Making Up the Difference: Wage Differential Claims Under the Illinois Workers' Compensation Act

by Shawn M. Robin

As if it's not enough that an injured worker must deal with the pain, debilitation, and frustration caused by a work-related injury, he must also face the harsh reality that his permanent disability may result in a permanent loss of earnings as well.

As stated by the Illinois Supreme Court over 50 years ago, the social policy behind the Illinois Workers' Compensation Act ("Act") "is to provide employees a prompt, sure, and definite compensation, together with a quick and efficient remedy, for injuries or death suffered by such employees in the course of their employment . . . and to require the cost of such injuries to be borne by the industry itself and not by its individual members.[1] The purpose of the Act is to provide financial protection for injured employees who might otherwise have to bear the loss of earnings themselves as a substitute for the common-law system of master-servant liability.[2]

Although workers' compensation legislation was originally designed to compensate injured workers for future lost wages caused by their injury or disability, through the years it has become more common to award compensation based on a fixed number of weeks of disability for the loss, loss of use, or disfigurement of each body part or the body as a whole. This form of compensation is referred to as permanent partial disability ("PPD"), and is found in the Act under §8(e) for loss to a specific body part, §8(d)(2) for loss to the person as a whole, or §8(c) for disfigurement.

PPD is the ideal compensation when an injured worker is able to return to his pre-injury occupation in the same capacity and earn the same, if not better wages than before the injury. However, when a worker is unable to resume his previous employment due to a work-related disability *and* suffers from a reduction in earnings as a result, he may be entitled to recover wage differential benefits under §8(d)1 of the Act. This poses a challenge to an injured worker's attorney to determine which avenue will result in a greater recovery for his client, for although a worker may suffer from both a functional disability and a loss of earning capacity, he cannot recover for both.

The Preferred Compensation

The supreme court has found that compensation under §8(d)1 is generally more preferable in cases involving impaired earnings because the employee's actual wage loss may exceed the maximum benefit allowed under §8(e) or §8(d)2:

> "Scheduled awards are often not fair…nor are scheduled allowances always fast and certain. It is often easier to calculate how much a claimant's earnings have decreased since the accident than to assign a percentage of partial loss of use...If ... [a claimant] can prove an actual loss of earnings greater than the schedule presumes, there is no reason why [a claimant] should not recover that loss. In theory, the basis of the workers' compensation system should be earning loss, not the schedule."[3]

With this rationale in mind, the courts have held that the Illinois Workers' Compensation Commission ("Commission") is prohibited from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity.[4] The only time a claimant who proves an impairment in earnings will be denied benefits under §8(d)1 is when he waives his right to recover under that provision.[5]

The Wage Differential Provision

§8(d)1 of the Act provides:

> If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the 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. 820 ILCS 305/8(d)(1).

Thus, in order to be eligible for wage differential benefits under this provision, the injured worker must establish that his work-related disability

has resulted in (1) a partial incapacity that prevents him from returning to his usual and customary line of employment and (2) impairment in earnings.

Partial Incapacity

Generally, if the injured worker cannot perform the job duties required of his pre-injury occupation without the risk of further injuring himself or others, then he will have satisfied the first element in proving a wage differential claim under §8(d)1. This can be established by permanent restrictions placed on a worker by his treating physician that prevent him from returning to his pre-injury occupation, or through a valid Functional Capacity Evaluation (FCE) that demonstrates an inability to function at the level required by the worker's usual occupation. It is therefore imperative to know the requirements of the *usual and customary line of employment* in order to satisfy this element, and in order to secure the appropriate medical evidence should it become a contested issue down the road.

Usual and Customary Employment

In *Edward Gray Corp. v. Industrial Commission*, the claimant was an ironworker who injured his back while working for a previous employer, and an FCE revealed that the claimant did not meet the lifting requirements of an ironworker. Nonetheless, the claimant began working with the employer in this case as an ironworker and stated on his job application that he suffered from no physical limitations that would prevent him from performing his job. Two months later, claimant re-injured his back and filed a claim for wage differential benefits against the employer.

