



26th Annual Claims Handling Seminars

GET CONNECTED! UPDATES & CHANGES

Thursday, May 19, 2011 – Bloomington, Illinois

WAGE DIFFERENTIAL REDUCTION STRATEGIES

Presented and Prepared by:

James J. Manning

jmanning@heyloyster.com

Peoria, Illinois • 309.676.0400

Heyl, Royster, Voelker & Allen

PEORIA • SPRINGFIELD • URBANA • ROCKFORD • EDWARDSVILLE • CHICAGO

WAGE DIFFERENTIAL REDUCTION STRATEGIES

I.	DEVELOPMENT OF WAGE DIFFERENTIAL THEORY IN ILLINOIS	G-3
II.	MODIFYING SECTION 8(d)(1) WAGE DIFFERENTIAL AWARDS.....	G-5
III.	CALCULATIONS.....	G-6
IV.	WHEN WILL THE PETITIONER SEEK A WAGE DIFFERENTIAL AWARD UNDER SECTION 8(d)(1)?	G-6
V.	WHEN SHOULD THE EMPLOYER SEEK TO PROVE A WAGE DIFFERENTIAL?	G-7
VI.	TIPS FOR MINIMIZING WAGE DIFFERENTIAL EXPOSURE.....	G-7
VII.	PROPOSED LEGISLATIVE CHANGES.....	G-8

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

WAGE DIFFERENTIAL REDUCTION STRATEGIES

I. DEVELOPMENT OF WAGE DIFFERENTIAL THEORY IN ILLINOIS

When an injured employee returns to his former employment at pre-injury pay, compensation is awarded for permanent partial disability, or PPD, represented by the loss of use of the injured body part. PPD awards may fall under section 8(d)(2) person as a whole provisions or section 8(e) specific loss provisions. However, where the employee *cannot* return to his former employment *and* he further suffers a diminished earning capacity, benefits may be awarded under section 8(d)(1), the so-called wage differential provision. The Act in part 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. [emphasis added]

820 ILCS 305/8(d)(1).

Thus, in order to qualify for a section 8(d)(1) differential, the petitioner must prove two things:

- (1) a partial incapacity which prevents the pursuit of his/her "usual and customary line of employment," and
- (2) an impairment of earnings.

The differential is to be paid for the duration of disability which has been interpreted as to mean "for life" – not "work life," even if after an award is rendered, the employee changes jobs resulting in a larger loss of wages. *Rutledge v. Industrial Comm'n*, 242 Ill. App. 3d 329, 611 N.E.2d 526, 183 Ill. Dec. 263 (1st Dist. 1993).

The petitioner cannot recover for both section 8(d)(1) wage differential and a specific loss of use for a man as a whole under section 8(e) or section 8(d)(2). *Pruett v. Industrial Comm'n*, 65 Ill. 2d 240, 357 N.E.2d 544, 2 Ill. Dec. 377 (1976); *Freeman United Coal Min. Co. v. Industrial Comm'n*, 283 Ill. App. 3d 785, 670 N.E.2d 1122, 219 Ill. Dec. 234 (5th Dist. 1996).

To recover a wage differential award, the employee must present medical evidence that the employee cannot return to the original employment and has a loss of earnings. *Old Ben Coal Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 555 N.E.2d 1201, 144 Ill. Dec. 682 (5th Dist. 1990).

If there is evidence of a permanent reduced earnings capacity and a wage differential is sought, the Commission is *required* to award a wage differential award. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 734 N.E.2d 482, 248 Ill. Dec. 554 (3d Dist. 2000). Note that the petitioner is in essence entitled to "elect" whether they wish to proceed under the schedule or under a wage differential. Naturally the petitioner's counsel will calculate which avenue will provide the greatest recovery.

