

BELOW THE RED LINE

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

June 2024

A WORD FROM THE PRACTICE CHAIR

Summer 2024 is underway, and I hope you are enjoying the extended daylight hours. Personally, I love being able to go for a walk after dinner, weather permitting, to stretch my legs and soak in what I miss while sitting in an office for much of the day. Don't get me wrong, when it is 95 degrees with high humidity, I am very grateful that I work indoors where air conditioning is plentiful. My hat is off to those amazing people who work outdoors in the summer heat and the great companies that employ them and keep our country running smoothly.

With the Fourth of July approaching, many of you are likely making plans with family and friends. Please enjoy stepping away from the office or computer and celebrating all the wonderful aspects of life in America and how special it really is. Nothing is better than watching fireworks light up the night sky to the sound of the 1812 Overture. Enjoy!

One of the many advantages of working with Heyl Royster is our deep bench of skilled attorneys. Our seven offices boast over twenty-five attorneys focusing on workers' compensation, either part-time or full-time. We are active throughout the Midwest, covering every corner of Illinois and Missouri. Our experience with the various Arbitrators, Commissioners, and ALJs is unparalleled. Our collective attorney knowledge and familiarity with these jurists provide valuable insight into how they may view an issue

or their likely recommendations which in turn allows you to accurately set values and reserves on your claims, and frankly what to expect next. It is our job to listen, learn, and absorb how these judges operate in various situations and then share that information with our Heyl Royster practice group and our clients. Even when judges are reassigned, our practice group collaborates to stay informed about what to expect from any new judge assigned to our case. We then share this valuable knowledge with one another and you. This is yet another example of how our collective strength and teamwork make you more effective and successful.

This month's newsletter is authored by [Steve Getty](#), who works in our Rockford office under the guidance of [Kevin Luther](#). Steve has proven to be an excellent attorney and, in my experience, a reliable associate who consistently delivers high-quality results. One of Steve's standout qualities, likely developed under Kevin Luther's mentorship, is his fighting spirit and tenacity. This month, Steve discusses strategies and methods to put into practice when combating a petitioner-friendly theory favored by many arbitrators here in Illinois - "loss of occupation." Based on case law, Steve talks about various avenues to explore to continue the fight and resist the notion that workers who suffer a loss of occupation should automatically be entitled to a windfall. After all, folks, we are in Illinois, and we need to be prepared to fight within the law in order to protect our clients and friends.

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The “Loss of Occupation” Theory: Effective Defense Strategies



BY STEVEN GETTY

We’ve all been there: a new claim arrives in your inbox, initially a compensable shoulder strain. However, as treatment progresses, imaging is taken, and complaints persist, the shoulder strain has escalated into a rotator cuff tear requiring multiple surgeries. Eventually, the employee is issued permanent restrictions, preventing a return to their original job duties and prompting a demand of 60% person as a whole permanent disability.

The injured worker’s attorney argues that, given the permanent job restrictions confirmed by your IME physician, the employee is unable to return to their prior occupation. Fortunately, despite the restrictions, the worker has found new employment and is earning the same wages. The demand is met with resistance because it is excessive in comparison to similar medical claims with a full release to work valued around 20% person-as-a-whole and would also result in a windfall for the Petitioner.

Thanks to Section 8(d)(2) of the Illinois Workers’ Compensation Act, claimants and their attorneys have often attempted to recover significant settlements in similar factual situations—however, a highly underutilized Second District Appellate Court case, *CDW Corp. v. Illinois Workers’ Comp. Comm’n*, 2021 IL App (2d) 200562WC-U provides a valuable tool for workers’ compensation defense attorneys to defend against these windfall demands when used strategically and effectively.