The employer argued that because claimant's permanent restrictions prevented him from working as a full duty ironworker, ironworking could not have been his usual and customary line of work at the time of injury. However, the court stated that what constitutes a claimant's usual and customary line of employment is a question of fact for the Commission, and will not be set aside unless it is against the manifest weight of the evidence. The court found that although the FCE suggested that the claimant was unable to return to ironworking, this finding was rebutted by the fact that he had been working full duty as an ironworker for the plaintiff for nearly three months prior to his injury, and his testimony that he had been an ironworker for 30 years was not contradicted. Moreover, the court held that "to deny an injured employee benefits under the circumstances of this case would be contrary to the purpose of the Act, and would discourage employees from attempting to return to work by penalizing those who do."[6]

Impairment in Earnings

In *Copperweld Tubing Products Company v. Illinois Workers' Compensation Commission*, the claimant was a mill operator who sustained an injury to his left arm that prevented him from returning to his pre-injury job. A vocational counselor noted that without professional assistance, the claimant would likely be able to earn between $8.00 and $12.00 per hour in the open job market. The claimant obtained a job as a security guard earning $8.00 for 40 hours a week, but quit the job shortly thereafter for family reasons. The employer argued that the claimant was not entitled to a wage differential award because he voluntarily removed himself from the work force, and was therefore no longer suffering a loss in earning capacity. The court held that a worker who voluntarily removes himself from the labor market is not precluded from receiving a wage differential award. The Commission must look to the amount that the claimant is earning or *is able to earn* in some suitable employment after the accident.[7]

Full Performance

In calculating a wage differential award, it is necessary to determine what the worker would be able to earn in the *full performance* of his pre-injury job, including any raises since the date of injury. Once this is established, there is a presumption that the worker would be engaged in the full performance of his pre-injury duties but for the injury.[8]

Forest City Steel Erectors v. Industrial Commission involved an ironworker who was injured on the job and was found to be permanently restricted from returning to his usual trade following the injury. The employer argued that because iron work is a seasonal occupation and the claimant only worked an average of approximately 20 hours per week in the years preceding his injury, the wage differential should be based on that of a part-time worker in order to avoid a windfall for the claimant. The court disagreed, instead choosing to focus on the plain meaning of the words *"in the full performance of his duties in the occupation in which he was engaged at the time of the accident."* The court found that the legislative intent behind those words was such that wage differential awards are to be calculated based on the number of hours constituting the "full performance" of a particular occupation, and therefore the claimant's pre-accident earnings were to be based on a full 40 hour work week and not on part-time work.[9]

No Speculation

Because wage differential benefits are typically long term, a simple one or two dollar-an-hour difference can result in a substantial payout over the duration of the award. As such, every effort should be made to calculate the wage differential based on what a worker's earnings *could have been* at the time of trial but for the injury, rather than simply using the pre-injury wage or what the worker was actually able to earn after returning to work. This can

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be accomplished through the testimony of a similarly situated co-worker,[10] introduction of union pay scales,[11] or through the use of a qualified vocational counselor.

If, however, it is difficult to determine what the current wage rate at the time of trial would be, then the Commission is permitted to use the worker's wage rate at the time of the accident to avoid speculating as to what changes in wages may have occurred since the date of accident.[12] In fact, the overall body of case law surrounding §8(d)1 claims makes it clear that wage loss calculations should not be based on speculation.

In *Deichmiller v. Industrial Commission*,[13] the claimant was an apprentice plumber at the time of his work injury and the court held that his wage loss should be based on such, and not on the wage of a journeyman plumber, especially in the absence of evidence indicating an intention by the claimant to become a journeyman. "An award for loss of earnings cannot be based on speculation as to the particular employment level or job classification which a claimant might eventually attain."[14] However, this does not preclude a claimant from submitting evidence that he would hold a higher paying position in the future in order to establish a greater wage loss, as was the case in *Duncan v. Bell Engineering*,[15] where the claimant proved that he would have become a journeyman had he not been injured.

Similarly, it is improper for an employer to speculate as to the potential longevity of a worker's pre-injury occupation, or that his post-accident wages will increase in the future.

A well-known example of this priniciple involved Ted Albrecht, a former offensive lineman for the Chicago Bears who sustained a low back injury during training camp prior to his sixth season and never played again. Although he started a travel agency and worked as a sportscaster following his football career, he claimed a loss of wages and sought wage differential benefits under the Act. The circuit court affirmed both the Commission and arbitrator's decision denying benefits under §8(d)1 based on the employer's testimony that the average career of an offensive lineman is less than 10 years, and that the claimant was in a "position of temporary employment, not a career where he could anticipate continued employment as long as he desired."