In computing the wage differential, use the amount of money the petitioner would be earning at the time of the settlement (including raises) if that figure is greater than the average weekly wage as it was computed at the time of the accident. *General Elec. Co. v. Industrial Comm'n*, 144 Ill. App. 3d 1003, 495 N.E.2d 68, 99 Ill. Dec. 3 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 573, 505 N.E.2d 352, 106 Ill. Dec. 46 (1987). Post-accident earnings in the pre-accident job may be shown through testimony by similarly situated employees. *Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 853 N.E.2d 40, 304 Ill. Dec. 508 (1st Dist. 2006). Fringe benefits are not included in calculating pre-accident earnings. However, vacation pay is included. *Pluto v. Industrial Comm'n*, 272 Ill. App. 3d 722, 650 N.E.2d 631, 208 Ill. Dec. 937 (1st Dist. 1995).

In computing wage differential awards, do not speculate on what increases or promotions the petitioner might have had if he had continued to work. *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 497 N.E.2d 452, 100 Ill. Dec. 474 (1st Dist. 1986). Wage differentials are calculated on the presumption that, but for the injury, the employee would be in the full performance of his original duties; the petitioner's wage differential is therefore calculated on the petitioner's job classification at the time of the original injury. *Old Ben Coal Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 555 N.E.2d 1201, 144 Ill. Dec. 682 (5th Dist. 1990); *First Assist, Inc. v. Industrial Comm'n*, 371 Ill. App. 3d 488, 867 N.E.2d 1063, 311 Ill. Dec. 77 (4th Dist. 2007) (operating room nurse was entitled to have benefits based on the wage of an operating room nurse at the time of the arbitration rather than a R.N. in general nursing). If the pre-accident wage is difficult to determine or unknown at the trial, it is permissible to use the average weekly wage in effect at the time of the accident rather than to speculate as to changes since the accident date. *Fernandes v. Industrial Comm'n*, 246 Ill. App. 3d 261, 615 N.E.2d 1191, 186 Ill. Dec. 134 (4th Dist. 1993).

In calculating the wage differential, an employee who works less than full time (that is to say a 40 hour week on average) is entitled to have the wage differential benefit calculated based on an assumption that he was in "full performance of work," even if he did not work full-time during the preceding 52 weeks. *Forest City Erectors v. Industrial Comm'n*, 264 Ill. App. 3d 436, 636 N.E.2d 969, 201 Ill. Dec. 537 (1st Dist. 1994); *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 832 N.E.2d 331, 295 Ill. Dec. 180 (1st Dist. 2005).

Pursuant to the 2005 Amendments to the Illinois Workers' Compensation Act, a wage differential award cannot exceed 100 percent of the State average weekly wage, currently \$923.56 (Note: prior to the 2005 Amendments, the wage differential was capped at the PPD rate in effect at the time of the accident.) This will apply primarily to high wage earners who as a result of injuries are unable to return to pre-accident earning levels.

If the petitioner is released to return for a "trial" at his original job, but refuses to do so and elects to take a lower paying job which he "enjoys," he cannot obtain a wage differential recovery. *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886, 553 N.E.2d 8, 142 Ill. Dec. 658 (5th Dist. 1990). However, in the Appellate Court decision of *Yellow Freight Systems v. Industrial Comm'n*, 351 Ill. App. 3d 789, 814 N.E.2d 910, 286 Ill. Dec. 684 (1st Dist. 2004), the Court reversed an award of 40 percent of a person where there was a pre-existing shoulder injury (the arbitrator had awarded a 45 percent loss of an arm) and awarded a wage differential despite the fact that the petitioner had accepted a lower paying job as a security guard, refused to apply for higher paying positions with the employer and was found by the Commission not to have shown any evidence of an appropriate job search. This Decision was based on a finding that the employer had approved of the job which the petitioner took and advised their vocational rehabilitation specialist to close their file.

II. MODIFYING SECTION 8(d)(1) WAGE DIFFERENTIAL AWARDS

Wage differential awards are governed by section 8(d)(1) of the Act and provide the employee with a weekly benefit based on two-thirds of the difference between what the employee earned in his or her employment and what he or she is earning or capable of earning following the accident. 820 ILCS 305/8(d)(1). Wage differential awards are payable for life and do not end when the employee retires.

