Illinois Association of Defense Trial Counsel
P.O. Box 7288, Springfield, IL 62791
IDC Quarterly Vol. 16, No. 3 (16.3.M1)

THE IDC MONOGRAPH:

ECONOMIC DISABILITY AND EARNING CAPACITY:

A HISTORICAL ANALYSIS FOR WAGE DIFFERENTIAL CLAIMS

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I. DEVELOPMENT OF WAGE-DIFFERENTIAL THEORY IN THE UNITED STATES

In recent years, employers and workers' compensation defense attorneys have observed a proliferation of workers' compensation claims wherein the petitioner is requesting a wage-differential award pursuant to §8(d)(1) of the Workers' Compensation Act.[1] As illustrated below, this theory can present an employer and/or its workers' compensation carrier with increased monetary exposure. The purpose of this article is to identify the historical origins of the wage-differential theory, both in Illinois and in other jurisdictions, and also to suggest an analysis to be utilized in these claims which will not cause results which conflict with the initial motivations for this type of benefit.

Workers' compensation laws, both in the United States and in other countries, initially based compensation on a "wage-loss principle." This principle provides that an injured worker should receive compensation that is representative of the loss of future wages that results from the workers' compensation injury. Over time, however, there has been a gradual erosion of this wage-loss principle in favor of what is known as a "schedule principle."

Rather than compensating an individual for wage loss, the schedule principle takes a different form. In a typical schedule, which exists in most jurisdictions in this country, there is a list or schedule in the workers' compensation statute describing various members of the body and prescribing a fixed number of weeks of compensation for that particular body part's loss or loss of use. It has been noted that through 1911, of the 32 such statutes enacted throughout the world, including ten in the United States, only one, New Jersey, had a schedule.[2] After the New Jersey schedule was adopted, schedules in other jurisdictions began to appear. A number of states, including Illinois, whose original workers' compensation statute did not have any schedule added them within a few years.[3]

Over time, the expansion of scheduled losses continued to include more and different body parts, and as time went by this system of disability evaluation and compensation further departed from the traditional "wage-loss" system. Many commentators have concluded that basing a workers' compensation system on scheduled disability per body part can lead to illogical and unfair awards.[4]

As discussed below, in the state of Illinois, a petitioner and his/her attorney can select either a wage-differential award which is consistent with the "wage-loss" analysis or a "scheduled loss" award. Mathematical calculations will determine which theory the petitioner selects. For example, assume that in the state of Illinois a 30-year-old man sustains a shoulder injury on March 1, 2006, which results in shoulder surgery. Assume that this petitioner is not released to regular work duties but is released to permanent modified or restricted work duties. At the time of the accident, this petitioner was earning $1,500 per week as a construction laborer. Because of the injury, he is only capable of earning $600 per week. If he presented a scheduled loss claim, the case may have a value in the range of 35 percent of the arm or $52,401.23, pursuant to §8(e).[5] If a wage loss claim is presented pursuant to §8(d)(1) of the Act, he would be entitled to weekly periodic payments which total $38,133.16 annually. With a life expectancy of 46.9 years, the present cash value of this §8(d)(1) award would total $594,457.83 with a 6 percent discount rate. With an 8 percent discount rate, the present cash value would be $491,456.35. When one compares these two results, it is obvious why the attorney for the petitioner would present this as a wage loss claim pursuant to §8(d)(1) as opposed to a scheduled loss pursuant to §8(e) of the Illinois Workers' Compensation Act.

In most jurisdictions, when a "wage-loss" approach is utilized, the degree of disability for purposes of compensation is calculated by comparing actual earnings before the injury with "earning capacity" after the injury.[6] It should be noted that the two items utilized in this comparison are not the same. The first part of the equation concerns itself with actual earnings, which are relatively simple to measure. Earning capacity, however, is not empirically fixed but is a more theoretical concept. The term earning capacity does not mean actual earnings but rather the test remains one of wage capacity.[7] If

various state statutes had identified wages that the petitioner "has earned thereafter," then the comparison of actual wages before and actual wages after would be indicated. However, as in Illinois, this is not the analysis to be used in the majority of jurisdictions.

