

# Wage Differentials and the Challenge to find Suitable Employment

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The courts have had limited discussions regarding the exposure and procedures for determining the amount a claimant may be awarded in a wage differential scenario, and the specific requirements for calculating the figures where the claimant has not returned to work at the time of the calculation. Largely, claimants relied on the results of their vocational rehabilitation assessments to determine the employment opportunities and the wages they could potentially earn. Here, we will explore the wage differential statute as contained in the Illinois Workers' Compensation Act (the Act), the effect and application of the recently decided *Crittenden* case and practice pointers for future claims.

The Act addresses wage differential scenarios in 820 ILCS 305/8(d)1. Specifically, the statute requires that after a claimant has sustained an accidental injury, and, as a result of the accidental injury has become partially incapacitated from pursuing his usual and customary line of employment, he shall receive compensation for the duration of his disability. The compensation is 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 he is earning or is able to earn in some suitable employment or business after the accident.

As we know all too well, the claimant's expected recovery for a claim significantly increases when the issue of a wage differential is brought into play. To curtail this, the use of a labor market survey can help determine the availability of jobs within an area of a claimant's home that not only comply with the restrictions placed upon the claimant, but provide a snapshot of the wages the claimant could earn in this new capacity. The courts have previously established how to address the average amount which a claimant earned in full performance of his duties in the occupation in which the claimant was engaged at the time of his accident. However, until recently, the courts had not yet addressed the average amount that an employee would be able to earn in some suitable employment after the accident, if the claimant has not yet returned to work. The Appellate Court, First District, Workers' Compensation Division, has recently tackled this issue in the case of *Crittenden v. Illinois' Workers' Compensation Commission*, 2017 IL App (1st) 160002WC.

## Recent Appellate Court Decision Regarding the Calculations of Wage Differentials

In *Crittenden*, the claimant, Carl Crittenden, filed an application for benefits alleging an injury to his low back 'arising out of' and 'in the course of' his employment with respondent, the City of Chicago. The claimant alleged that on April 11, 2008, he bent over while lifting a bag of compost and threw it onto a garbage truck causing an injury to his low back. After undergoing a course of medical treatment, the petitioner was referred for a functional capacity evaluation which was conducted on October 17, 2009. Pursuant to the functional capacity evaluation, the claimant could only perform with 20 pounds of lifting on an occasional basis, 13 pounds of lifting on a frequent basis, and limitations on bending or standing (among other limitations), placing him in the light physical demand category. Further, the functional capacity evaluation indicated that the claimant was at maximal functional improvement. These were corroborated by an independent medical examination. The claimant's treating physician also agreed the claimant was at maximum medical improvement and opined that the claimant could not return to his regular job due to his permanent physical restrictions.

On July 27, 2010, the claimant met with Steven Blumenthal who conducted a vocational rehabilitation assessment. Although Mr. Blumenthal did not testify at the hearing before the Commission, his report was entered into evidence. The report indicates that the claimant advised that he lost his driving privileges due to a DUI, but expected to have his license reinstated in December 2010. Further, the claimant advised that he graduated high school in 1980.

Included in the report completed by Mr. Blumenthal was the claimant's prior work history which included a part-time cleaning position, earning \$12/hour, and a part-time customer service supervisor earning \$11/hour. Further outlined in the report are several occupations that Mr. Blumenthal finds suitable for the claimant with his current physical capabilities. However, he does note that some positions, such as customer service or cashiering, would require specific accommodations by the employer.

The report drafted by Mr. Blumenthal concluded that the claimant would earn between \$8.25/hour and \$13.78/hour. The wage of \$13.78/hour reflected the median wage for a school bus driver. An employee of MedVoc Rehabilitation testified at hearing that the claimant was not fully compliant with their program and this non-compliance continued to increase over time. Further, she testified that the claimant advised her that he did not have his high school diploma or GED and that he would not be getting his driver's license reinstated anytime soon. The claimant was required to submit his own job searches, but further investigation into his logs revealed inconsistencies and false statements.

Following a hearing, the Arbitrator concluded the claimant did sustain an injury arising out of and in the course of his employment on April 11, 2008. The arbitrator further found that the claimant was partially incapacitated from pursuing his usual and customary line of employment as a result of the accident, and therefore was entitled to wage differential benefits pursuant to the Act. Following this finding, the Arbitrator calculated the amount of the wage differential award using the undisputed prior wage of \$32.79/hour. This amount reflects the claimant's earnings had he continued to work for his employer after the accident. Next, the Arbitrator selected \$11.00/hour as a reasonable wage the claimant would make in suitable employment following the accident. Footnotes from the appellate court indicate the Arbitrator's calculation may have been based on an average in the range between \$8.25/hour (minimum wage) and \$13.78/hour (the median wage for a bus driver).