On appeal, the court reversed and granted the wage differential award, finding that "but for claimant's injury, he would have been in the full performance of his duties as a Bears offensive lineman after 1983." The court found that §8(d)1 contained no reference to situations of shortened work expectancy, and that it is more common for workers to change jobs several times over the course of a lifetime than to practice a lifelong trade. The court stated that "professional football players are skilled workers contemplated under the statute and that any shortened work expectancy in claimant's career would not preclude him from a wage loss differential award under the Act." In granting the award, the court also refused to speculate as to how much the claimant would have earned in the years after his injury despite evidence indicating that the salaries of other linemen increased dramatically.[16]

Suitable Employment

A common argument made by employers defending wage differential claims is that the employee failed to mitigate his wage loss by not seeking *"suitable employment"* after the accident as provided under §8(d)1 (emphasis added). Employers may argue that an employee failed to take a job that paid a higher wage, or failed to conduct a sufficient job search following the injury, in order to diminish his wage loss. The Commission has denied wage loss benefits in the past where it found that the employee failed to put forth a sufficient effort to obtain a job that would decrease his wage loss, and instead awarded PPD under either §8(e) or §8(d)2.

One example of this involved a claimant who was a repairman unable to return to his previous occupation due to a work-related shoulder injury. Although he was released by his treating physician to return to work on a trial basis, he never attempted to work again as a repairman and instead took a job as a school administrator at his church. The court held that the claimant was not entitled to a wage differential award because he did not attempt to return to work or try to find any other employment, and therefore he failed to establish an impairment in earnings.[17]

However, in *Gallianetti*, a case that has altered the wage differential landscape on numerous fronts including job searches, the claimant was a tree trimmer who injured his elbow while working. Following an FCE that revealed that he was unable to resume his previous duties as a tree trimmer, the claimant conducted a job search by contacting several factories in the area near his home, and also contacting employers identified in a labor market survey prepared on behalf of the employer. The employer argued that the claimant's job search was insufficient in both the number of jobs contacted and the geographical scope of the search, and that he offered no documentation to support his claim that the jobs he contacted did not have available work within his restrictions. In finding that the claimant was entitled to a wage differential award, the court held that *"[t]here is no affirmative requirement under section 8(d)(1) that a claimant even conduct a job search. Rather…a claimant need only demonstrate an impairment of earnings. Evidence of a job search is but one way to show impairment of earnings"* (emphasis added).[4]

In another example of where the employer attempted to argue the "suitability" of the employee's post-injury job, the claimant was a structural

ironworker who sustained a permanent disability to his wrist after falling off a roof. Following the injury, the claimant had expressed an interest in driving a truck to his vocational rehabilitation specialist, and he applied on his own for several truck driving jobs that paid between $9.00 and $12.00 per hour but was rejected for all of them. The rehabilitation specialist then located several positions that paid between $4.00 and $9.00 per hour, including a truck driver and a security guard. The claimant took the job as a security guard which paid $4.30 per hour, $12.45 less than he was earning as an ironworker before the injury, and the Commission awarded a wage differential based on the new wage as a security guard.[12]

On appeal, the employer argued that the wage differential should have been based on the higher wage that the claimant could have earned as a truck driver and not on the wage of the lesser paying security guard position. The court held that the security guard job was "suitable" because it fell within the claimant's restrictions and the rate of pay was within the range for jobs found by the rehabilitation specialist.[18]

Artificial Pay Raise/Sham Job Offer

An employer is precluded from artificially increasing an employee's wages simply to avoid exposure for a wage differential award under §8(d)1.

This point was illustrated in a case involving a claimant who accepted a lower-paying, less strenuous job within her restrictions following a work injury. Inexplicably, and without any modification to her duties, the employer increased the claimant's pay on three separate occasions so that her wage as of the date of trial was the same as the pre-injury wage. The court found that the employer provided the claimant with a sham wage above that which is normally paid for the position that she held in order to prevent a reduction in earnings and avoid a wage differential award, and reversed the circuit court reinstating the arbitrator's award for wage differential benefits.[19]

Similarly, an employer cannot make sham offers of employment in order to prevent a wage differential award.