Accordingly, the best possible estimate of future impairment of earnings is made not by solely examining actual post-injury earnings but by an analysis of other factors which suggest "earning capacity." Many jurisdictions identify the following factors as bearing on earning capacity: previous work history, education and training, capacity to work after the accident, the type of work done before the accident, the nature and degree of the injury, its effect on activities, and earnings both past and present.[8] While actual post-injury earnings are a factor, they are not the "end all" in this analysis. Courts in some jurisdictions have determined that actual post-injury earnings create a presumption of earning capacity, which may be rebutted by evidence independently showing capacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity.[9]

A survey of other jurisdictions reveals that any analysis for purposes of a wage-loss claim which relies solely on actual post-injury wages is improper. Post-accident earnings may be considered in judging earning capacity, but other factors need to be considered to determine a petitioner's earning capacity following a work-related accident. For example, in *Peloso v. Peloso*,[10] the petitioner worked in a family business as a rigger. This required special skills in transportation of heavy cargo. As a result of a worker's compensation injury, the petitioner could no longer work as a rigger. However, he switched jobs with his father and began doing office work while his father handled the rigging. The petitioner continued to receive his regular salary. Because the petitioner earned his entire salary, it was determined that the petitioner had regained his entire earning capacity and his wage-loss claim was denied.

An analysis of the development of §(8)(d)(1) wage-differential claims in Illinois will follow. The significant decisions in Illinois discussing wage-differential claims will be identified, including the most recent analysis by the Illinois Supreme Court.

II. DEVELOPMENT OF WAGE-DIFFERENTIAL THEORY IN ILLINOIS

Where 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 his injured body part. PPD awards may fall under §8(d)(2)'s person-as-a-whole or §8(e)'s 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 §8(d)(1), the so-called wage-differential provision. An employee cannot recover both a PPD and a wage-differential award.[11]

In order to qualify for a §8(d)(1) wage differential, a petitioner must prove: (1) a partial incapacity which prevents the pursuit of his/her "usual and customary line of employment," and (2) impairment of earnings.[12] The Illinois Supreme Court has expressed a preference for wage-differential awards over scheduled awards.[13] In fact, §8(d)(1) requires a wage differential if a petitioner requests and proves that he/she is qualified for one.[14]

Where a wage-differential award is appropriate, the amount owed by the employer is calculated by determining the difference between the petitioner's earnings in the *full performance* of his "usual and customary line of employment" and his wages in "suitable" post-accident employment.[15] This difference is then multiplied by two-thirds, which represents the wage differential to be paid. Wage-differential awards are payable weekly for the duration of the disability, which has been interpreted as the life of the petitioner. Prior to the 2005 amendments, this amount was capped at the maximum PPD rate. Wage-differential awards are currently limited to 100 percent of the state average weekly wage (currently $822.20 through July 14, 2006).[16]

Wage-Differential Example

- Average weekly wage $1,200
- Post-accident wage in suitable employment, $300
- *Calculation*: $1,200 minus $300 = $900 x 2/3 = $600
- *Prior law*: wage differential limited to maximum PPD rate or $567.87
- *New law*: wage differential not limited, since $600 is less than current cap of $822.20

In requesting a wage differential, a petitioner must first demonstrate an inability to return to his/her "usual and customary line of employment."[17] What constitutes an employee's "usual and customary line of employment" is a question of fact which focuses on the type of work the petitioner performed prior to and at the time of the accident.[18]

In many cases, the evaluation of the petitioner's pre-accident wage involves simply looking at what he was earning at the time of his accident. However, this determination is not limited to what the employee was actually making at that time but also can include what the petitioner would have been able to earn in the full performance of his "usual and customary line of employment" at the time of trial or hearing.[19] There is a presumption that but for the injury, the employee would be in the full performance of his duties.[20]

Calculating a petitioner's post-accident wages involves determination of whether his/her post-accident job is "suitable." Specifically, the Industrial Commission considers what the petitioner is earning or is capable of earning, considering his capabilities and work restrictions.[21] This requirement is important because it prevents a petitioner from simply taking a low-paying job to manufacture a high wage-differential award. In *Durfee v. Industrial Commission*,[22] the petitioner (a computer operator) elected to take a job he enjoyed and which coincided with his clerical interests but which was below his earning capabilities. Moreover, he did not attempt to return to work or to obtain a position in any other form of employment. The Commission found that he had failed to prove any loss of earning power and awarded petitioner person-as-a-whole benefits under §8(d)(2).

In *Smith v. Industrial Commission*,[23] the appellate court reversed the denial of a wage-differential claim where the petitioner established that her injuries prevented her from pursuing her usual and customary line of employment as a security officer and that she suffered an impairment of wages. The Commission had denied wage-differential benefits because the petitioner was actually earning the same post-accident as she had pre-accident, even though the employer had artificially raised petitioner's wages to pre-accident levels. The appellate court found that this inflated wage did not accurately reflect what the petitioner, with her restrictions, was able to earn.

Smith teaches that an employer may not avoid a wage-differential scenario by simply modifying what the employee earns post-accident. Similarly, an earning loss award cannot be based on speculation as to the particular employment level or job classification which a petitioner might eventually attain. Thus, in *Deichmiller v. Industrial Commission*,[24] an employer was not able to argue that the petitioner's suitable employment should include him becoming a journeyman plumber when the employee had not passed the journeyman plumber examination and the only proof that he could was the employer's opinion.

