

WHAT DOES LOSS OF TRADE OR OCCUPATION REALLY MEAN? –*Jesse Lanshe*

There are many gray area areas of Illinois Workers' Compensation law. One of the most perplexing is the concept of "loss of trade" or "loss of occupation". When a claimant is given permanent restriction, the exposure can widely vary depending on the particular facts of the case. The range for these types of cases can be from 15% to 55% person as a whole with no particular way to predict the outcome from case to case.

Even arbitrators appear to approach loss of trade inconsistently. Some base their decision on whether the employee's "trade" or "occupation" was a skilled or semi-skilled position. Some base their decision on whether the employee sustains a loss in earning capacity or not. Some are willing to consider a loss of trade "light" (for example where there are permanent restrictions without any surgery) or to split the difference between a wage differential (under Section 8(d)(1)) and a loss of trade (under Section 8(d)(2)), in circumstances where one or the other is not necessarily entirely appropriate.

One reason for such confusion may be the wording of Section 8(d)(2), which contains no reference to "loss of trade" or "loss of occupation," but which references a sort of catch-all PPD award based on 500 weeks (i.e. loss of person as a whole) where an employee sustains:

"[I]njuries [which] do not incapacitate [them] from pursuing the duties of [their] employment but which would disable [them] from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; or if such *injuries partially incapacitate [them] from pursuing the duties of [their] usual and customary line of employment* but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive [their] right to [a wage differential under Section 8(d)(1).]"

Based on this language, to qualify for a loss of trade, the injured worker could:

Have an injury where they can return to their pre-accident job, but may not be able to obtain other "suitable" jobs; or

Have some "other" (unspecified) physical impairment; or

Not be able to pursue their "usual and customary line of employment," but does not result in lower earnings; or

Obtain a job with lower earnings, but waive a wage differential (because loss of trade may be more financially appealing).

The following cases are representative of some different approaches that have been taken by arbitrators, the Commission and the Appellate Court, confronting this amorphous issue:

In Ibarra v. JM Concrete (2008 WL 4223230), the arbitrator ruled that, due to a hand injury, Petitioner had "lost his trade as a construction worker." On appeal, the Commission found no evidence that Petitioner was a "construction" worker or that he "lost his occupation" as a result of the injury. Rather, Petitioner had "no specialized training and apparently had performed various jobs in restaurants, stores, and 'in construction.'" In the Commission's view, this clearly indicated essentially unskilled manual labor type jobs and not specialized jobs in which Petitioner could be considered to have "lost his career occupation." The Commission ruled that the appropriate award was under Section 8(e) (specific loss), not 8(d)(2) (loss of trade) and ultimately reduced award from 20% BAW to 35% loss of a hand (100 weeks down to 71.75 weeks).

In Sara Lathan v. Chicago Board of Ed. (2012 WL 3276428), Petitioner's own IME doctor opined that she'd never return to work as a teacher, due to bilateral ankle, bilateral knee and right wrist injuries. However, the arbitrator found the bilateral ankle injuries to be unrelated. Further, two of Petitioner's treaters opined that Petitioner could return to work full duty. Additionally, Respondent had offered to bring Petitioner

back to work at full salary in an unassigned teacher pool and Petitioner took no action regarding same because she thought it was a “dead end” job. Nevertheless, the arbitrator awarded a loss of trade of 40% BAW. Given the facts described above, the Commission deemed the award excessive and reduced it accordingly to 25% loss of each leg and 7.5% loss of a hand. This resulted in lowering PPD from 200 weeks to 122.875 weeks.

In Jenkins v. Jackson Park Hosp. Found. (2012 WL 6863005), the arbitrator ruled that Petitioner did not lose any earnings, and was earning the same rate of pay in a new position, but could not return to her pre-accident job as a Stationary Engineer. Nevertheless, the arbitrator awarded a loss of trade of 40% BAW because Petitioner was “incapacitated from pursuing other suitable occupations and as such significantly limit[ed] her ability to locate suitable employment in the labor market.” The Commission upheld the award on appeal.

In Cain v. Mental Health Center (2019 WL 5420044), Petitioner was a mental health nurse who had been attacked twice by patients. The arbitrator found that, while Petitioner did not appear to have any significant ongoing disability, either physically or mentally, that would prevent her from returning to a job outside of the mental health field, it was “understandable” that returning to her pre-accident job would be “difficult.” The arbitrator awarded a loss of trade of 12.5% BAW. On appeal, the Commission upwardly modified the award to 20% BAW (based in part on its analysis of the 5 PPD factors).

