employee's post-accident earnings. Joe does a great job of breaking down the facts of the case and providing you with some practice pointers on how this case can be used to defeat a large wage differential claim and allow the employer to better minimize permanency exposure.

Finally, we have included a short segment at the end of our newsletter discussing some of our workers' compensation lawyers' recent association activities, publications, and trial victories.

As always, your thoughts, comments, and questions are welcomed and appreciated. If you have ideas for issues you would like us to address in this newsletter in the future, I invite you to contact me via e-mail. Thank you and I look forward to seeing you this Spring at one of our seminars!



Toney J. Tomaso  
WC Practice Group Chair  
ttomaso@heyloyroyster.com



### *In this issue . . .*

Wage Differential Without a Change in Wages?

Firm Workers' Compensation Activities and Victories

# HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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Editors, Brad Elward and Dana Hughes

## WAGE DIFFERENTIAL WITHOUT A CHANGE IN WAGES?

### *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*

What is the difference between the amount a claimant is currently earning and the amount the claimant is capable of earning? According to the Appellate Court, Workers' Compensation Commission Division, the answer is, "a lot." In *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, the appellate court addressed whether a claimant can be entitled to a wage differential award, where the amount she is earning after the accident is the same as the amount she earned before the accident. In finding that the claimant was entitled to a wage differential award, the appellate court specifically distinguished between earnings and earning capacity.

### Introduction

In *Jackson Park Hospital*, the claimant, a stationary engineer, was injured when she attempted to gain entry into a locked office through a sliding glass window. The claimant was able to get into the office, but fell when she was attempting to get down from a desk below the window. The claimant had stepped onto a desk chair, which rolled away. Initially, the claimant noticed pain in her left lower back, through her left leg, and in her left knee. Ultimately, she underwent very extensive physical therapy and surgery to repair a torn meniscus. After the accident of October 25, 2005, and the surgery of April 29, 2006, the claimant was released to work in a sedentary position as of June 1, 2006. The employer was unable to accommodate those restrictions and the claimant remained off work.

While off work, the claimant underwent a functional capacity evaluation in February 2007, that placed her at the light physical demand level. It was undisputed that she was not going to be able to return to her regular position as a stationary engineer. The claimant was incapable of prolonged stooping, kneeling or squatting and was unable to perform any prolonged standing

or walking. Following the evaluation, her surgeon cleared her to return to work at the sedentary level on a permanent basis.

Shortly after her release, the employer returned the claimant to a light-duty position in its accounting department where her duties were clerical, including sorting, stapling, and filing papers. Although she experienced some discomfort in her left knee and low back, she performed this job for approximately three months, and the employer paid her at the same rate she had previously been paid as a stationary engineer.

In May of 2007, the claimant was transferred to the employer's health department, where she performed similar clerical duties. Once again, the claimant was being paid at the same rate she had earned as a stationary engineer.

Finally, in July of 2007, the claimant was transferred to the employer's security department, where she worked as a public safety officer. In this position, the claimant continued to experience pain in her low back and left knee, but she was able to complete the necessary job duties. The claimant continued working in this position, despite the fact that she did not meet necessary qualifications to hold that job. Further, the claimant continued to receive a pay rate of \$23.61 per hour, despite the fact that public safety officers started at a wage of \$8.34 per hour.

As the claimant continued in her work as a public safety officer, the parties agreed that it was time to resolve the claim. In preparation for trial, the parties agreed to stipulate that the claimant was working in a light-duty position, while maintaining the pay rate associated with the stationary engineer position. Further, the parties stipulated that public safety officers were normally paid between \$8 and \$10 per hour. According to the appellate court, the purpose of these stipulations was to avoid the need for witnesses to appear and testify in person.

While there was no dispute as to the content of these stipulations, the parties disagreed about the use of the stipulated facts. The claimant's attorney wanted the

## HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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stipulated facts to be admitted for all purposes, including for a potential wage differential award. The arbitrator ruled that the stipulated facts were relevant only for purposes of an award based upon a percentage loss of use of a person as a whole. The arbitrator concluded that the facts would not be relevant for a wage differential claim, because "she doesn't have a wage loss, at this time." *Jackson Park*, 2016 IL App 142431WC, ¶ 26.