Section 8(d)(2) of the Illinois Workers’ Compensation Act provides the framework for injured workers to assert a theory of recovery in one of three ways: First, if the employee sustains injuries as a result of a work accident which does not incapacitate them from pursuing the duties of their employment but would disable them from pursuing other suitable occupations or have otherwise resulted in physical impairment. Second, if the injuries partially incapacitate the employee from pursuing the duties of their usual and customary line of employment but do not result in an impairment of earning capacity. Or third, the employee’s injuries have resulted in an impairment of earning capacity, and they elect to forego recovery under a wage differential theory. 820 ILCS 305/8(d)(2). In the example above, the employee is partially incapacitated from pursuing the duties of his usual and customary line of employment but does not experience impairment of earning capacity. If proven, the injured employee can recover pursuant to Section 8(d)(2) on a person-as-a-whole (500 weeks) basis, significantly increasing the exposure and award or settlement value of the claim despite the initial nature of the injury. *Id.*

On its face, it appears as though this section of the Act provides relatively simple elements to allow injured workers to provide their case under the “loss of occupation” theory. However, in recent years, the Illinois Appellate Court has highlighted a necessary evidentiary component for recovery under Section 8(d)(2).

In *CDW Corp. v. Illinois Workers' Comp. Comm'n*, the appellate court held that because the Commission found the claimant's work restrictions precluded her from returning to her usual and customary line of employment, Section 9110.10 of the Commission's rules required a vocational rehabilitation assessment be performed. 2021 IL App (2d) 200562WC-U, ¶ 1. In *CDW Corp.*, the causal relationship between the employee's back surgery and workplace injury was undisputed. *Id.* ¶ 22. Following the surgery, the treating doctor imposed a 10-pound lifting restriction, and the employer's IME physician agreed with the restriction imposed. *Id.* ¶¶ 14-15. The court acknowledged that vocational rehabilitation was an issue in the case and was previously requested by the employee. *Id.* ¶ 27. Testimony from a vocational rehabilitation counselor and a vocational expert was presented at arbitration by the employee. *Id.* Both agreed that the injured worker would benefit from formal vocational rehabilitation in order to prepare for and find quality employment. *Id.* In short, the appellate court held that because the injured worker was unable to resume the regular duties she was engaged in at the time of the injury, the employee was required to undergo a vocational assessment pursuant to Section 9110.10 of the Commission Rules. *Id.* ¶ 28. Consequently, the Appellate Court reinstated the Commission's denial of permanent total disability benefits (by reversing the portion of the circuit court's decision that reversed the Commission's reversal of the arbitrator's award of PTSD benefits). It remanded the case to the Commission for a vocational rehabilitation assessment. *Id.* ¶ 29.



Section 9110.10(a) of the Commission's rules provides:

"An employer's vocational rehabilitation counselor, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care and, if appropriate, vocational rehabilitation required to return the injured worker to employment. The vocational rehabilitation assessment is required

when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he or she was engaged in at the time of the injury." 50 Ill. Adm. Code 9110.10(a) (2016).

Often, employees proceed to trial and fail to admit any evidence of a request for a vocational assessment or completion of one pursuant to Rule 9110.10. Instead, they rely on the medical records demonstrating a permanent restriction and their own testimony. Upon initial review, the *CDW Corp.* case requires the employer to provide a vocational assessment, thereby assisting the injured worker in proving their claim for a loss of occupation. However, with an effective strategy and a close reading of Rule 9110.10, *CDW Corp.* can be utilized by employers and their attorneys effectively.

Rule 9110.10 specifically provides that the employer's vocational rehabilitation counselor prepare the vocational assessment. 50 Ill. Adm. Code 9110.10(a) (2016). Initially, this can alleviate any concerns of an employee relying upon an expert they have hired to offer a favorable opinion. Instead, this gives the employer's attorney the opportunity to carefully consider who they utilize and retain as a vocational counselor to gather fair, objective, and data-driven information. Strategically, this work should be done in advance, much like a records review, providing the vocational specialist with the requisite information (job history, educational history, certifications, and job training) to prepare an initial report. If this report is favorable, the injured worker and their attorney should then be consulted for continued assessment pursuant to the rule.

It is imperative that your defense strategy not only consider the implication of *CDW Corp.*, including the evidentiary requirements necessary for a "loss of occupation" award but also utilize the holding in an effective and defense-oriented manner in an effort to reduce exposure and minimize potential windfalls in litigation. Heyl Royster's workers' compensation practice group has extensive experience in defending loss of occupation claims, and we are ready and willing to provide assistance and guidance with your claims.

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ABOUT THE AUTHOR



[Steven Getty](#)

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- Professional Liability
- Workers' Compensation

Steve is an experienced trial attorney with the knowledge, skill, and confidence to handle the unpredictable nature of litigation.