In Kmiecik v. IWCC (2020 IL App 4th 200091 WC-U), Petitioner sustained a hand injury and was released with a vague permanent restriction to “proceed with caution,” coupled with a “self-limiting” FCE. The arbitrator deemed this a loss of trade and awarded 30% BAW (150 weeks), which the Commission lowered to 30% loss of a hand (61.5 weeks). The Appellate Court upheld the Commission’s reduced award, agreeing that Petitioner hadn’t met the burden of proof to show he had suffered a loss of occupation, given no substantive restrictions and the subpar FCE.

In Sosa v. In & Out Moving (2021 WL 944898), Petitioner was a mover who had sustained a knee injury. The arbitrator awarded BOTH 35% loss of a leg AND 20% BAW due to the knee injury. On appeal, the Commission

held that an injured worker cannot receive 2 awards for same body part. However, it vacated the loss of leg award and raised the BAW award from 20% to 35% BAW, reasoning that Petitioner’s FCE had determined a light to medium physical demand level. This was despite the fact that Petitioner had offered no job logs and his condition didn’t preclude him from working in “some” capacity. Interestingly, the PPD total amount awarded went from 175.25 weeks to 175 weeks.

Takeaways: when dealing with potential loss of trade claims (i.e. with permanent restrictions), sometimes bringing Petitioner back to work without any lost wages is not sufficient to avoid a loss of trade. Factors to consider include: The age of the claimant, the type of occupation (skilled or unskilled), the AWW, employment history, state of the economy, FCE results, or any language barriers.

EVANS & DIXON, LLC RECENT WINS

Employers and insurance carriers currently face challenging times at the Commission. It is often easy to take a cynical and pessimistic approach in light of these challenges. However, it should be remembered that good facts, solid investigation and teamwork can still produce favorable outcomes. During the first half of 2022 our Illinois team in both St. Louis and Chicago have produced some outstanding results. This has included complete denials of alleged permanent and total disabilities with extremely high exposure. Below are summaries of those wins.

Ken Capps defended a case in front of the Illinois Workers’ Compensation Commission. Petitioner alleged her current neck condition and need for treatment were related to a work incident wherein she allegedly suffered a whiplash injury while performing an emergency stop of a train. Exposure was significant, including prospective cervical surgery. Petitioner had a long and complex prior medical and claims history, with well-documented prior cervical conditions. After hearing Oral Arguments, and despite the very low bar for causation in Illinois, the Commission found Petitioner’s neck condition was not causally related and denied

prospective treatment. This win is especially significant because Petitioner has a subsequent claim which was just tried last week. The issues are nearly identical, and Petitioner is seeking a 2-level cervical disc replacement. But this decision now spoils her case, as the Commission declared Petitioner's neck condition, which has not been resolved, to be related to her preexisting condition.

On 5/23/22, Arbitrator Gallagher found for Respondent on the issue of prospective medical treatment. This case was tried on a 19(b) on 3/30/22. Initially, Petitioner alleged on the date of accident, he was standing on a ledge of his work truck when he slipped and struck his left knee on the ground. At trial, Petitioner testified his left knee was twisted during the fall and his right knee hit the ground. When discussing his injury to various medical providers, Petitioner's story frequently changed and he often reported that different knees struck the ground. In his early treatment records, Petitioner did not mention any injury to the left knee and instead only reported pain to the right knee. Arbitrator Gallagher noted these inconsistencies and found Petitioner was not credible. Thus, he found no liability for prospective medical treatment. This case was tried by Michelle Symank and briefed by Monika Heater.

Mike Karr received a "zero" award and total denial of an alleged permanent total disability. In the case of *Garrett v. St. Mary's Good Samaritan*, the claimant underwent 5 cervical spine surgeries, 9 knee surgeries and a rotator cuff repair. The claimant alleged a repetitive trauma claim working with patients in her capacity as a CNA. The claimant's treating physician testified on her behalf in support of causation. The respondent presented the testimony of their IME physician. The Arbitrator found that the claimant did not provide proper notice of the alleged accident. The Arbitrator further found that the testimony of the treating physician was not credible. The issue of notice notwithstanding, the Arbitrator also denied accident and causal connection.

Paul Schumacher secured a very large victory in the case of *Meeker v. Tradesman International*. The claimant, a journeyman electrician, worked for the Respondent three weeks prior to the alleged accident. He claimed injury to the low back due to bending and threading pipe. The claimant underwent lumbar surgery resulting in permanent restrictions. He presented a vocational rehabilitation expert that opined he was not

employable. The claimant alleged an odd lot permanent and total disability. The Respondent presented a medical expert who opined there was no causal relationship and a vocational rehabilitation expert who opined the claimant was employable. Depositions were taken of all the experts. The Arbitrator found that claimant's testimony was not credible and denied the entire case.