However, there are many cases where the petitioner receives a wage-differential award despite his fortuity in working at a higher post-accident wage.[25] In each of these cases, the courts rejected the happenstance of the higher wages in lieu of the petitioner's true earning capacity.

III. GALLIANETTI V. INDUSTRIAL COMMISSION AND ITS PROGENY

In *Gallianetti v. Industrial Commission*,[26] the appellate court addressed the question of whether the Industrial Commission erred in awarding compensation under §8(d)(2) rather than §8(d)(1) when the petitioner proved an actual wage loss. The court found that the Commission had erred in awarding benefits under §8(d)(2) and remanded the matter so an award could be entered pursuant to §8(d)(1).

The petitioner in *Gallianetti* sustained injuries to his left elbow when he was hit with shotgun pellets while working as a tree trimmer for his employer, Asplundh Tree Expert Company. After treatment, the petitioner underwent a functional capacity evaluation ("FCE"), which indicated that he would be unable to return to his normal job activities as a tree trimmer. The evaluation indicated a sedentary-type job which would not place demands on the left upper extremity and which would only require light, intermittent use.[27] A treating doctor thereafter testified that the petitioner was unable to return to work as a tree trimmer.[28]

Prior to the injury, the petitioner worked as a tree trimmer with the International Brotherhood of Electric Workers ("IBEW") through Local 51.[29] A business representative for IBEW testified that the union has approximately 30 classifications of employment in three principal areas: tree trimming, electrical work, and telephone work. The business representative testified that based on the FCE, the petitioner would be unable to perform duties with any of the job classifications for which he was qualified.[30]

A labor market survey prepared by the employer's expert identified four possible types of employment, including tree trimming supervisor, exterminator, storage rental clerk, and security guard. The petitioner testified that he contacted four exterminators and at least two security firms from the labor market survey. He did not find any position with those employers but eventually obtained full-time employment at a garage, where his earnings were only $5.50 per hour.[31] The court found that the petitioner produced ample evidence to establish that he was unable to return to his "usual and customary line of employment."

The court rejected the Commission's award of 60 percent loss of use under §8(d)(2), or 300 weeks of permanent disability, ruling that the percentage under §8(d)(2) was inappropriate because the petitioner had proved loss of earning capacity which justified a wage-differential award. The court noted that Section §8(d) of the Act specifies two distinct types of compensation: a wage-loss award under §8(d)(1) and a percentage of the person-as-a-whole award under §8(d)(2). The court cited to the Illinois Supreme Court's decision in *General Electric v. Industrial Commission*,[32] in which the Court expressed a preference for wage-differential awards over scheduled awards, explaining:

> Scheduled awards are often not fair. For example, partial loss of use of a finger may not be an annoyance to some workers but a catastrophe for a violinist. Nor are scheduled losses always fast and certain. It is easier to calculate how much a petitioner's earnings have decreased since the accident than to assign a percentage partial loss of use. If [a worker] can prove an actual loss of earnings greater than the schedule presumes, there is no reason why he should not recover that loss. In theory, the basis of the workers' compensation system should be earnings loss, not the schedule.[33]

The court cited to the various provisions of §8(d) and concluded that the plain meaning of §8(d) prohibits the Commission from making an award under §8(d)(2) where the petitioner has presented sufficient evidence to show a loss of earning capacity.[34] Section §8(d)(2) applies to those cases in which the petitioner suffers injuries that partially incapacitate him from pursuing the usual and customary duties of his employment, but do not cause him to suffer any impairment of earning capacity.[35]

The court did note that the petitioner may waive his right to recovery under §8(d)(1), citing *Freeman United Coal Mining v. Industrial Commission*,[36] but found that the petitioner had not made such a waiver.

The court in *Gallianetti* stated that if the petitioner has requested a wage-differential award and proved that he qualifies for an award, then the plain language of §8(d)(1) requires that the Commission make an award under §8(d)(1). The court noted that to qualify for a wage-differential award under §8(d)(1), the petitioner must prove: (1) partial incapacity which prevents him from pursuing his usual and customary line of employment, and (2) an impairment of earnings.[37] As the petitioner was unable to return to his usual and customary line of employment, the focus became whether or not the petitioner demonstrated an impairment of earnings.

The object of §8(d)(1), as noted by the court, is to compensate an injured petitioner for his reduced earnings capacity, and if the injury does not reduce his earning capacity, he is not entitled to compensation. The petitioner must prove his actual earnings for a substantial period before his accident and after he returns to work, or what he is able to earn in some suitable employment.[38] The court noted that the petitioner did not return to work as a tree trimmer and that of the various positions listed by the labor market survey, the petitioner was only able to find employment with Stiemle Garage, earning $5.50 per hour.