At trial, the claimant testified that she was licensed as a stationary engineer, but she did not have any qualifications to work as a security guard. Specifically, the claimant established that her employer required security guards to complete a certification course and have a high school diploma. The claimant never took the certification course, and twice failed to pass the G.E.D. test.

The claimant also presented testimony from a vocational rehabilitation counselor. That counselor testified that security guard positions usually pay between \$9 and \$11 per hour, and that a rate of pay in excess of \$23 per hour was "not indicative of other security positions." *Id.* ¶ 28. The vocational counselor further explained that the claimant's lack of education and transferrable skills would make her suitable for employment as a cashier, gas station attendant, or parking lot attendant, with pay between \$8 and \$9 per hour.

The arbitrator found that the claimant was no longer capable of performing the necessary physical activities of a stationary engineer. The arbitrator further found that the claimant had not proven an impairment in earning capacity, "as she continues to earn the same rate of pay that she would have been earning as a [s]tationary [e]ngineer." *Id.* ¶ 29. The arbitrator rejected the claimant's request for a wage differential award, and instead provided the claimant with an award based on 40 percent loss of use of a person as a whole.

While the claim was on review, the employer terminated the claimant's employment. The claimant's attorney sought to re-open proofs to submit evidence of the termination. The Commission denied the motion, noting the claimant had already failed to prove a wage differential award, given the claimant was earning her

same wages when working in security under permanent light duty restrictions. According to the Commission, reopening proofs would give the claimant an unfair second chance at proving a wage differential award.

The Commission affirmed and adopted the arbitrator's decision and the claimant appealed to the circuit court, additionally arguing that the Commission incorrectly refused to reopen proofs and that the arbitrator erred in limiting the use of the factual stipulation of the parties at trial.

The circuit court held that the claimant should have received a wage differential award and remanded the case to the Commission for a new award to be issued. On remand, the Commission "found no evidence in the record that warranted altering its prior decision." Despite that finding, the Commission awarded a wage differential of \$389.60 per week based on two-thirds of the difference between the stationary engineer wages of \$23.61 per hour and the rate of \$9 per hour, which represented the claimant's current earning capacity. The employer appealed the Commission's new decision, which was affirmed by the circuit court. The employer then appealed to the appellate court.

### Appellate Court Decision

The appellate court initially examined whether a wage differential award is appropriate, rather than an award based on a percentage loss of a person. In doing so, the court stated "the crucial issue in the present case is determining which type of PPD award is appropriate is whether the claimant has suffered an impairment of her 'earning capacity.'" *Id.* ¶ 42. The court recognized the Illinois Supreme Court had previously held that "although wages are indicative of earning capacity, they are not necessarily dispositive." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 531 (2006). The appellate court concluded that "whether the claimant has sustained an impairment of earning capacity cannot be determined by simply comparing pre- and post-injury income," but rather the analysis requires "consideration of other factors, including the nature of the post-injury employment in comparison to wages the claimant can

## HEYL ROYSTER WORKERS' COMPENSATION UPDATE

March 2016

Editors, Brad Elward and Dana Hughes

earn in a competitive job market." *Jackson Park*, 2016 IL App (1st) 142431WC, ¶ 45. The court concluded the Commission failed to properly evaluate the claimant's "earning capacity" by relying only on her actual wages after the accident. The appellate court also found that the Commission abused its discretion in limiting the admission of the stipulation regarding wages.

In explaining its rationale for requiring more than an examination of post-accident wages to evaluate earning capacity, the court explained that, if post-accident wages were the sole consideration, "an injured worker could be denied a wage differential award simply because the employer pays the injured worker an inflated wage in an employer-controlled job that does not otherwise exist in the labor market and which may be temporary in duration." *Id.* ¶ 51. The court dismissed the employer's argument that failing to consider post-accident wages could result in a situation where wage differential benefits are awarded where there is no change in wages earned. An impairment in earning capacity is the necessary element, held the court, and a wage differential award would be appropriate if there was evidence of such an impairment, even if the claimant's wages remained the same.

