Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

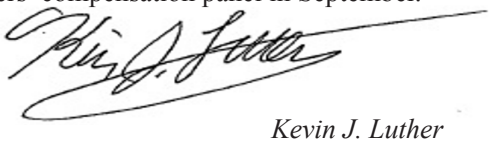
A Newsletter for Employers and Claims Professionals **September 2010**

A Word from the Practice Group Chair

This month's featured author is Attorney John Langfelder. John is one of our workers' compensation attorneys who assists Gary Borah and Dan Simmons in representing employers at the venues covered by our Springfield office.

John discusses the troubling and now popular section 8(d)(1) wage differential benefit claim. You have probably seen a proliferation of these types of claims recently filed by petitioner attorneys. Many years ago this section was largely overlooked, but thanks to some labor-friendly decisions and generally tough economic times, these claims have become commonplace. Given these developments, we need to do what we can to defend these claims since they can have the effect of turning modest indemnity exposure into hundreds of thousands of dollars. Care should be taken to develop defenses, such as taking an aggressive and thorough look at the medical restrictions (and improving the restrictions when we can); working with the employer to accommodate the restrictions; and then identifying and expanding the potential earning capacity of the petitioner so as to minimize the wage differential amount in the event the employer cannot accommodate the restrictions. Please feel free to contact us should you need assistance in reducing wage differential exposure in your claims.

Also, as of August 1, 2010, Justice Bruce D. Stewart has replaced Justice James Donovan as the Appellate Court, Fifth District, representative on the Appellate Court, Workers' Compensation Commission Division. He graduated from Southern Illinois University in Carbondale with a bachelor's degree in government in 1973 and from SIU School of Law in 1976. Justice Stewart practiced law in Southern Illinois from 1976 until 1995, with primary emphasis on litigation. In 1995, he was appointed Circuit Judge of the First Judicial Circuit and was elected to that position in 1996. He served as a Circuit Judge until November 2006, when he was elected to the Appellate Court, Fifth District. Justice Stewart will hear his first arguments as a member of the workers' compensation panel in September.



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This Month's Author:

After 20 years working in claims for what was then known as Country Companies Insurance, John Langfelder worked for a year in private practice in Columbus, Ohio and then moved back to Central Illinois and began his legal career with Heyl Royster in 2003 in the Springfield office. John focuses his practice on the defense of employers in workers' compensation at both the arbitration and appellate levels. He also puts his medical knowledge to good use in the defense of general personal injury and medical malpractice litigation. John is a graduate of Western Illinois University where he received his Bachelor of Science in Chemistry, and of Capital University Law School in Columbus, Ohio.

FROM THE COMMISSION ...

The Commission is holding an open house at the Chicago Commission office on September 8 and November 9. There is no charge to attend, but registration is limited. To sign up, please send an email with the subject "open house" to susan.piha@illinois.gov.

The Commission first announced an open house in Chicago in January 2010, and the seats filled up on the day it was announced. The programs in February, April, May, and June also filled up quickly and were well-received. According to the Commission, visitors walk away with a greater understanding of how to interact with the Commission and work with the process.

The program runs from 9:00 a.m. to 12:00 noon. After an overview of the Commission process, visitors can observe arbitration hearings and review-level oral arguments. After oral arguments end, there will be a question-and-answer period with the Commissioners.

UNDERSTANDING WAGE DIFFERENTIAL AWARDS

During the course of handling and resolving workers' compensation claims, we often tend to automatically characterize cases as percentages of body parts under Section 8(e) or as person as a whole under Section 8(d)(2). With the current economic climate and shrunken job market, however, we must be more cognizant of situations where the injured worker is unable to return to his former employment due to permanent restrictions or disability and, as a result, the worker's earning capacity is diminished. In such cases, a claimant may be entitled to a wage differential award, which could result in a significant monetary exposure for the employer.

Wage Differential as Defined by Section 8(d)(1)

Section 8(d)(1) provides that:

> 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) (italics added).