Steve began his practice in 2011 as an Assistant State's Attorney and gained substantial litigation experience. During this time, he handled all aspects of criminal prosecution from investigations charging, pretrial motions, trials, and sentencing. Steve has extensive trial skills as both first and second chair, giving him the knowledge and ability to effectively present and argue evidentiary and factual issues before judges and juries.

This background gave Steve the unparalleled ability to dissect and analyze legal and factual issues and effectively represent client interests when he joined Heyl Royster. Steve concentrates his practice on the defense of employers in Workers' Compensation claims and defends physicians, hospitals, and extended providers in professional liability and medical malpractice claims. He also assists in defending nursing home and long-term care facility claims and other general civil litigation.

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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WHEN EXPERIENCE MATTERS

If your business, organization, or you as an individual need premier defense services from an industry-leading workers' compensation defense firm, the dedicated legal minds at Heyl Royster are ready to provide you with the legal advice and legal services that you deserve. From complex claims to disputes, causation, and more, our workers' compensation attorneys are experienced litigators ready to come to your defense.

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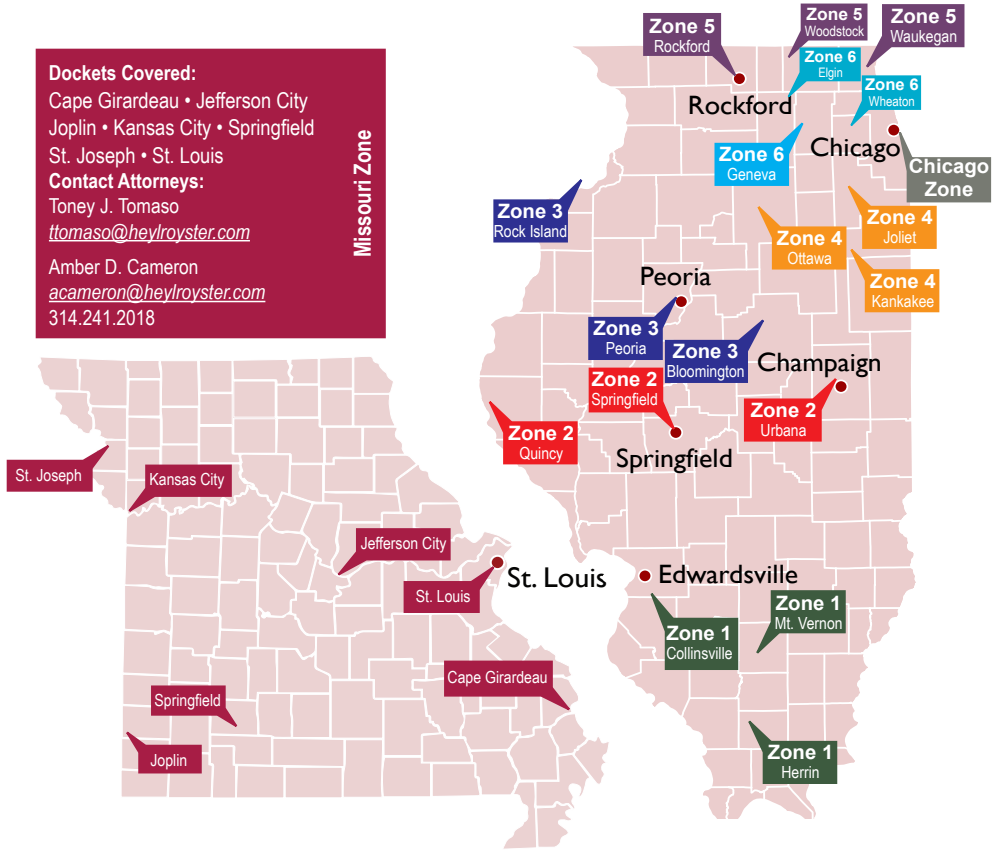
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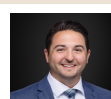


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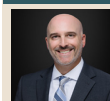


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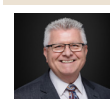


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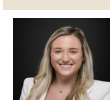
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