Section 19(h) of the Act permits both parties to review a prior award of permanency payable in installments where the employee's disability has "recurred, increased, diminished, or ended." 820 ILCS 305/19(h). Section 19(h), however, limits the time for challenging the employee's condition to 60 months after the award becomes final in the case of an award under section 8(d)(1). Section 19(h), therefore, gives either party five years to determine if the injured employee's condition has "recurred, increased, diminished, or ended." However, the case law is very clear that there must be a "material change in circumstance." It is not enough to show that the worker is now making more money than before and has received an economic boost in pay. Economic change is insufficient. *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165, 513 N.E.2d 104, 111 Ill. Dec. 858 (3d Dist. 1987); *Cassens Transport. Co. v. Industrial Comm'n*, 354 Ill. App. 3d 807, 821 N.E.2d 1274, 290 Ill. Dec. 700 (4th Dist. 2005).

III. CALCULATIONS

Wage differential example 1:

Average weekly wage \$1,200.00
Post-accident wage \$ 300.00
Calculation: $\$1,200.00 - \$300.00 = \$900.00 \times \text{two-thirds} = \600.00

Wage differential award is \$600.00

Wage differential example 2:

Date of accident 5/1/11
Average weekly wage \$2,000.00
Post-accident wage \$ 300.00
Calculation: $\$2,000.00 - \$300.00 = \$1,700.00 \times \text{two-thirds} = \$1,133.90$

*Wage differentials are limited to 100 percent of the State average weekly wage in effect on the date of the injury. In this case it would be \$930.39.

Wage differential example 3:

Date of accident 7/1/08
Average weekly wage \$2,000.00
Pre-accident wage at time of trial \$2,500.00
Post-accident wage \$1,000.00
Calculation: $\$2,500.00 - \$1,000.00 = \$1,500.00 \times \text{two-thirds} = \$1,000.00$

Wage differential award is \$883.86

IV. WHEN WILL THE PETITIONER SEEK A WAGE DIFFERENTIAL AWARD UNDER SECTION 8(d)(1)?

- Where there are permanent restrictions which prevent the employee from returning to work at their former job and there is an impairment of earnings capacity, and;
- Where the wage differential will yield a higher award than would the expected schedule award for the same injury.

V. WHEN SHOULD THE EMPLOYER SEEK TO PROVE A WAGE DIFFERENTIAL?

- Anytime the petitioner is seeking to prove a claim of odd lot permanent total disability, the employer should aggressively attempt to prove a wage differential themselves via labor market survey, vocational testing, etc.

VI. TIPS FOR MINIMIZING WAGE DIFFERENTIAL EXPOSURE

- Broaden the area of a job search. Often times employees who live in remote areas but work in more urban areas attempt to have their job search limited to the remote rural areas in which they live. If in fact the employee was injured in an urban area, at a minimum a job search should be expanded to include that area.
- Employer should consider paying wage differential benefits weekly rather than in a lump sum unless they receive a significant discount on the present value of that stream of payments.

Question: If I want to pay in a lump sum, what is the value of the wage differential case?

Answer: The cost of the purchase of an annuity to fund that stream of payments which will often be less than a straight forward present value calculation using a five percent or six percent rate of return on the petitioner's anticipated life expectancy.

Question: Are there any ways to prove or reduce the costs of this annuity?

Answer: Yes, obtain a "rated life" on the employee in the case of any individuals who have significant injuries and/or other health conditions. Their "chronological age" might be significantly less than their "rated age." That is to say a 50-year-old individual with significant health conditions might be rated as age 58. A rated life annuity can then be purchased based on the rated age on the present value which would significantly reduce the costs of the purchase of the annuity that would fund the stream of payments. Thus, the actual value of the case on a lump sum basis is the cost to purchase a rated life annuity. In these instances, the insurance company that settles the annuity is running the risk that the individual will live longer than their rated life.

