

BELOW THE RED LINE

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WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

A Newsletter for Employers and Claims Professionals

August 2017

A WORD FROM THE PRACTICE CHAIR

It's August! Students are back, football season is right around the corner, and we are all getting back to more of a normal (non-summer) pace. Congratulations, you made it through another summer! I hope you were able to create many fun-filled memories over the past few months to fuel you as you start another year.

On a more somber note, I wanted to express my sincere condolences and sadness for the loss of one of our arbitrators. Robert Falcioni passed away last week after a difficult battle. Although I did not always agree with his decisions, I did appreciate and respect the man. He was good-natured and I grew up before him in the professional sense. My thoughts and prayers go out to the family he leaves behind. We are often reminded of the small world in which we work when handling workers' compensation claims. Some of the arbitrators before whom we practice each month have served the Commission for more than 25 years. They certainly become a part of the fabric of the practice we enjoy and their loss is unquestionably felt.

In this month's issue my partners Kevin Luther and Lynsey Welch have provided you with wonderful insight as to what is happening on the ground in the workers' compensation arena when it comes to settlement (wage differentials versus loss of occupation claims). Knowledge of what petitioner's attorneys are thinking and doing these days is a great way to get you ready for your next round of settlement negotiations. Getting insights as to petitioner's attorneys strategies is always

a great idea and we welcome the opportunity for our claims professionals to learn what type of "tricks" are being perpetrated by the petitioner's bar. Keeping you informed is our job, so that your job is made easier.



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WAGE DIFFERENTIAL VS. "LOSS OF OCCUPATION" CLAIMS

By: Kevin Luther and Lynsey Welch, Rockford

Practicing law in the workers' compensation arena in Illinois is never dull. While we are sure we are not the only ones frequently shocked by the demands we receive from opposing counsel, we have noticed a recent trend of settlement demands being sent based on a "loss of occupation" claim versus a wage differential equation. This got us thinking — why the change?

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

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loss provisions. However, where the employee cannot return to their former employment and further suffers a diminished earning capacity, benefits may be awarded under section 8(d)(1), the so-called wage differential provision.

As you recall, statutory changes to the Illinois Workers' Compensation Act (the Act) went into effect in 2011. One of the statutory changes to the Act in 2011 was regarding calculation of wage differentials. In our June article, we explored the wage differential statute as contained in the Act and the effect and application of the recently decided *Crittenden* case. Using that article as a bit of a foundation for this article, we are going to speak this month on the recent trend toward demands for "loss of occupation" claims pursuant to Section 8(d)(2) that may be the unexpected result from the 2011 amendments to the Act. Specifically, petitioners cannot recover for both section 8(d)(1) wage differential and a specific loss of use for a person-as-a-whole under sections 8(e) or 8(d)(2).

820 ILCS 305/8(d)(1)

The Act addresses wage differential scenarios in Section 8(d)(1), which states:

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. *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* 820 ILCS 305/8(d)(1) (Emphasis added).

Specifically, the change in 2011 amended section 8(d)(1) so that wage differential awards were no longer payments "for life." Instead, wage differential benefits now terminate when the employee reaches the age of 67 or five years after the award becomes final, whichever is later. *Id.* Thus, the clock begins ticking on the five year limitation on the payment of wage differential awards as soon as an award becomes final. It was anticipated that this limitation would be a monumental saving to employers by greatly reducing the exposure for wage differential claims, particularly as they apply to older workers.

Example:

- Petitioner is a 55-year-old, male who was earning \$1,000 as his average weekly wage pre-accident.
- Post-accident he returned to employment earning \$15/hour with a post-accident average weekly wage of \$600.
- With a life expectancy of 78, the lump sum wage differential payout pre-2011 was \$319,092.80.
- Under the current statute, the lump sum wage differential payout would end at 67 and total \$166,483.20.