The employer in *Gallianetti* argued that the petitioner failed to establish his true earning capacity because he did not secure suitable employment within his restrictions. The court found this argument unpersuasive. The court noted that there is no affirmative requirement under §8(d)(1) that the petitioner even conduct a job search. Rather, as discussed above, the petitioner need only demonstrate an impairment of earnings.[39] However, the court stated, "evidence of a job search is one way to show impairment of earnings."[40] The employer further contended that the petitioner did not prove his wage loss because he did not provide documentation. The court found that the petitioner did testify about many of the employers listed in the employer's labor market survey and testified as to the unavailability of positions.

The court found that the petitioner proved both prongs of §8(d)(1), that being partial incapacitation which prevented him from pursuing his usual and customary line of employment and also an impairment of earnings. The court then remanded the matter to the Industrial Commission to enter an award pursuant to §8(d)(1).

In *Pietrzak v. Industrial Commission*,[41] the appellate court addressed the issue of whether the petitioner has an affirmative duty to conduct a job search. The Commission had determined that the petitioner failed to prove entitlement to a wage loss because he did not conduct a sufficient job search and accepted a position at a salary lower than the position previously offered and also lower than what he could have expected to command in light of his work experience.[42] The Commission relied on a labor market survey by a vocational expert chosen by the employer. The counselor found 43 available positions within a two-week period. It was her opinion that the petitioner could obtain a position within his industry at a salary commensurate to his previous earnings. The court ruled that the Commission could reasonably rely on that evidence to find that the petitioner did not prove his earnings were impaired as a result of his disability.[43] Citing *Gallianetti*, the court noted that to qualify for a §8(d)(1) differential award, the petitioner must prove a partial incapacity which prevents him from pursuing his usual and customary line of employment and also an impairment of

earnings. The court noted that although the petitioner testified as to restrictions, there was no evidence to establish that he was incapable of performing the duties within his industry.[44] The court also stated that although there is no affirmative duty that the petitioner conduct a job search, a job search is one way of demonstrating impairment of earnings.[45] The court in *Pietrzak* found that the Commission's reliance on the job survey performed by the employer's vocational counselor, finding 43 available positions, supported the finding that the petitioner failed to prove that his earnings were impaired as a result of his disability.[46]

In *Gallianetti*, the appellate court emphasized the Illinois Supreme Court's preference for wage-differential awards over scheduled awards.[47] The court also restated that it is the petitioner's burden to establish a wage loss award. The *Gallianetti* court stated, "to qualify for a wage-differential award under §8(d)(1), the petitioner must prove: (1) partial incapacity which prevents him from pursuing his 'usual and customary line of employment' and (2) an impairment of earnings."[48]

The *Gallianetti* decision did not change the status of any legal premise under §8(d)(1) but found that the Industrial Commission's decision was against the manifest weight of the evidence and that the petitioner had proved the two-prong test of §8(d)(1). The court noted that if a petitioner has proven a wage loss, then a§8(d)(1) award should be given. Significantly, the *Gallianetti* court noted that the petitioner asked the Commission to award a wage loss under §8(d)(1) and did not waive his right to recover.

The *Gallianetti* court's comment that the petitioner is not under an affirmative duty under §8(d)(1) to conduct a job search and need only demonstrate an impairment of earnings is controversial. However, the court's ruling did not negate or change the petitioner's burden of proving a wage loss. The petitioner in *Gallianetti* presented testimony by a union business representative that he would be unable to perform duties within the job classifications for which he was qualified.[49] The court noted that given the petitioner's education, experience, and restrictions, it was unlikely that he would be able to locate a position at a wage substantially greater than the wage that eventually was paid at Stiemle Garage. In reviewing the evidence, the court found that the petitioner did indeed prove wage loss under §8(d)(1) and that the Industrial Commission had erred.[50]

An employer facing a potential wage loss claim should carefully review the requirements of §8(d)(1) and determine what evidence could be derived to rebut evidence produced by the petitioner. The employer should also be aware of the updated requirements in regard to vocational counselors pursuant to §8(a). The new section states:

> Any vocational rehabilitation counselors who provide service under this Act shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation. Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution. The employee or employer may petition to the Commission to decide disputes relating to vocational rehabilitation and the Commission shall resolve any such dispute, including payment of the vocational rehabilitation program by the employer.[51]

As of the date this Monograph was submitted for publication, the term "appropriate certifications" has not been defined. An employer should review any new case law and the publications of the Illinois Workers' Compensation Commission regarding the future interpretation and application of "appropriate certifications."