The italicized phrases are key factors in determining and calculating a claimant's entitlement to a wage differential award. To qualify for a wage differential award under Section 8(d)(1), a claimant must prove:

(1) partial incapacity which prevents pursuit of his/her usual and customary line of employment; and

(2) an impairment of earnings. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 734 N.E.2d 482 (3d Dist. 2000); *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 648 N.E.2d 923 (1st Dist. 1995).

We should be on the alert for a potential wage differential award any time the resultant disabilities prevent the employee from returning to his former job. In that case, inquiry must be made to determine whether the claimant's injury has created a disability that reduces his earning capacity and results in an impairment of earnings.

Does the Disability Preclude the Employee's Return to His "Usual and Customary Line of Employment"?

Section 8(d)(1) refers to a claimant becoming partially incapacitated from "*pursuing his usual and customary line of employment*." Exactly what constitutes a claimant's "usual and customary line of employment" is a question of fact for the Commission and its decision will not be overturned unless it is contrary to the manifest weight of the evidence. *Edward Gray Corp. v. Industrial Comm'n*, 316 Ill. App. 3d 1217, 738 N.E.2d 139 (1st Dist. 2000). A claimant must show that the injury prevents him from pursuing his usual and customary line of employment by a preponderance of the evidence. A worker is considered disabled if he can no longer perform his job "without endangering his life or

health." *Radaszewski v. Industrial Comm'n*, 306 Ill. App. 3d 186, 713 N.E.2d 625 (1st Dist. 1999).

An employee's usual and customary line of employment is established through evidence of his prior work duties. The inability to perform those duties is established through medical evidence and the claimant's testimony. In practice, these determinations are usually very fact-dependent, as is evident from the review of several representative cases.

For example, in *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 497 N.E.2d 452 (1st Dist. 1986), the Appellate Court affirmed the Commission's conclusion that it was speculation whether the claimant, an apprentice plumber, would eventually become a journeyman plumber. The Commission had refused to base the earnings loss award on the average amount which claimant "might have earned" as a union journeyman plumber. According to the Court, the Commission properly determined that it would have been "mere speculation" to assume that the claimant would have completed his training. "The record indicates that claimant never took the union examination. In fact, the claimant did not testify that he ever intended to take the examination." The Court concluded that there was nothing in the Act which would have required the Commission to compute the claimant's earnings loss award based on the amount which he might have earned as a union journeyman plumber, a position he never attained.

In a similar case concerning a claimant's usual and customary line of employment, the *Edward Gray Corp.* case cited above, the claimant had sustained at least five prior work-related accidents as an iron worker and was working within restrictions at the time of the accident. The employer argued that iron-working was not the claimant's usual and customary line of employment because his prior restrictions precluded him from performing full duty work as an iron worker. The Court nevertheless found the claimant's usual and customary line of employment was that of an iron worker in part because the restrictions were for claimant's previous employer. No evidence was submitted of the present employer's work restrictions to support the argument that claimant could not perform the full duties of an iron-worker while working for Edward Gray.

Likewise, in *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 648 N.E.2d 923 (1st Dist. 1995), it was determined that a professional football player was entitled to a wage differential award despite the fact that such players have a shortened work expectancy. The Appellate Court noted that in today's society, it is not uncommon to have employees change jobs several times in their careers and shortened work expectancy is not a proper consideration or bar to a wage differential award.

How Do We Calculate Earnings In the Full Performance of Usual and Customary Duties?

Wage differential awards are to be based on the presumption that, but for the injury, an employee would be in full performance of his duties. Thus, it is important to identify the number of hours that constitute "full performance" of the particular occupation. *Forest City Erectors v. Industrial Comm'n*, 264 Ill. App. 3d 436, 636 N.E.2d 969 (1st Dist. 1994). In addition, a wage differential award focuses on what the claimant would have been able to earn at the time of arbitration if he were able to fully perform the duties of the occupation in which he was employed at the time of his injury. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1021-22, 832 N.E.2d 331 (1st Dist. 2005).