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Without any further investigation or calculation, this is great savings, right? However, what was discussed above is the lump sum value. Employers should consider paying wage differential benefits weekly rather than in a lump sum unless they receive a significant discount on the present value of the stream of payments. Given the example used above, it is fair to expect a discount of around 5-6 percent for payment of a lump sum versus payment on a weekly rate. At a 6 percent discount, \$166,483.20 is reduced to \$116,313.49.

When will the petitioner seek a wage differential award under section 8(d)(1) versus a “loss of occupation” award under section 8(d)(2)?

Simply put, they will do so any time and any way it betters them financially. The example above illustrates the gray area where, given the case specifics and facts, a possible 8(d)(2) person-as-a-whole calculation could exceed a section 8(d)(1) wage differential recovery. This calculation is appearing more and more relevant with an aging work force at or near the age of 60. In the example above, the PPD rate is \$600. Any 8(d)(2) demand over 38 percent person-as-a-whole would equate to a dollar value over the wage differential equation noted above when using a reasonable discount rate.

We anticipate petitioner's attorneys and their clients are not happy with this new statutory change and are now working their cases as a section 8(d)(2) “loss of occupation” claim essentially as an election for more money. Instead of arguing that there is impairment in earning capacity, the argument is that the petitioner's recovery should be based on a “loss of occupation.” Further, we have seen this trend toward “loss of occupation” settlement demands for [section]

8(e) claims as well. Again, this is merely a choice for a calculation for section 8(d)(2) as opposed to a wage differential award that would not work in their favor.

Practice Pointers

In our June article we discussed practice pointers. Many of those same practice pointers are still relevant here.

Negotiation Strategy

First and foremost, we recommend that the respondent run the calculation for potential exposure as both a wage differential and under section 8(d)(2) prior to beginning any settlement negotiations. If a wage differential award is more beneficial to the employer, then settlement negotiations should remain based on a wage differential basis. This avoids muddying the water of settlement negotiations, and hopefully, the attorney does transition to a section 8(d)(2) demand.

Where there is evidence of a permanently reduced earning capacity and a wage differential is sought, the Commission is required to award wage differential benefits. The claimant elects whether they wish to proceed under the schedule or wage differential. Presumably the petitioner will seek benefits under the provision which will provide the greatest recovery.

Burden of Proof

It is the Petitioner's burden to prove both that the injury precludes them from returning to their usual and customary line of employment and an impairment of earnings. Petitioners are not required to submit evidence of a job search as a means to support allegations of impairment of earnings, but this is routinely done. Anytime the petitioner is seeking to prove a claim for “loss of occupation” pursuant to section 8(d)(2), the employer should aggressively

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attempt to prove a lower exposure recovery via Functional Capacity Evaluation (FCE), labor market survey, or vocational testing. The Commission will need this evidence to support what employment is suitable to the claimant's condition and the average amount they are able to earn.

Appropriate Computation

Computation of wage differential awards are not simply based on the average weekly wage at the time of the injury. The average weekly wage calculation at the time of the accident can be used if it is too difficult to determine the current wage at the time of trial or settlement, and is frequently used. *Taylor v. Industrial Comm'n*, 372 Ill. App. 3d 327 (4th Dist. 2007).

However, in computing the wage differential, the appropriate wage is the amount of money the petitioner would be earning at the time of the trial or settlement (including raises) if that figure is greater than the average weekly wage as it was computed at the time of the accident. *General Electric Co. v. Industrial Comm'n*, 144 Ill. App. 3d 1003 (4th Dist. 1986), *appeal denied*, 113 Ill. 2d 573 (1987). This wage calculation should still comply with the statutory provisions for calculating an average weekly wage as set out in Section 10 of the Act. Make sure to exclude overtime from the calculation unless it is mandatory. The appellate court has outlined in great detail the proper method of calculating the wages in a section 8(d)(1) wage differential situation. 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 (1st Dist. 2006).