The issue of wage loss under §8(d)(1) is a matter of proof. If the petitioner establishes *prima facie* evidence, then the employer must rebut with expert testimony or other evidence to refute the petitioner's allegations. The maximum rate under §8(d)(1) has dramatically increased, and exposure in

wage loss cases is significant. However, employers can minimize their exposure with careful attention to each claim and sufficient proof during a hearing before the Commission.

IV. CASSENS TRANSPORT COMPANY V. INDUSTRIAL COMMISSION

The Illinois Supreme Court in *Cassens Transport Company v. Industrial Commission*[52] held that the Commission lacks jurisdiction to modify the petitioner's award of a wage differential pursuant to §8(d)(1). The petitioner in this case injured his left hand while working for Cassens on August 24, 1988. Following a hearing before the Commission, he was awarded wage-differential benefits, and the award was affirmed on review.

A decade after the petitioner's injury, the employer renewed its interest in the worker's compensation claim. The employer requested the petitioner's income tax returns for the years 1999 and 2000. The petitioner declined to disclose this information. The employer then filed a motion with the Commission praying that it suspend the petitioner's benefits based on his refusal to provide current wage information. The Commission denied this motion. While the employer's appeal to the circuit court was pending, the company served a subpoena on the petitioner's current employer and obtained 11 years of information about his wages. The wage information revealed that in the year 2002, 14 years after his injury, the petitioner began to earn a wage that exceeded the wage the employer paid him at the time of his injury.

The employer terminated the appeal of its original motion to suspend the petitioner's benefits. It filed a new motion to suspend benefits arguing that the wage discrepancy which gave rise to the petitioner's award under §8(d)(1) no longer existed. Relying on *Petrie v. Industrial Commission*,[53] the Commission again denied the employer's motion. In so holding, the Commission determined that the phrase "for the duration of his disability" contained in §8(d)(1) referred to the duration of the petitioner's physical or mental disability and not the duration of his economic loss.

The Circuit Court of Coles County denied the employer's motion to overturn the Commission's decision, echoing the Commission's rationale. On appeal, the appellate court vacated the Commission's decision and dismissed the employer's motion to suspend benefits, finding that the Act did not give the Commission or the court jurisdiction to entertain the motion.[54] The appellate court relied on §19(h) of the Act,[55] which requires requests for review based upon a change in disability to be filed within 30 months of the date of an award.[56] The court went on to determine that the "duration" language in §8(d)(1) did not give the Commission jurisdiction to reopen or modify an award after the 30-month period provided in §19(h).[57] However, before dismissing the appeal, the court addressed the employer's argument that the definition of "disability" in §8(d)(1) includes economic loss. The court noted that while *Petrie* addressed the definition of "disability" in §19(h), it did so by examining the use of language throughout the Act.[58] The *Petrie* court determined that "disability" means "physical disability" because the Act consistently uses other terms when referring to economic status.[59] Thus, the §8(d)(1) language addressing the duration of disability refers to the duration of a physical disability.[60] In a special concurrence, one justice noted that this discussion of the merits was *obiter dictum*.[61] The special concurrence also noted that the court's holding on jurisdiction did not prevent an employer from unilaterally terminating benefits on a belief that the duration of a petitioner's disability had ended.[62]

The Illinois Supreme Court exercised *de novo* review as the case at bar presented a matter of statutory construction of §8(d)(1). The employer argued that §8(d)(1) granted extended jurisdiction to the Commission to modify an award for wage differential by virtue of the language contained in §8(d)(1) allowing a petitioner to receive compensation "for the duration of his disability." The employer argued that this phrase would allow the Commission to modify an award for a wage

differential whenever the "disability" no longer exists. The Supreme Court disagreed. The court began its analysis by stating that it was mindful of the fact that the Workers' Compensation Commission is an administrative agency lacking general or common law powers. Because its powers are limited to those granted by the legislature, any action taken by the Commission must be specifically authorized by statute. §18 of the Act authorizes the Commission to settle all questions arising under the Act, and §19 establishes the procedure by which the Commission is authorized to do so.[63] §19(f) provides that a decision of the Commission is conclusive unless a proceeding for review is commenced within 20 days of receipt of notice of the decision.[64] The Commission may modify a conclusive decision only when the Act specifically authorizes it to do so.

The court referenced its opinion in *Alvarado v. Industrial Commission*,[65] wherein it held that there are only two instances in which the Commission may modify a final award. Section 19(f) gives the Commission limited authority to correct clerical errors, and §19(h) gives the Commission authority to review an installment award within 30 months of its entry when a party alleges that the employee's disability has recurred, increased, diminished, or ended.[66] Cassens argued that §8(f) of the Act provided a third route to modification of the final award, one which Cassens analogized to extended jurisdiction under §8(d)(1).