Following issuance of the Arbitrator's decision, the City of Chicago filed a review before the Commission. The Commission found that the claimant had shown that he was entitled to a wage differential. The court indicated that although the respondent could have provided more assistance to the claimant than they did, it did not absolve the claimant from exerting a full effort in his job search. The Commission found the calculation of the claimant's earning capacity following the accident should be based on \$13.78/hour, the maximum rate of pay identified in the report authored by Mr. Blumenthal.

The claimant appealed the Commission's decision to the Circuit Court of Cook County. The circuit court affirmed the decision of the Commission. The claimant then appealed to the Illinois Appellate Court. The Illinois Appellate Court reversed the decision and remanded the case to the Commission.

It is important to note that whether the claimant was entitled to a wage differential was not an issue on appeal. What was at issue was the method of determining the average amount the claimant is able to earn in a suitable position after the accident. Specifically, the court has yet to establish precedent on the average amount an employee may earn in some suitable employment or business after the accident in the event the employee has not yet returned to work.

It is well-established that the claimant, if he is working at the time of the wage differential calculation, must provide his actual earnings for a substantial period after he returns to work. The Commission may then apply his average weekly wage to the calculation for wage differential benefits. However, if the claimant is not working at the time of the calculation, the Commission has to rely on the information provided through a vocational rehabilitation expert as well as the functional capacity evaluation. Further, it cannot go without mention that pursuant to the Act, the average weekly wage should be determined based upon suitable employment which the claimant is both able and qualified to perform.

The appellate court, in issuing its ruling, held that in order to calculate the wage differential award the Commission must identify, based on evidence presented and located within the record, an occupation the claimant is able and qualified to perform. The burden of proof rests on the claimant to introduce evidence sufficient for the Commission to identify this position as well as the average weekly wage.

In *Crittenden*, the Commission used \$13.78/hour as the average amount the claimant was able to earn. The court noted that the Commission failed to identify a suitable occupation for the claimant and further, failed to identify that \$13.78/hour was the amount the claimant could earn in a suitable position.

The court found that the position of a bus driver, which reflected the wages of \$13.78, was not a suitable occupation for the claimant. The claimant did not, at the time of the Arbitrator's calculation, possess a driver's license and therefore did not qualify for the position of bus driver as he was not able and qualified. Consequently, the case was reversed and remanded to the Commission with direction to recalculate the wage differential in accordance with an occupation that is suitable, meaning an occupation in which the claimant is able and qualified to perform.

### **The Impact of *Crittenden* and the Steps Needed to Protect the Employers Interest in Wage Differentials**

This case provides much needed direction in regards to calculating a correct wage differential figure when the claimant has not yet returned to work. Pursuant to the Act, it is the claimant's burden to submit evidence regarding a lower potential earning capacity. This evidence provides them with the potential to increase their wage differential award. However, diligent and thoughtful case preparation can assist in reduction of the respondent's potential exposure in such a case. This includes using a well-prepared functional capacity evaluation as a defense in these types of claims.

A functional capacity evaluation is the backbone of a claimant's demand for a wage differential scenario. To ensure full efforts are being put forth by the claimant, functional capacity evaluations include validity testing. Unfortunately, without proper and well-controlled validity testing, a claimant's physical ability can be severely under-estimated. The respondent can ask for an independent functional capacity evaluation to ensure high-quality results. The completed functional capacity evaluation report is presented to the claimant's treating physician, just as it was in *Crittenden*.

Treating physicians tend to rely on the findings from physical therapists as well as their own opinions in regards to a claimant's physical limitations. Respondents have the ability to protect their interests and obtain an objective assessment of the claimant's physical limitations through an independent medical examination to ensure that the opinions authored by both the physical therapist as well as the claimant's treating physicians reflect a true and accurate assessment. This safeguard is of utmost importance when preparing a claim for a wage differential assessment.

An aggressive, detailed and closely-monitored approach must be taken when searching for potential, suitable jobs for the claimant post-accident. The *Crittenden* case provides that any calculation of a wage differential claim where the claimant has not yet returned to work must be based on a position that the claimant is able and qualified to perform.