The claimant in *Yellow Freight Systems v. Industrial Comm'n* was a high school drop-out and dockworker who injured his shoulder while working. As a result of the injury, he was prevented from returning to his pre-injury work due to an inability to handle the overhead lifting requirements of the job. The claimant began working with a vocational specialist retained by the employer and eventually took a job as security guard earning $7.00 per hour. Approximately five months later, the employer advised the claimant of three available job openings, all of which required a high school degree or better. Realizing that he wasn't qualified for any of the job openings, the claimant continued to work as a security guard. The employer argued that his failure to apply for any of the three open positions should disqualify him from receiving a wage differential award.

The court found that the employer's actions were merely a

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sham. "It is clear that claimant was not qualified for the jobs "offered" by the employer, as claimant does not even possess a high school diploma….Most importantly, the employer only notified claimant about three open positions, but never actually offered the employee any of the positions. The employer cannot be allowed to use this type of tactic to defeat claimant's entitlement to a wage differential award."[20]

Maximum Benefit

Prior to the July 20, 2005, amendments to the Act, the maximum rate for a wage differential award under the Act was equal to the maximum PPD rate in effect at the time of injury. As of February 1, 2006, the maximum rate for a wage differential award under Section §8(d)1 is 100 percent of the Illinois average weekly wage. As a point of reference, the maximum PPD rate in effect today is $664.72, as compared to the current Illinois average weekly wage of $946.06, thus illustrating the substantial increase in the maximum wage differential benefit following the amendment.

For example, a worker earning $1,800.00/week who sustains a work-related injury on October 1, 2010, and then obtains a post-accident job paying him $600.00/week, will have a wage differential of $800.00 ($1,800.00 - $600.00 = $1,200.00 x 2/3 = $800.00).

However, if that same worker is only able to obtain a post-accident job paying him $300.00/week, he will then have a wage differential of $946.06 ($1,800.00 - $300.00 = $1,500.00 x 2/3 = $1,000.00 which is capped at the State average weekly wage of $946.06).

Duration of Benefit/Modification

Before the most recently amended Act became law on June 28, 2011, an injured worker entitled to wage differential benefits under §8(d)1 could receive compensation for the *duration of his disability*, thereby making awards under this provision a lifetime benefit for as long as the worker's physical disability continued. However, a significant blow was dealt to employees with the recently amended §8(d)1, which now states that *"For accidental injuries that occur on or after September 1, 2011, an award for wage differential under this subsection shall be effective only until the employee reaches the age of 67 or 5 years from the date the award becomes final, whichever is later."* As such, wage differential is no longer a lifetime benefit, and the amount that an injured worker can potentially recover under this section has been significantly limited with this new cap in place. It should be emphasized, however, that the cut-off is 5 years from the date that the *"award becomes final,"* not 5 years from when the claimant's entitlement to the benefit begins. As such, the claimant's benefit could potentially continue for a period longer than 5 years following entry of the final award.

With regard to modification of an award, §19(h) of the Act provides that a wage differential award under §8(d)1 can be reviewed by the Commission at the request of either the employer or the employee *on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.* On July 20, 2005, §19(h) of the Act was amended to extend the review period from 30 months to 60 months in order to request a modification of a prior wage differential award.

In order to modify a §8(d)1 award under §19(h), a change in the employee's physical or mental condition must be established, and not just a change in the employee's economic circumstances.[21] Modification of a wage differential award can only occur if there is a change in the employee's physical disability.[22]

Practical Considerations

Because a wage differential award under §8(d)1 is potentially a long term benefit which could take several years to fully accrue, there is generally some interest by both the employee and the employer to reach a lump sum settlement instead. For instance, an employee may not want to be tied to the employer or its insurance carrier until he reaches 67 years of age, or may realize that there is no guarantee that he will live long enough to collect the full benefit, and therefore he would rather settle for a lump sum based on present day cash value and close out the claim. From the employer's perspective, it may view paying a lump sum as a hedge against the possibility that the employee might actually live long enough to collect the full payout. As with most settlement negotiations, the sticking point will likely be a determination of what constitutes a "fair" settlement.

In order to calculate the present day cash value of a lifetime wage differential award, life expectancy tables are used to determine the employee's life expectancy and the projected length of the lifetime benefit. The weekly benefit is then multiplied by 52 weeks to get the yearly benefit, which is then multiplied by a fair interest rate to get the full present day cash value award. From that figure, both sides can attempt to negotiate a fair lump sum settlement.

Conclusion

The hardship that can follow a work-related injury where the injured worker is unable to resume his pre-injury employment can be devastating. The amount of lost earnings projected out over the course of a worker's lifetime will almost always be greater than any amount of permanent partial disability benefits that he can receive. As such, a wage differential award under §8(d)1 of the Act is the only fair remedy for an injured worker with a reduced earning capacity. Although no amount of money can ever make him whole, the wage differential provision can certainly help to make up the difference.