For example, if Rachael earns $15 per hour at the time of her accident, and thereafter cannot return to that job because of her injuries, and her job now pays $17 per hour, her wage differential calculation will be based on the $17 per hour that her job earns at the time of arbitration. In other words, in calculating damages the Commission looks to the date of accident to determine the type of job the claimant was doing, but then to the date of hearing to determine what the claimant would be making but for the injuries.

What If the Claimant Has Multiple Jobs?

In most cases, the wage calculation process is fairly straightforward since the occupation in which the employee was engaged is the employee's sole employment. In cases involving concurrent employment however, the situation is more complicated. For example, an employee may be injured at his temporary job and, as a result of that injury, is unable to return to his primary job, the employee's usual and customary line of employment. In such a case, the calculation of the employee's earnings requires a more detailed analysis of his earning history.

In this situation, the first inquiry is whether the employer knew of the second job and, if so, then the second wage will be factored into the loss of earnings.

For example, in *Flynn v. Industrial Comm'n.*, 211 Ill. 2d 546, 813 N.E.2d 119 (2004), the Illinois Supreme Court addressed the issue of calculating the earnings for an employee working concurrently with two or more employers in the context of workers in seasonal industries. In that case, the claimant had driven trucks for related asphalt companies for 17 years, his work season running from March/April to November/December each year depending upon the weather. During the off-season, the claimant signed the referral list maintained by the union and was also on call with the asphalt companies. The claimant never applied for unemployment compensation during the off-season, but worked at other employment when available. The claimant subsequently sustained an eye injury while operating a snow-blower ($8.00/hour) during temporary employment in the off-season. He returned to his work as an asphalt truck driver, but the State refused to renew his license due to his vision impairment. The claimant found other employment as an armed guard earning $9.00 per hour compared to the $22.59 per hour claimant would have earned as an asphalt driver.

The arbitrator awarded a wage differential based upon his work as an asphalt driver, which he considered the claimant's usual and customary line of employment. The Commission modified the award, finding that the claimant was not concurrently employed at the time of the injury and claimant's earnings as an asphalt driver should not be considered. The Commission also refused to make any wage differential award, finding that the claimant earned more as a security guard. Although the Appellate Court also affirmed, the Supreme Court reversed the Commission's decision and remanded the case for calculation of a wage differential award with consideration of all of claimant's earnings from concurrent employment.

The Court concluded that all earnings of a worker who is concurrently employed should be considered when calculating a wage differential award even where the claimant was not working in the second job at the time. In so doing, the Court relied on *Jacobs v. Industrial Comm'n*, 269 Ill. App. 3d 444, 646 N.E.2d 312 (2d Dist. 1995), where the Appellate Court considered the claimant's wages as a sheet metal worker because the employment relationship had not been severed during the layoff. The claimant had been employed as a sheet metal worker most of the prior 52-week period with the exception of a short layoff common in the industry. Moreover, the part-time employer was aware of the concurrent employment as a sheet metal worker and the claimant was available and subject to recall at any time for his job as a sheet metal worker.

The Court further relied on the Pennsylvania Supreme Court's ruling in *Triangle Bldg. Center v. Workers' Compensation Appeal Board (Linch)*, 560 Pa. 540, 746 A.2d 1108 (2000), a case which held that a temporarily severed employment relationship could be considered concurrent employment provided that the relationship remains sufficiently intact. Applying this case to the facts in *Flynn* revealed that the claimant's relationship remained "sufficiently intact" – his layoff was temporary, he was ready and willing to return to his asphalt driving work and had done so for 17 years, his part-time employer was aware of his concurrent employment, and he returned to his work as an asphalt driver until his injury prevented him from continuing in that position.