In a footnote to its decision, the court described the potential benefit of its analysis to employers. Specifically, the appellate court explained how lower wages after an accident might not be sufficient to establish a wage differential award:

Although this case involves a claim where the claimant's wages were artificially inflated, we also note that an employer who believes that a claimant's current earnings are artificially low should be allowed to present evidence that those earnings do not represent the claimant's true earning capacity. Such evidence should be considered by the Commission to determine whether the claimant is entitled to a wage differential award and, if so, in what amount.

*Id.* ¶ 51, FN 1.

While the holding in this case does not represent a revolutionary change in the evidence necessary to establish a wage differential award, employers will need to present additional evidence of a claimant's earning capacity especially when the claimant is earning pre-accident wages in a different, post-accident job.

### Practice Pointers

From an employer's perspective, this case can be used as both a shield and a sword. Unfortunately, this decision also leaves a number of unanswered questions about when a claimant's post-accident wages are truly indicative of earning capacity, and when they are not. Regardless of the facts of your case, it is necessary to consider the applications of this decision whenever a wage differential award may be possible.

The most important outcome of this decision is that it will likely afford claimants a stronger argument for a wage differential award when he or she has not returned to pre-accident job duties, even if the claimant's wages remain the same after the accident. A claimant could rely upon the opinions of a vocational expert to establish that permanent restrictions will make it impossible to return to his or her regular job and that a suitable job would result in a lower wage rate.

To counter this testimony, the employer would need to have its own vocational expert to establish that the post-accident wages are consistent with the claimant's capabilities. While retaining a vocational expert obviously represents an additional cost of defense, those expenses could be dwarfed by the present cash value of a wage differential award. In *Jackson Park Hospital*, the initial wage differential award came to nearly \$400 per week. It would not take too many months of those benefits to pay for an appropriate expert, along with any costs associated with the expert's deposition.

Employers should rely on the court's logic in this case to reduce its exposure for a wage differential award. If a claimant had been making \$1,000 per week, and finds a new job at minimum wage, the employer could argue that the new wage is not indicative of the claimant's earning capacity. Once again, this type of argument

## HEYL ROYSTER WORKERS' COMPENSATION UPDATE

March 2016

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would require a vocational expert to establish that the claimant is "under-employed." A successful argument would probably require identifying several jobs in the claimant's geographic region, within the claimant's physical abilities and significantly higher wages than the claimant's present post-accident employment. An employer may be able to take a wage differential off the table even where the claimant has not earned at or near his pre-accident wages since the accident.

This decision does not provide much guidance for when to take a closer look at whether a claimant's post-injury wage is truly inflated, as opposed to being justified by unique skills or experience. There was no dispute in *Jackson Park Hospital* that the claimant was being overpaid as a security guard. The claimant continued to make more than \$23 per hour, while all of her colleagues in the same position were making between \$8 and \$10 per hour. An inconsistency may be more difficult to determine where the claimant has a unique job title, a one-of-a-kind position or has unique managerial responsibilities. If the claimant in *Jackson Park Hospital* had been "promoted" to the position of Security Officer Manager, an assessment of her wage rate would be more difficult, thus likely creating more difficulty in proving entitlement to wage differential benefits. The court's concern that an employer could temporarily pay the claimant an inflated wage to avoid a wage differential award would still be valid, but it would be much more difficult to establish the employer's intent to purposefully overpay the claimant to avoid wage differential exposure. As the Commission and courts get additional opportunities to evaluate this issue, it should become easier to identify where a new job with an old wage rate will be scrutinized.

Under the right set of facts, *Jackson Park Hospital* can be used as a weapon. For example, there are instances where a claimant cannot return to his former employment and after a self-directed job search secures a "sham job" (perhaps one making minimum wage) to increase the value of the potential wage differential award. Arguably under *Jackson Park Hospital* the earnings from such a sham job would not represent the claimant's true earning

capacity, and thus, fail to support a wage differential claim.

If you have any questions regarding the potential impacts of this case, or strategies for any wage differential matter, you can always contact any of the workers' compensation attorneys at Heyl Royster. This is an area of law that could see rapid changes in the next year or two and it will be critical to handle these claims in the context of the latest law and decisions.



**Joseph Guyette**

*Urbana Office*

Joe concentrates his practice in the areas of workers' compensation defense, professional liability and employment matters. Joe has taken several bench and jury trials to verdict, and has drafted and argued numerous dispositive motions. Joe has handled workers' compensation arbitration hearings at venues throughout the state, and has argued multiple cases before the Workers' Compensation Commission.