MAKE SURE THERE ARE FACTS TO SUPPORT YOUR DISPUTE! –Paul Krauter

The Illinois Appellate Court recently addressed the issue of penalties in the case of *McDonald's v. IWCC*. The claimant worked for McDonald's approximately 21 years. On the date of accident, she went into a refrigerator to get a box of meat. She grabbed the box, placed it on her shoulder and the box began to fall, which twisted her low back. As the box was falling the claimant tried to stop it with her right hand and felt pain in her right shoulder. She took to the meat to the kitchen and told two supervisors what occurred. Medical treatment involved multiple injections to the back and right shoulder. There was a recommendation for surgery to the right shoulder. There was also an FCE with permanent sedentary to light restrictions. The Respondent had an IME for the low back who opined that treatment was not reasonable and the claimant could work full duty. The Respondent also had an IME for the right shoulder who agreed with causation and the permanent restrictions.

The Arbitrator awarded medical expenses, 17.5% person as a whole and penalties under Sections 19(k) and 16. The Respondent appealed the decision without success up through the Appellate Court.



This decision provided an analysis of the standard regarding penalties. It was noted that the Commission awarded penalties because the Respondent disputed the issues of accident and notice, and not because of delay or refusal to pay benefits. The Commission found that the Respondent did not act reasonable as contesting these issues presented no real controversy and was merely vexatious.

The Appellate Court noted that the Respondent presented no evidence in support of its position denying notice and furthermore *it actually possessed evidence* that proper notice was given. The Court stated that the Respondent contested the issue of notice only to introduce delay in the proceeding, and increase the time and cost required by the parties, the Arbitrator, and the Commission. The Court stated that is the type of conduct the Act seeks to discourage.

The Court also cited Illinois Supreme Court Rule 137, which states in pertinent part:

“The signature of an attorney or party constitutes a certificate by him that he had read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”

The reference to Rule 137 suggests that disputing issues on the request for hearing form (commonly referred to as the “stip sheet”) without any reasonable basis to do could expose the Respondent to penalties.

In our experience, penalties should rarely if ever be awarded in a case. If there is some evidence on which to legitimately dispute an issue that should be enough to insulate a party from penalties. However, if there is no evidence to support the denial of a particular issue, there will be penalty exposure. The Respondent and their counsel should always make sure they have reviewed and are in agreement with all stipulations and disputes contained on the request for hearing prior to trial.

This McDonald’s decision was issued by the Court as a “Rule 23” decision which means that it has limited precedential value. However, the claimant motioned the Court for the decision to be published which would give it full precedent. It is our understanding that Court has granted the motion and it will be published.

NOTES, EVENTS & VOLUNTEERS

Our entire firm celebrated Pride Month by conducting a fundraiser for [The Trevor Project](#), which works to provide crisis intervention and suicide prevention services to LGBTQ+ youth.



Save the date! The Evans & Dixon Illinois Workers’ Compensation team will be hosting an in-person seminar on Thursday, September 15th in Oakbrook, Illinois. You can register and find more details about the agenda [here!](#)

We are very proud of the passion and dedication Lilia Picazo demonstrates in giving back to the community. She has continued her support of [WGirls Chicago](#), a non-profit organization that aims to support and empower women and children in underserved Chicago communities. In April Lilia attended cooking for

a cause which raised money for the [Chicago Children's Advocacy Center](#). In June Lilia participated in a kickball tournament to benefit [Apna Ghar](#), a human rights organization to end gender violence.

In March, Paul Krauter was awarded a blue belt in Brazilian jujitsu (BJJ) at the [Ferro Academy](#). BJJ focuses on the skill of taking an opponent to the ground, controlling one's opponent, gaining a dominant position, and using a number of techniques to force them into submission via joint locks or chokeholds.

Jim Gallen moderated a panel on the "50th Anniversary of the National Commission on State Workers' Compensation Laws' Report" at the 27th Annual Missouri Division of Workers' Compensation Educational Seminar at the Lake of the Ozarks on May 5, 2022. At the invitation of the following moderator, Mark Walls, Jim and his panel remained on the stage to participate in a discussion of "Does Our System Do Harm?"

GETTING TO KNOW: Caroline French

HOW LONG HAVE YOU BEEN WITH E&D?

4 years

WHAT'S THE TOP DESTINATION ON YOUR MUST-VISIT LIST?

Santorini, Greece

WHAT ARE SOME OF YOUR HOBBIES & INTERESTS?

I love going out to eat and trying new restaurants.

WHAT'S YOUR FAVORITE TEAM TO ROOT FOR?

The St. Louis Blues

WHAT IS SOMETHING ABOUT YOU THAT PEOPLE WOULD NEVER GUESS?

I can lick my elbow and twist my arm around 360 degrees.

DO YOU HAVE ANY PETS?

Pumba is a mastiff mix. He is 8 years old and weighs 93 lbs. Although his name is Pumba, he also goes by: bubba, bubbly, pumby, and big dog. He loves to take boat rides and swim in the lake. He also enjoys sunbathing and sleeping in.