Looking at the actual dollars involved, *Flynn* illustrates the significant monetary increase in a wage differential award where there is concurrent employment. The claimant's wage in full performance of his duties as an asphalt driver was $903.60 per week ($22.59 x 40 hours). His employment after the accident paid $360.00 per week ($9.00 x 40 hours). The claimant's wage differential was calculated as $903.60 - $360.00 = $543.60 x 2/3 = $362.40 per week. On an annual basis, this equated to $18,844.80. Using an estimated remaining life expectancy of 20 years, claimant's award has a value of $376,896.00 (25 years is $471,120). In comparison, a PPD award of 40 percent of a person as a whole with an average weekly wage of $903.60 would have been $108,432 ($542.16 x 200 weeks).

PRACTICE POINTER

In cases involving concurrent employment, answers are needed to the following questions: (1) whether the employer was aware of any concurrent employment; (2) the nature of concurrent employment and the length of time working; and (3) whether the layoff period was permanent or temporary to determine if the relationship remained sufficiently intact to be considered in a wage differential calculation.

Proving Impairment of Earning Capacity

Simply establishing that the claimant cannot return to his prior employment is not enough to warrant a wage differential award. He must also show that as a result of the work-injury and his inability to return to his former job, he has suffered an impairment of his earning capacity. At first blush, this may seem as simple as the claimant finding work and comparing that wage with his former wage.

The Act does not allow a worker to use any wage for comparison. Thus, a steel worker earning $55 per hour cannot make a case for a substantial wage differential by merely finding minimum wage work at a local fast food restaurant. The Act states that we can focus on what the claimant, in his post-injury condition, is "able to earn."

One method of demonstrating an impairment of earning capacity is by a job search. Using this method, the claimant conducts a search for jobs within his restrictions and uses the results of that search to justify why he cannot earn higher wages than the job he has found. For example, in *Durfee v. Industrial Comm'n*, 195 Ill. App. 3d 886, 553 N.E.2d 8 (5th Dist. 1990), the Commission rejected the claimant's argument that he was entitled to a wage differential award because he did not attempt to return to work within his restrictions and did not produce evidence of any attempts to find other suitable employment.

In the case of *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 734 N.E.2d 482 (3d Dist. 2000), however, although the claimant gave a detailed summary of his effort to obtain suitable employment including names, approximate dates, wages offered, and results, he did not have any supporting physical documentation to submit. The Commission nevertheless awarded a wage differential and held that the amount of details provided regarding his job search was sufficient evidence to prove an impairment in earning capacity.

Cases involving wage differential claims appear to focus on the *degree of effort* of the job search if and when it is performed. In *Residential Carpentry, Inc. v. Illinois Workers' Compensation Comm'n,* 389 Ill. App. 3d 975, 910 N.E.2d 109 (3d Dist. 2009), the claimant sustained a shoulder injury and was released to return to work with restrictions as a carpenter. The claimant testified he remained in contact with his union, regularly attended union meetings for work, sought to be re-employed by his employer, and contacted 15-20 potential other contractors for employment. The claimant was unable to find a job and produced a log documenting his efforts to find employment. The Court held that the evidence of a diligent search is sufficient to show that a worker was not employable and that no employment was available for claimant. Although the employer disputed the job search effort, the court noted that the employer had a light duty program yet failed to offer claimant any job within his job restrictions.

In *Gurley v. Lexcam, Inc. & Gerald Brown Construction*, 97 IIC 2125, 94 WC 41797 (Nov. 21, 1997), the claimant was denied benefits under Section 8(d)(1) because he failed to produce evidence that he conducted an adequate job search and failed to show that positions in his area of expertise and training were unavailable before accepting a part-time job. Similarly, in *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 769 N.E.2d 66 (1st Dist. 2002), the claimant was denied benefits under Section 8(d)(1) because he did not complete any job applications and simply accepted employment at the second company he called. The claimant also failed to present evidence that he could not perform his duties within his restrictions.