### FIRM WORKERS' COMPENSATION ACTIVITIES AND VICTORIES

To be more successful in defending your claims and working with you to improve your workplace culture, the attorneys at Heyl Royster are actively engaged in leadership roles, research and writing on complex and pressing issues, and educating the workers' compensation bar. Over the past year, several of our workers' compensation lawyers have played significant leadership roles in various organizations devoted to workers' compensation. **Brad Ingram** is the President of the College of Workers' Compensation Lawyers. **Joe Guyette** is a Member of the ISBA Workers' Compensation Section Council. Through their involvement, Heyl Royster remains at the forefront of national and statewide workers' compensation trends and legislation.

We are contributing to the legal authority in Illinois workers' compensation. **Bruce Bonds** and **Kevin Luther**



## HEYL ROYSTER WORKERS' COMPENSATION UPDATE

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continue to update their comprehensive legal treatise on Illinois workers' compensation. **Brad Elward** authored two chapters for the Illinois Institute of Continuing Legal Education on Workers' Compensation Appeals and Workers' Compensation Procedure and Review. Along with **Dana Hughes**, Elward also published an article discussing the enforcement of Commission awards in the Circuit Court and the applicable interest rate due on awards in Southern Illinois University's Law Review. **Brad Peterson** and **Jessica Bell** contributed to the Illinois Association of Defense Counsel's *Quarterly* publication.

In addition to writing, we were asked to educate our peers and clients in various forums. **Joe Guyette** and **Brad Peterson** presented at the ISBA's Workers' Compensation Section Council's Advanced Workers' Compensation Seminar. **John Flodstrom** presented on general workers' compensation issues to the Illinois Association of Electric Cooperatives. **Jessica Bell** and **Dana Hughes** discussed unique claims handling issues for the trucking industry at the Midwest Truckers' Association Annual Truck Show. **Craig Young, Bruce Bonds, Kevin Luther, Jim Manning, Brad Elward** and **Brad Peterson** also spoke at governmental workers' compensation programs presented to various local governmental entities in Springfield and Naperville.

**Brad Elward** presented a talk on workers' compensation appeals for a group of attorneys and adjusters at a Sterling Educational Services seminar and spoke on Social Security Disability effects in workers' compensation at a National Business Institute event. **Vince Boyle** and **Joe Guyette** spoke at the Sterling Educational Services seminar, speaking on settlement and return to work issues and injuries while working at home, respectively. **Joe Guyette** also spoke at the ISBA Annual Workers' Compensation seminar on the compensability of psychological injuries.

This past year also saw many successes at trial and we wanted to share just a select few of those results. In a very difficult claim involving a quadriplegic, **John Flodstrom** successfully defeated the claimant's request for an additional \$430,000 for services and home modifications in addition to stipulated permanent total

disability benefits. The arbitrator agreed with John that additional services were worth \$145,000. **Vince Boyle** prevailed in a disputed chemical exposure claim and also defeated a claim involving an excavator by proving that the claimant was an independent contractor. **Brad Antonacci** defeated a claimant's request for permanent total disability benefits at trial in favor of a 15 percent loss of use of the person. **Brett Siegel** successfully defended a claim involving an altercation between the claimant and a third party. There, the arbitrator awarded initial medical treatment, but denied claimant's request for TTD, additional medical benefits and permanency.

## ILLINOIS WORKERS' COMPENSATION RATES

<b>PEORIA</b> <b>Craig Young</b> cyoung@heyloyroster.com (309) 676-0400	<b>CHICAGO</b> <b>Kevin Luther</b> kluther@heyloyroster.com (312) 853-8700	<b>EDWARDSVILLE</b> <b>Toney Tomaso</b> ttomaso@heyloyroster.com (618) 656-4646	<b>ROCKFORD</b> <b>Kevin Luther</b> kluther@heyloyroster.com (815) 963-4454	<b>SPRINGFIELD</b> <b>Dan Simmons</b> dsimmons@heyloyroster.com (217) 522-8822	<b>URBANA</b> <b>Bruce Bonds</b> bbonds@heyloyroster.com (217) 344-0060
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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.