Endnotes

[1] *O'Brien v. Rautenbush*, 10 Ill.2d 167, 139 N.E.2d 222, 226 (1956).

[2] *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill.2d 437, 359 N.E.2d 125, 3 Ill.Dec. 715 (1976).

[3] *General Electric Co. v. Industrial Commission*, 89 Ill.2d 432, 433 N.E.2d 671, 60 Ill.Dec. 629 (1982).

[4] *Gallianetti v. Industrial Commission of Illinois*, 315 Ill.App.3d 721, 728, 734 N.E.2d 482, 248 Ill.Dec. 554 (3rd Dist. 2000).

[5] *Freeman United Coal Mining Co. v. Industrial Commission*, 283 Ill.App.3d 785, 670 N.E.2d 1122, 219 Ill.Dec. 234 (5th Dist. 1996).

[6] *Edward Gray Corp. v. Industrial Commission*, 316 Ill.App.3d 1217, 738 N.E.2d 139, 250 Ill.Dec. 175 (1st Dist. 2000).

[7] *Copperweld Tubing Products Company v. Illinois Workers' Compensation Commission*, 341 Ill.Dec. 865, 931 N.E.2d 762 (1st Dist.2010).

[8] *Old Ben Coal Company v. Industrial Commission*, 198 Ill.App.3d 495, 555 N.E.2d 1201 (5th Dist. 1990).

[9] *Forest City Steel Erectors v. Industrial Commission*, 264 IlI.App.3d 436, 636 N.E.2d 969 (1st Dist. 1994).

[10] See *Morton's of Chicago, Inc. v. Industrial Commission*, 304 IlI.Dec. 508, 853 N.E.2d 40 (1st Dist. 2006); *Copperweld Tubing Products Company v. Illinois Workers' Compensation Commission*, 341 Ill.Dec. 865, 931 N.E.2d 762 (1st Dist.2010).

[11] See *Greaney v. Industrial Commission*, 295 III.Dec. 180, 832 N.E.2d 331 (1st Dist. 2005).

[12] *Fernandes v. Industrial Commission*, 246 Ill.App.3d 261, 615 N.E.2d 1191, 186 Ill.Dec. 134 (4th Dist. 1993).

[13] *Deichmiller v. Industrial Commission*, 147 IlI.App.3d, 497 N.E.2d 452 (1st Dist. 1986).

[14] See *Forest City Steel Erectors v. Industrial Commission*, 264 IlI.App.3d 436, 636 N.E.2d 969 (1st Dist. 1994); *Old Ben Coal Company v. Industrial Commission*, 198 Ill.App.3d 495, 555 N.E.2d 1201 (5th Dist. 1990); see also *First Assist, Inc. v. Industrial Commission*, 371 III. App.3d 488, 867 N.E.2d 1063 (4th Dist. 2007), where the court held that the wage differential should be based on the claimant's wages as an operating room nurse at the time of injury rather than as a registered nurse at the time of trial).

[15] *Duncan v. Bell Engineering*, 08 IWCC 0413.

[16] *lbrecht v. Industrial Commission*, 271 Ill. App.3d 756, 648 N.E.2d 923 (1st Dist. 1995).

[17] *Durfee v. Industrial Commission*, 195 IlI. App.3d 886, 552 N.E.2d 9 (5th Dist. 1990).

[18] See *Yellow Freight Systems v. Industrial Comm'n*, 351 Ill. App. 3d 789, 814 N.E.2d 910 (1st Dist. 2004), where the court also held that a security guard position approved by the employer was suitable).

[19] *mith v. Industrial Commission*, 308 Ill. App.3d 260, 719 N.E.2d 329, 241 Ill. Dec. 468 (3rd Dist. 1999).

20 *Yellow Freight Systems v. Industrial Comm'n*, 351 Ill. App. 3d 789, 814 N.E.2d 910 (1st Dist. 2004).

[21] *Petrie v. Industrial Commission*, 160 III. App.3d 165, 513 N.E.2d 104 (3rd Dist. 1987).

[22] *Cassens Transport Company v. Industrial Commission*, 354 IlI.App.3d 807, 821 N.E.2d 1274 (4th Dist. 2005).

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