In a similar case, however, the claimant was denied a wage differential award despite providing testimony about her job search. *Rodebeck v. Kraft Pizza Co.*, 02 IIC 0726, 98 WC 40629, 2002 WL 31950017 (Oct. 1, 2002). Although it appeared that the claimant had done an extensive search before accepting a part-time position, at trial the claimant could not present evidence of any names, dates, times, wages offered, or whether full time employment within her restrictions was available at her part-time place of employment. Unlike *Gallianetti*, the claimant in *Rodebeck* could only speculate as to earnings and wages. There was no medical evidence to show she was restricted to part-time employment. Due to the failure to present evidence to support a wage differential claim, the claimant implicitly waived her right to this award and compensation was awarded under Section 8(d)(2).

In the event a claimant is unable to return to work, a claimant must provide proof of what he or she is able to earn in some suitable employment. In *Greaney v. Industrial Comm'n,* 358 Ill. App. 3d 1002, 832 N.E.2d 331 (1st Dist. 2005), the claimant could not perform the duties of a laborer for a masonry contractor due to permanent restrictions involving his right hip. The claimant attempted other employment ($10.75 per hour), but was unable to physically perform his duties due continued pain. He subsequently obtained employment at $8.00 per hour. The wage differential

award was based on claimant's second employment ($8.00) rather than the first ($10.75). The first employment was unsuitable because the claimant was physically incapable of performing the job. A claimant is generally entitled to vocational rehabilitation when sustaining a work-related injury causing a reduction in earning power and there is evidence that rehabilitation will increase his earning capacity. It was also noted that vocational assistance could have been beneficial because the evidence showed claimant's self-created vocational program increased his earning capacity as demonstrated by the positive results of his own job search.

Wage differential payments commence when the claimant has found other suitable employment. *Payetta v. Industrial Comm'n*, 339 Ill. App. 3d 718, 791 N.E.2d 682 (2d Dist. 2003). In *Payetta*, the claimant had lost an arm and was being paid TTD benefits. It could not be shown that claimant was partially incapacitated from pursuing his usual and customary line of employment until the date he starts his new employment. A claimant is not allowed to collect a wage differential award while receiving TTD benefits.

What Is the Duration of the Disability and How Are Wage Differential Awards Reopened?

A Wage Differential Is Payable for Life

A wage differential award is for the duration of the employee's disability, and is paid for the remainder of his life – not of his work life. *Goclan v. Granite City Steel*, 02 IIC 0684, 98 ILWC 33716, 2002 WL 31423202 (Sept., 4, 2002); *Rutledge v. Industrial Comm'n*, 242 Ill. App. 3d 329, 611 N.E.2d 526 (1st Dist. 1993) (the award is for the claimant's life and cannot be modified unless the nature of the disability changes and that change permits the claimant to perform higher paying work).

PRACTICE POINTER

A vocational expert can be helpful in potential wage differential situations by completing a labor market survey to determine job availability and assisting an injured employee in obtaining appropriate employment.

Section 19(h) Permits Limited Modification of a Wage Differential

Section 19(h), however, allows for review of awards which pay compensation in installments if the employee's disability diminishes or ends. 820 ILCS 305/19(h). A Section 19(h) petition must be filed within 60 months of the Section 8(d)(1) award and the employer bears the burden to show that the employee's disability has materially changed. Section 19(h) requires that the change in disability involve a change in the claimant's physical or mental condition, not his economic condition, and that the change be a material one. *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165, 172, 513 N.E.2d 104 (3d Dist. 1987).

Although it was a case concerning an attempted modification of a permanent total award, the recent decision in *Boyd Electric v. Illinois Workers' Compensation Comm'n*, No. 1-09-0766WC, 2010 WL 2991069 (1st Dist., July 13, 2010), demonstrates this point. There, the employer attempted to obtain claimant's income tax records and earnings as grounds to challenge the award, but was denied. The Court held that the relevant inquiry was whether there was a change in claimant's physical disability. The employer presented no authority to support requests for production of the records or earnings information. There was no indication that a Section 12 examination was requested in order to evaluate any possible change in the claimant's physical or mental disability status, and no witness testimony regarding claimant's capacity to work was presented.