# WORKERS' COMPENSATION PRACTICE GROUP



## Practice Group Chair

Toney Tomaso

[ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)

### Peoria Office



#### Contact Attorney:

**Craig Young**

[cyoung@heyloyroyster.com](mailto:cyoung@heyloyroyster.com)



Bradford Ingram

[bingram@heyloyroyster.com](mailto:bingram@heyloyroyster.com)



James Manning

[jmanning@heyloyroyster.com](mailto:jmanning@heyloyroyster.com)



Brad Elward

[belward@heyloyroyster.com](mailto:belward@heyloyroyster.com)



Dana Hughes

[dhughes@heyloyroyster.com](mailto:dhughes@heyloyroyster.com)



Jessica Bell

[jbelle@heyloyroyster.com](mailto:jbelle@heyloyroyster.com)



Vincent Boyle

[vboyle@heyloyroyster.com](mailto:vboyle@heyloyroyster.com)

### Chicago Office



#### Contact Attorney:

**Kevin Luther**

[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)



Brad Antonacci

[bantonacci@heyloyroyster.com](mailto:bantonacci@heyloyroyster.com)



Lynsey Welch

[lwelch@heyloyroyster.com](mailto:lwelch@heyloyroyster.com)



Bide Akande

[bakande@heyloyroyster.com](mailto:bakande@heyloyroyster.com)



Steven Getty

[sgetty@heyloyroyster.com](mailto:sgetty@heyloyroyster.com)

### Edwardsville Office



#### Contact Attorney:

**Toney Tomaso**

[ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)



Amber Cameron

[acameron@heyloyroyster.com](mailto:acameron@heyloyroyster.com)

### Rockford Office



#### Contact Attorney:

**Kevin Luther**

[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)



Brad Antonacci

[bantonacci@heyloyroyster.com](mailto:bantonacci@heyloyroyster.com)



Lynsey Welch

[lwelch@heyloyroyster.com](mailto:lwelch@heyloyroyster.com)



Lindsey D'Agnolo

[ldagnolo@heyloyroyster.com](mailto:ldagnolo@heyloyroyster.com)



Steven Getty

[sgetty@heyloyroyster.com](mailto:sgetty@heyloyroyster.com)

### Springfield Office



#### Contact Attorney:

**Daniel Simmons**

[dsimmons@heyloyroyster.com](mailto:dsimmons@heyloyroyster.com)



John Langfelder

[jlangfelder@heyloyroyster.com](mailto:jlangfelder@heyloyroyster.com)



Jessica Bell

[jbelle@heyloyroyster.com](mailto:jbelle@heyloyroyster.com)



Brett Siegel

[bsiegel@heyloyroyster.com](mailto:bsiegel@heyloyroyster.com)

### Urbana Office



#### Contact Attorney:

**Bruce Bonds**

[bbonds@heyloyroyster.com](mailto:bbonds@heyloyroyster.com)



John Flodstrom

[jflodstrom@heyloyroyster.com](mailto:jflodstrom@heyloyroyster.com)



Bradford Peterson

[bpeterson@heyloyroyster.com](mailto:bpeterson@heyloyroyster.com)



Joseph Guyette

[jguyette@heyloyroyster.com](mailto:jguyette@heyloyroyster.com)



Toney Tomaso

[ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)



# WORKERS' COMPENSATION GROUP

## "WE'VE GOT YOU COVERED!"

**Contact Attorney:**

Kevin J. Luther  
[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)  
312.971.9807

Chicago Zone

**Dockets Covered:**

Elgin • Geneva • Wheaton

**Contact Attorney:**

Kevin J. Luther  
[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)  
815.963.4454

Zone 6

**Dockets Covered:**

Rockford • Waukegan • Woodstock

**Contact Attorney:**

Kevin J. Luther  
[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)  
815.963.4454

Zone 5

**Dockets Covered:**

Kankakee • New Lenox • Ottawa

**Contact Attorney:**

Kevin J. Luther  
[kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)  
815.963.4454

Zone 4

**Dockets Covered:**

Bloomington • Rock Island • Peoria

**Contact Attorney:**

Craig S. Young  
[cyoung@heyloyroyster.com](mailto:cyoung@heyloyroyster.com)  
309.676.0400