The court, in addressing this argument, first noted that the plain language of §8(d)(1), which authorizes compensation to a petitioner "for the duration of his disability," does not mention modification of a final award. The court went on to examine each provision of the Act which does specifically authorize the Commission to reopen a final award. As noted above, §§19(f) and (h) allow modification to correct clerical errors and the reopening of installment awards within 30 months. Section §8(f) authorizes the reassessment of any award for total and permanent disability if the petitioner returns to work, or is able to do so, and earns or is able to earn a wage.[67] The court commented that each of these provisions includes language that is tailored to authorize a review proceeding. In contrast, §8(d)(1) contains no such language. Reading the Act as a whole, the court determined that §8(d)(1) does not authorize the Commission to reopen final installment awards for partial disability. The court thus concluded that the Commission did not have jurisdiction under §8(d)(1) to reopen the petitioner's final award after the 30-month period for reopening an installment award under §19(h) had elapsed.

The Supreme Court went on to explain that since the Commission lacked jurisdiction to reopen the petitioner's award, neither party was aggrieved or had its due process rights violated, as both parties had an equal opportunity to present evidence and argument before the Commission at their initial hearing as to the likely duration of an injury and its effect on the petitioner's earning capacity. The court noted that the plain language of §8(d)(1) allows arbitrators and the Commission the option of determining that a petitioner's disability is likely to end, abate, or increase after a certain duration and award compensation accordingly.

The court went on to state that with this holding it was unnecessary to address the employer's argument as to the definition of "disability" in §8(d)(1), and accordingly the appellate court's discussion of that issue was improper.

V. EARNING CAPACITY ANALYSIS

While the Supreme Court in *Cassens Transport Company* did not address the employer's argument as to the definition of "disability" in §8(d)(1), the court reaffirmed that for purposes of calculating a §8(d)(1) award, "earning capacity" is the proper analysis as opposed to merely examining post-accident "actual earnings." This is a significant observation because the trend at the Illinois Workers' Compensation Commission has been for the arbitrators and reviewing commissioners to focus solely on actual earnings as opposed to earning capacity. In essence, defense attorneys in workers'

compensation claims have increasingly encountered efforts by petitioners' attorneys to have the petitioners go out and obtain very low-paying jobs well below their earning capacity so as to increase the value of the wage-differential award.

The Supreme Court in *Cassens* unequivocally noted that to receive an award under §8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment, and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn.[68] In *Sroka v. Industrial Commission*,[69] the Supreme Court noted, "This court has held that the second prong of inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay."

The Illinois Supreme Court also referenced other prior decisions that emphasized that earning capacity is more than an identification of current post-accident earnings. In *Franklin County Coal Corp. v. Industrial Commission*,[70] the court was faced with an argument that a wage differential under §8(d)(1) should be measured solely by gross yearly income. In rejecting this argument, the Supreme Court looked to other factors, such as wage increases, overtime, and increased hours of work. While the *Franklin* and *Sroka* decisions interpreted an earlier version of §8(d), the phrase "is earning or is able to earn" was not changed by the statutory amendment. Accordingly, the *Cassens* court noted that the test remains the same: the capacity to earn, not necessarily the amount earned. Although wages are indicative of earning capacity, they are not dispositive. The Illinois Supreme Court in *Cassens* stated that the initial hearing on the employee's claim is to give both the employees and the employers the opportunity to present evidence beyond wages to establish long-term earning capacity.[71]

As noted above, the *Cassens* court did not address the employer's argument as to the definition of "disability" in §8(d)(1). However, given the court's discussion on earning capacity and its rejection of merely focusing on actual wages earned after the accident, one can conclude that the Illinois Supreme Court is cognizant of the initial theory that gave rise to wage-differential benefits. Section §8(d)(1), as noted previously, is based on a "wage-loss principle," which is to focus on the loss of future wages as opposed to a schedule of disability for each body part. To be consistent with the initial reason for a wage-differential award (compensation for actual wage loss), the definition of "disability" must not be limited to mere "physical disability." If §8(d)(1) concerns itself with "disability," then to be consistent with the initial theory of compensation for wage loss, "disability" must mean "economic disability." Because the Illinois Supreme Court in *Cassens* reaffirmed an analysis of "earning capacity," it follows that the Illinois Supreme Court would or should interpret "disability" to mean "economic disability" as opposed to "physical disability."