Similarly, in *Cassens Transport Co. v. Industrial Comm'n,* 354 Ill. App. 3d 807, 721 N.E.2d 1274 (4th Dist. 2005), the employer attempted to suspend wage differential benefits due to claimant's failure to provide income tax returns as requested. Due to the fact that there were no allegations of a change in claimant's physical condition, there was no basis for suspending payments. The term "disability" as used in Section 8(d)1 was found to refer to physical and mental disability, not economic disability. The Court held that "disability" had the same definition for purposes of review as it does for wage differentials under Section 8(d)(1) and a change in physical condition is a prerequisite for a Section 19(h) petition. *Petrie v. Industrial Comm'n,* 160 Ill. App. 3d 165, 513 N.E. 2d 104 (3d Dist. 1987).

These cases highlight the difficulty an employer faces when wanting to challenge a claimant's continuing entitlement to a Section 8(d)(1) wage differential. Not only is

the time to do so substantially curtailed (60 months), but the employer cannot affect a change for simple economic grounds, *i.e*., the employee can find higher-paying work. The employer must show a material change in the claimant's physical or mental condition and that, as a result of that material change, the claimant is able to earn more. In other words, it is not enough to simply show that other higher-paying work is available to the claimant.

Caution on Artificially Raising Wages to Avoid a Wage Differential

An employer cannot artificially raise an employee's wages to defeat a wage differential claim. In *Smith v. Industrial Commission*, 308 Ill. App. 3d 260, 719 N.E.2d 329 (3d Dist. 1999), the employee proved an earning impairment and was working in a position within her restrictions. The employer increased the employee's wage without any reason, explanation, or modification of duties. The Court held that the raises were not based on her labor, service or performance, and thus were an improper attempt to avoid a wage differential award.

Similarly, in *Yellow Freight Systems v. Industrial Comm'n,* 351 Ill. App. 3d 789, 814 N.E.2d 910 (1st Dist. 2004), the claimant was a 43 year-old dock worker with an 11th grade education who could no longer perform the required overhead work due to a shoulder injury. The circuit court reversed the Commission's 8(d)(2) award and remanded the case for calculation of a wage differential award. There was no dispute that the claimant could not continue in his usual and customary line work as a dock worker, which paid $19.15 per hour. The claimant took a job earning $7.00. The employer argued that a wage differential was not warranted because the claimant failed to apply for three positions that were posted with the employer.

The evidence revealed that the claimant did not have the skills or experience for the positions in question, and the employer had simply notified the claimant of the positions without offering them to him. Testimony from a vocational expert supported the claimant's argument that the job he had accepted was appropriate for his educational experience and physical restrictions. The employer's arguments were deemed to be without merit in the absence of a *bona fide* offer, and the Court stated that an employer could not use this type of "tactic" to defeat the claimant's entitlement to a wage differential award.

CONCLUSION

The possibility of wage differential awards has increased in today's tight economy. Nevertheless, the burden of proof is still on the claimant to establish that his disability has prevented him from returning to his normal line of work and that he has, as a result of that disability, suffered an impairment of earnings. Whenever there is a potential for a wage differential claim, it is critical to immediately and aggressively determine the nature of any disability and to evaluate, through IME and/or vocational assessment, the claimant's ability to work.

The use of vocational assistance and rehabilitation are valuable tools which may assist in returning the claimant to suitable and appropriate employment. If the claimant's restrictions can be accommodated, an effort to return the claimant to work in a different capacity with the same employer may be the best option, in which case a *bona fide* offer must be made.

Should you have potential wage differential issues, please feel free to call any of our workers' compensation attorneys.

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