Zone 3

**Dockets Covered:**

Quincy • Springfield • Urbana

**Contact Attorney:**

Bruce L. Bonds  
[bbonds@heyloyroyster.com](mailto:bbonds@heyloyroyster.com)  
217.344.0060

Zone 2

**Dockets Covered:**

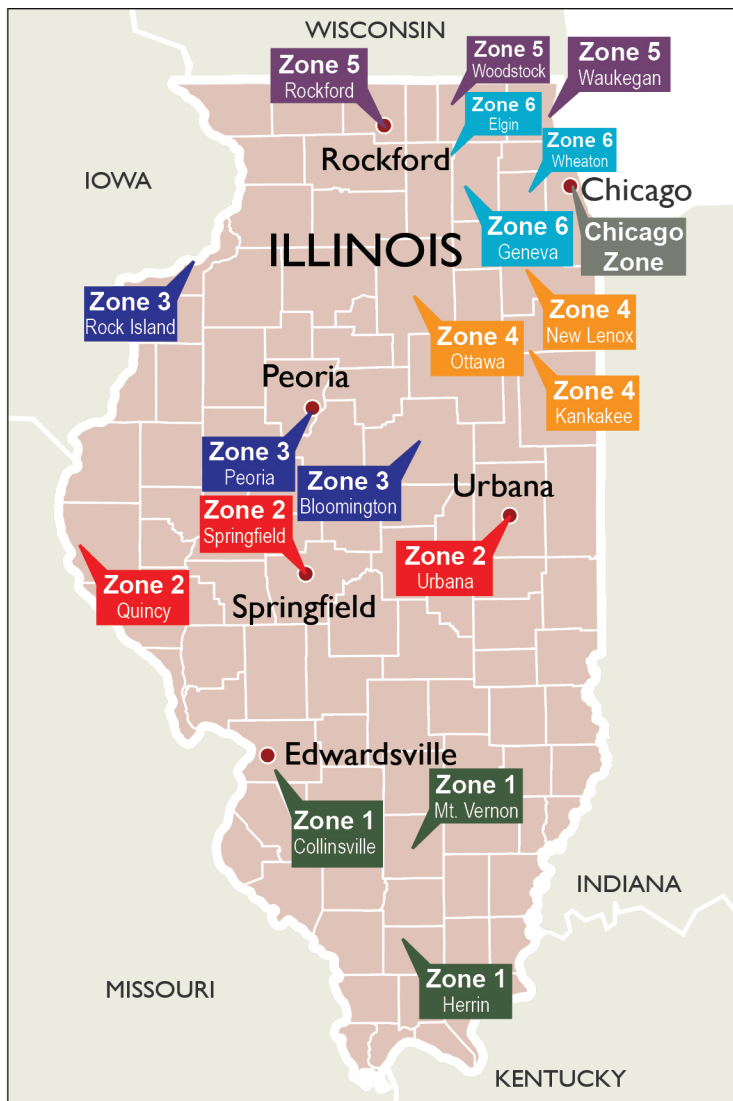
Collinsville • Herrin • Mt. Vernon

**Contact Attorneys:**

Toney J. Tomaso  
[ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)  
618.656.4646

Zone 1

### ILLINOIS ZONE MAP



### Statewide Workers' Compensation Contact

**Contact Attorney:**

Toney Tomaso - [ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)  
217-344-0060

### Statewide Appellate

**Contact Attorney:**

Brad A. Elward - [belward@heyloyroyster.com](mailto:belward@heyloyroyster.com)  
309-676-0400

### State of Missouri

**Contact Attorney:**

Toney Tomaso - [ttomaso@heyloyroyster.com](mailto:ttomaso@heyloyroyster.com)  
217-344-0060

### State of Wisconsin

**Contact Attorney:**

Kevin J. Luther - [kluther@heyloyroyster.com](mailto:kluther@heyloyroyster.com)  
815-963-4454

### Jones Act Claims

**Contact Attorney:**

Ann Barron - [abarron@heyloyroyster.com](mailto:abarron@heyloyroyster.com)  
618-656-4646