In computing wage differential awards, it is important not to speculate on what increases or promotions the petitioner might have earned if he or she continued in their employment. *United Airlines,*

Inc. v. Industrial Comm'n, 2013 IL App (1st) 121136WC. While wage differential calculations are based 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 calculated on the petitioner's job classification at the time of the original injury.

Please feel free to contact any of our workers' compensation attorneys statewide should you have any questions on this topic or any other workers' compensation issues.



Kevin Luther - Rockford & Chicago

Kevin concentrates his practice in the areas of workers' compensation, employment and labor law, and employer liability. He supervises the Workers' Compensation and Employment & Labor Practices in the firm's Rockford and Chicago offices. He is a past chair of the firm's statewide Workers' Compensation Practice. He has represented numerous employers before the Illinois Human Rights Commission and has arbitrated hundreds of workers' compensation claims in many Illinois Workers' Compensation Commission venues. Kevin is a co-author of "Illinois Workers' Compensation Law, 2017-2018," published by Thomson Reuters. Kevin also frequently speaks to industry and legal professional groups.



Lynsey Welch - Rockford

Lynsey dedicates a significant portion of her practice to the defense of employers in workers' compensation cases. She has successfully arbitrated several complex claims. She has also effectively argued numerous claims before the Illinois Workers' Compensation Commission. Lynsey has experience speaking to clients, claims representatives, employers, and attorneys on issues regarding the Illinois Workers' Compensation Act. Additionally, she has authored a variety of articles on Workers' Compensation and Workers' Compensation Appeals, including such topics as Personal Comfort Doctrine and defending a claim for a voluntary recreational activity.

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TTD, DEATH, PERM. TOTAL & AMP. RATES

ACCIDENT DATE	MAX. RATE TTD, DEATH, PERM. TOTAL, AMP.	MIN. RATE DEATH, PERM. TOTAL, AMP.
7/15/11 to 1/14/12	1261.41	473.03
1/15/12 to 7/14/12	1288.96	483.36
7/15/12 to 1/14/13	1295.47	485.80
1/15/13 to 7/14/13	1320.03	495.01
7/15/13 to 1/14/14	1331.20	499.20
1/15/14 to 7/14/14	1336.91	501.34
7/15/14 to 1/14/15	1341.07	502.90
1/15/15 to 7/14/15	1361.79	510.67
7/15/15 to 1/14/16	1379.73	517.40
1/15/16 to 7/14/16	1398.23	524.34
7/15/16 to 1/14/17	1428.74	535.79
1/15/17 to 7/14/17	1435.17	538.19

MINIMUM TTD & PPD RATES

# of dependents, including spouse	7/15/07- 7/14/08	7/15/08- 7/14/09	7/15/09- 7/14/10	7/15/10- 7/14/17
0	200.00	206.67	213.33	220.00
1	230.00	237.67	245.33	253.00
2	260.00	268.67	277.33	286.00
3	290.00	299.67	309.33	319.00
4+	300.00	310.00	320.00	330.00

MAXIMUM PERMANENT PARTIAL DISABILITY RATES

ACCIDENT DATE	MAXIMUM RATE
7/1/08 to 6/30/10	664.72
7/1/10 to 6/30/11	669.64
7/1/11 to 6/30/12	695.78
7/1/12 to 6/30/13	712.55
7/1/13 to 6/30/14	721.66
7/1/14 to 6/30/15	735.37
7/1/15 to 6/30/16	755.22
7/1/16 to 6/30/17	775.18

MAXIMUM 8(D)(1) WAGE DIFFERENTIAL RATE

ACCIDENT DATE	MAXIMUM RATE
7/15/13 to 1/14/14	998.40
1/15/14 to 7/14/14	1002.68
7/15/14 to 1/14/15	1005.80
1/15/15 to 7/14/15	1021.34
7/15/15 to 1/14/16	1034.80
1/15/16 to 7/14/16	1048.67
7/15/16 to 1/14/17	1071.58
1/15/17 to 7/14/17	1076.38