Section 19(h) of the Act presently allows a §8(d)(1) award to be reexamined if the §19(h) Petition is filed within 60 months of the date of the award. Accordingly, if in fact within this time period the petitioner's earnings have increased, then logically the petitioner's "earning capacity" has also increased. In such a situation, it follows that the original §8(d)(1) award should be modified by the Workers' Compensation Commission when a timely §19(h) Petition is filed. To merely focus on "physical disability" in such a situation is not consistent with the Illinois Supreme Court's analysis in *Cassens* or the reasons for the development of the wage-differential theory as set forth in other jurisdictions as well as in the state of Illinois.

In conclusion, employers in Illinois should be allowed to present complete evidence of "earning capacity" in the initial hearing before the arbitrator when defending a wage-differential claim pursuant to §8(d)(1). Rather than showing current actual earnings, the parties should be free to demonstrate short-term or long-term "earning capacity," which includes numerous factors. If in fact the employer can obtain and present qualified, admissible opinion evidence from a vocational rehabilitation specialist that the petitioner's earning capacity is much higher than the petitioner's current actual earnings, then in the absence of any contrary evidence presented by the petitioner, the employer's proof as to "earning capacity" should be accepted, which will result in a lower wage-differential

award. Any efforts by the Workers' Compensation Commission to restrict an analysis of earning capacity based on "physical disability" as opposed to "economic disability" is inconsistent with the origins of the wage-differential theory. Case law in other jurisdictions, as well as the state of Illinois, supports the position that for wage-differential claims, economic disability, not physical disability, is the appropriate analysis.

Endnotes

[1] Section 8(d)(1) 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 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).
Section 8(d)(2) provides:

> If, as a result of the accident, the employee sustains serious and permanent injuries not covered by paragraphs (c) and (e) of this Section or having sustained injuries covered by the aforesaid paragraphs (c) and (e), he shall have sustained in addition thereto other injuries which injuries do not incapacitate him from pursuing the duties of his employment but which would disable him from pursuing other suitable occupations, or which have otherwise resulted in physical impairment; or if such injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or having resulted in an impairment of earning capacity, the employee elects to waive his right to recover under the foregoing subparagraph 1 of paragraph (d) of this Section then in any of the foregoing events, he shall receive in addition to compensation for temporary total disability under paragraph (b) of this Section, compensation at the rate provided in subparagraph 2.1 of paragraph (b) of this Section for that percentage of 500 weeks that the partial disability resulting from the injuries covered by this paragraph bears to total disability. If the employee shall have sustained a fracture of one or more vertebra or fracture of the skull, the amount of compensation allowed under this Section shall be not less than 6 weeks for a fractured skull and 6 weeks for each fractured vertebra, and in the event the employee shall have sustained a fracture of any of the following facial bones: nasal, lachrymal, vomer, zygoma, maxilla, palatine or mandible, the amount of compensation allowed under this Section shall be not less than 2 weeks for each such fractured bone, and for a fracture of each transverse process not less than 3 weeks. In the event such injuries shall result in the loss of a kidney, spleen or lung, the amount of compensation allowed under this Section shall be not less than 10 weeks for each such organ. Compensation awarded under this subparagraph 2 shall not take into consideration injuries covered under paragraphs (c) and (e) of this Section and the compensation provided in this paragraph shall not affect the employee's right to compensation payable under paragraphs (b), (c) and (e) of this Section for the disabilities therein covered.

820 ILCS 305/8(d)(2).

[2] Arthur Larson, Workers' Compensation, § 57.15 (Desk Ed. 1997).

[3] *Id*. at § 57.15.

[4] *Id*. at § 57.17(a).

[5] 820 ILCS 305/8(e).

[6] Larson, *supra*, note 2, at § 57.20.

[7] *See, e.g., Batte v. Stanley's*, 374 P.2d 124 (N.M. 1962).

[8] *Latour v. Producers Dairy, Inc.*, 148 A.2d 655 (N.H. 1959).

[9] *Brooks v. Crimson Homes, Inc.*, 284 So. 2d 279 (Ala. Civ. App. 1973).

[10] *Peloso, Inc. v. Peloso*, 237 A.2d 320 (R.I. 1968),

[11] *Freeman United Coal Mining Co. v. Indus. Comm'n*, 283 Ill.App.3d 785, 670 N.E.2d 1122 (5th Dist. 1996).

[12] *Yellow Freight Sys. v. Indus. Comm'n*, 351 Ill.App.3d 789, 814 N.E.2d 910 (Ill. App. 1st Dist. 2004).

[13] *Gen. Elec. Co. v. Indus. Comm'n*, 89 Ill.2d 432, 433 N.E.2d 671 (1982).

[14] *Yellow Freight Sys.*, 814 N.E.2d at 914.

[15] 820 ILCS 305/8(d)(1).

[16] 820 ILCS 305/8(b)(4).

[17] *Fernandes v. Indus. Comm'n*, 246 Ill.App.3d 261, 615 N.E.2d 1191 (4th Dist. 1993).