### OFFICE LOCATIONS

**Peoria**

300 Hamilton Blvd.  
PO Box 6199  
Peoria, IL 61601  
309.676.0400

**Chicago**

33 N. Dearborn St.  
Seventh Floor  
Chicago, IL 60602  
312.853.8700

**Edwardsville**

105 W. Vandalia St.  
Mark Twain Plaza III  
Suite 100  
PO Box 467  
Edwardsville, IL 62025  
618.656.4646

**Rockford**

120 W. State St.  
Second Floor  
PO Box 1288  
Rockford, IL 61105  
815.963.4454

**Springfield**

3731 Wabash Ave.  
PO Box 9678  
Springfield, IL 62791  
217.522.8822

**Urbana**

102 E. Main St.  
Suite 300  
PO Box 129  
Urbana, IL 61803  
217.344.0060

Below is a sampling of our practice groups highlighting a partner who practices in that area – For more information, please visit our website  
[www.heyloyster.com](http://www.heyloyster.com)



**Appellate Advocacy**

Craig Unrath  
[cunrath@heyloyster.com](mailto:cunrath@heyloyster.com)



**Arson, Fraud and First-Party Property Claims**

Dave Perkins  
[dperkins@heyloyster.com](mailto:dperkins@heyloyster.com)



**Business and Commercial Litigation**

Tim Bertschy  
[tbertschy@heyloyster.com](mailto:tbertschy@heyloyster.com)



**Business and Corporate Organizations**

Deb Stegall  
[dstegall@heyloyster.com](mailto:dstegall@heyloyster.com)



**Civil Rights Litigation/Section 1983**

Keith Fruehling  
[kfruehling@heyloyster.com](mailto:kfruehling@heyloyster.com)



**Class Actions/Mass Tort**

Patrick Cloud  
[pcloud@heyloyster.com](mailto:pcloud@heyloyster.com)



**Construction**

Mark McClenathan  
[mmcclenathan@heyloyster.com](mailto:mmcclenathan@heyloyster.com)



**Employment & Labor**

Brad Ingram  
[bingram@heyloyster.com](mailto:bingram@heyloyster.com)



**Governmental**

John Redlingshafer  
[jredlingshafer@heyloyster.com](mailto:jredlingshafer@heyloyster.com)



**Insurance Coverage**

Jana Brady  
[jbrady@heyloyster.com](mailto:jbrady@heyloyster.com)



**Liquor Liability/Dramshop**

Nick Bertschy  
[nbertschy@heyloyster.com](mailto:nbertschy@heyloyster.com)



**Long Term Care/Nursing Homes**

Mike Denning  
[mdenning@heyloyster.com](mailto:mdenning@heyloyster.com)



**Mediation Services/Alternative Dispute Resolution**

Brad Ingram  
[bingram@heyloyster.com](mailto:bingram@heyloyster.com)



**Product Liability**

Rex Linder  
[rlinder@heyloyster.com](mailto:rlinder@heyloyster.com)



**Professional Liability**

Renee Monfort  
[rmonfort@heyloyster.com](mailto:rmonfort@heyloyster.com)



**Railroad Litigation**

Steve Heine  
[sheine@heyloyster.com](mailto:sheine@heyloyster.com)



**Toxic Torts & Asbestos**

Lisa LaConte  
[lilaconte@heyloyster.com](mailto:lilaconte@heyloyster.com)



**Trucking/Motor Carrier Litigation**

Matt Hefflefinger  
[mhefflefinger@heyloyster.com](mailto:mhefflefinger@heyloyster.com)



**Workers' Compensation**

Toney Tomaso  
[ttomaso@heyloyster.com](mailto:ttomaso@heyloyster.com)



Scan this QR Code  
for more information about  
our practice groups and attorneys

**Peoria**

300 Hamilton Boulevard  
PO Box 6199  
Peoria, IL 61601  
309.676.0400

**Chicago**

33 N. Dearborn Street  
Seventh Floor  
Chicago, IL 60602  
312.853.8700

**Edwardsville**

105 West Vandalia Street  
Mark Twain Plaza III  
Suite 100  
PO Box 467  
Edwardsville, IL 62025  
618.656.4646

**Rockford**

120 West State Street  
PNC Bank Building  
2nd Floor  
PO Box 1288  
Rockford, IL 61105  
815.963.4454

**Springfield**

3731 Wabash Ave.  
PO Box 9678  
Springfield, IL 62791  
217.522.8822

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Suite 300  
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Urbana, IL 61803  
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