- Include contract language in wage differential settlements indicating that the parties agree and stipulate that the employee will never be able to return to work in the capacity in which they were working at the time of the accident and that settlement payments are in part consideration for this stipulation. Consideration of coupling such a provision with a resignation should also be made. This would be done in an attempt to prohibit the petitioner from claiming permanent restrictions on which a wage differential settlement is made and then attempting to return to work a short time later, claiming they are "better now."

- In calculating the wage differential, focus on evidence of earnings capacity not just earnings. The fact that the petitioner claims that is the most they can earn is not dispositive. *Johnson v. University of Illinois*, 03 IL.W.C. 28303, 08 I.W.C.C. 0257, 2008 WL 1787577 (I.I.C. March 6, 2008).
- Consider whether the current economy has reduced the future loss of earnings capacity. For example, if an injured employee is a member of the United Auto Workers, future collective bargaining agreements may call for lower wages than are currently being paid. This might also apply in other industries. If that were the case, this would lower the current earnings in the customary line of work component of the wage differential calculation, thereby reducing the wage differential. Discuss the potential for future wage reductions with a vocational counselor.
- Work closely with a vocational specialist. Advise them up front not to document that a lower paying job is "appropriate" for the individual where higher paying jobs might be available. Such a statement may be used by the Commission as evidence against the employer.
- Verify legitimacy of permanent restrictions via IME, FCE and surveillance.

VII. PROPOSED LEGISLATIVE CHANGES

Proposed changes to the Workers' Compensation Act set forth in the current bill (SB1422) include an amendment to section 8(d)(1) as follows:

For accidental injuries that occur on and after the effective date of this amendatory Act of the 97th General Assembly, 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.

S.B. 1422, 97th Gen. Assem., Reg. Sess. (Ill. 2011)

If passed, this legislation would have a significant impact on wage differential awards. No longer would wage differential payments be "for life." Instead, wage differential benefits would terminate when the employee reaches the age of 67 or five (5) years after the award becomes final, whichever is later. This would apply only to new claims with accident dates subsequent to the enactment of the legislation, if passed.

This change would be monumental for employers and greatly reduce the exposure on wage differential claims as demonstrated by the following example:

Claimant is a 43 year old, male union laborer

Average weekly wage \$1,200.00

Post-accident avg weekly wage \$ 400.00

Wage differential calculation: $\$1,200.00 - \$400.00 = \$800.00 \times \text{two-thirds} = \533.33

Assuming a life expectancy of 78, expected payout would be \$970,660.60 under current statute. Under proposed legislation, the payout would end at age 67 and total \$665,595.84.



James J. Manning

- Partner

Jim has practiced in all areas of civil litigation, including premises and auto liability, commercial litigation, workers' compensation, real estate litigation (including the defense of realtors in E & O claims), and construction litigation.

Jim has presented numerous seminars and given presentations on various workers' compensation issues both for the Illinois Institute of Continuing Legal Education and Lorman Education Services.

Jim currently chairs the firm's real estate practice group where he represents buyers, sellers, builders and provides closing and title services on residential real estate transactions.

In March 2011, Jim was named Affiliate of the Year by the Peoria Area Association of Realtors.

Professional Recognition

- Selected as a *Leading Lawyer* in Illinois.
- Peoria Area Association of Realtors (2011 Affiliate of the Year)

Professional Associations

- Peoria County Bar Association, Member and former Chair of the PCBA Real Property Committee
- Illinois Real Estate Lawyers' Association
- Illinois Land Title Association
- Illinois State Bar Association
- American Bar Association
- Member, Attorneys Title Guaranty Fund

Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois

Education

- Juris Doctor, Saint Louis University School of Law, 1992
- Bachelor of Business Administration, University of Notre Dame, 1989