SCHEDULED LOSSES (100%)

Effective 2/1/06 (and 7/20/05 to 11/15/05)	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Person as a whole500 wks	Leg215 wks
Arm253 wks	Amp at hip joint.....296 wks
Amp at shoulder joint.....323 wks	Amp above knee242 wks
Amp above elbow.....270 wks	Foot167 wks
Hand.....205 wks	Great toe.....38 wks
Repetitive carpal tunnel claims190 wks	Other toes.....13 wks
Benefits are capped at 15% loss of use of each affected hand absent clear and convincing evidence of greater disability, in which case benefits cannot exceed 30% loss of use of each affected hand.	Hearing
Thumb76 wks	Both ears.....215 wks
Index.....43 wks	One ear.....54 wks
Middle.....38 wks	Eye
Ring.....27 wks	Enucleated173 wks
Little.....22 wks	One eye.....162 wks
	Disfigurement.....162 wks

Death benefits are paid for 25 years or \$500,000 whichever is greater.

As of 2/1/06, burial expenses are \$8,000.

The current state mileage rate is \$0.535 per mile.

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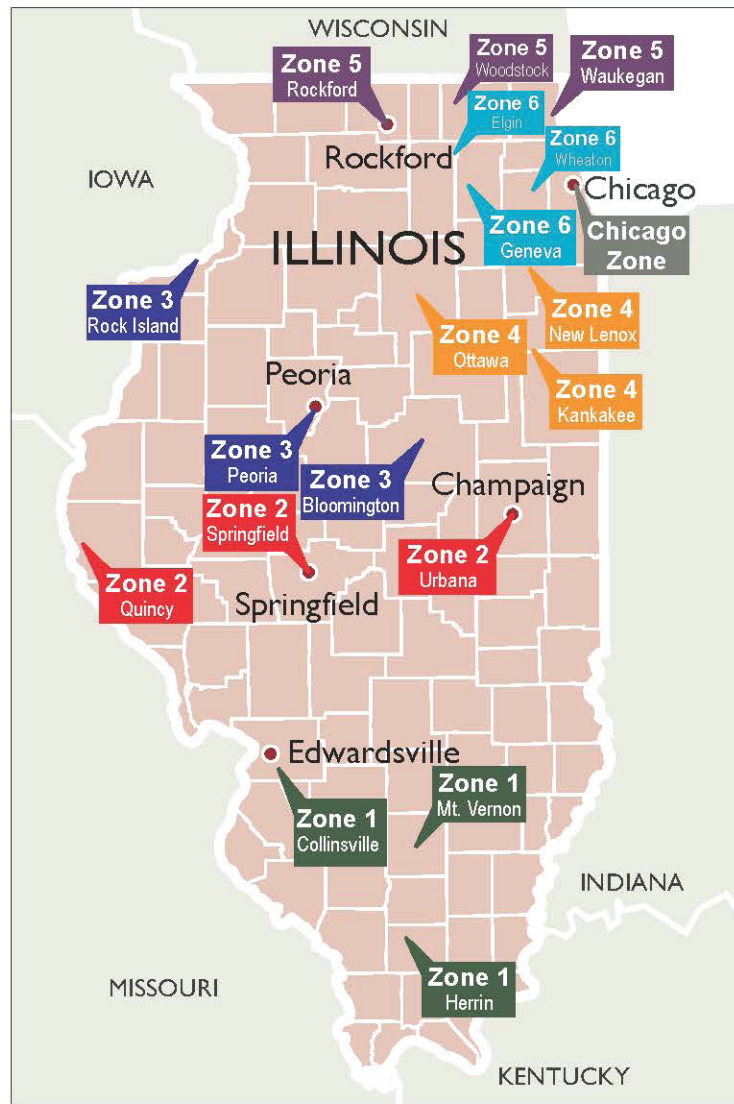
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