[18] *See, e.g., Edward Gray Corp. v. Indus. Comm'n*, 316 Ill.App.3d 1217, 738 N.E.2d 139 (1st Dist. 2000).
[19] *Fernandes*, *supra*, note 17, 615 N.E.2d at 1195; *Gen. Elec. Co. v. Indus. Comm'n*, 144 Ill.App.3d 1003, 495 N.E.2d 68, 75 (4th Dist. 1986).
[20] *Albrecht v. Indus. Comm'n*, 271 Ill.App.3d 756, 648 N.E.2d 923, 926 (1st Dist. 1995).
[21] *Smith v. Indus. Comm'n*, 308 Ill.App.3d 260, 719 N.E.2d 329, 334 (3rd Dist. 1999); *Franklin County Coal Corp. v. Indus. Comm'n*, 398 Ill. 528, 76 N.E.2d 457, 459 (1947).
[22] *See Durfee v. Indus. Comm'n*, 195 Ill.App.3d 886, 553 N.E.2d 8, 11 (5th Dist. 1990)
[23] *See Smith v. Indus. Comm'n*, 308 Ill.App.3d 260, 719 N.E.2d 329, 334 (3rd Dist. 1999).
[24] *Deichmiller v. Indus. Comm'n*, 147 Ill.App.3d 66, 497 N.E.2d 452, 457 (1st Dist. 1986).
[25] *See, e.g., Franklin County Coal Corp. v. Indus. Comm'n*, 398 Ill. 528, 76 N.E.2d 457 (1947).
[26] *Gallianetti v. Industrial Comm'n*, 315 Ill.App.3d 721, 734 N.E.2d 482 (3rd Dist. 2000).
[27] *Id*.
[28] *Id*., 734 N.E.2d at 486.
[29] *Id*., 734 N.E.2d at 484.
[30] *Id*., 734 N.E.2d at 486.
[31] *Id*.
[32] 89 Ill. 2d 432, 433 N.E.2d 671 (1982).
[33] *Id.*, 433 N.E.2d at 674.
[34] *Gallianetti*, *supra*, note 25, 734 N.E.2d at 488.
[35] *Id*. (citing 820 ILCS 305/8(d)(2). *See also*, *Smith v. Indus. Comm'n*, 308 Ill.App.3d 260, 719 N.E.2d 333 (3rd Dist. 1999).
[36] *Gallianetti*, *supra*, note 25 (citing *Freeman United Coal Mining v. Indus. Comm'n*, 283 Ill.App.3d 785, 670 N.E.2d 1122, 1126 (Ill. App. 5th Dist. 1996)).
[37] 820 ILCS 305/8(d)(1); *See also, Smith*, *supra*, note 34, 719 N.E.2d at 333; Albrecht v. Indus. Comm'n, 271 Ill.App.3d 756, 648 N.E.2d 923, 925 (1st Dist. 1995).
[38] *Gallianetti*, *supra*, note 25, 734 N.E.2d at 489 (citing *Smith*, *supra*, note 34, 719 N.E.2d at 333).
[39] *Gallianetti*, *supra*, note 251, 734 N.E.2d at 490 (citing, *Albrecht v. Indus. Comm'n*, *supra*, note 36, 648 N.E.2d at 925.
[40] *Gallianetti*, *supra*, note 25, 734 N.E.2d at 490.
[41] *Pietrzak v. Indus. Comm'n*, 329 Ill.App.3d 828, 769 N.E.2d 66 (1st Dist. 2002).
[42] *Id*., 769 N.E.2d at 71.
[43] *Id*., 769 N.E.2d at 73.
[44] *Id*., 769 N.E.2d at 72 (citing *Gallianetti*, *supra*, note 25, 734 N.E.2d at 489.)
[45] *Pietrzak*, 769 N.E.2d 66 at 72.
[46] *Id*., 769 N.E.2d at 73.
[47] *Gallianetti*, *supra*, note 25, 734 N.E.2d at 488 (citing *General Electric v. Indus. Comm'n*, note 32, *supra*.
[48] *Gallianetti*, 734 N.E.2d at 489.
[49] *Id.*, 734 N.E.2d at 486.
[50] *Id*., 734 N.E.2d at 491.
[51] 820 ILCS 305/8(a).
[52] *Cassens Transp. Co. v. Indus. Comm'n*, 218 Ill.2d 519, 844 N.E.2d 414 (2006).
[53] *Id*., 844 N.E.2d at 420 (citing *Petrie v. Indus. Comm'n*, 160 Ill.App.3d 165, 513 N.E.2d 104 (3rd Dist. 1987).
[54] *Cassens Transp. Co. v. Indus. Comm'n*, 354 Ill.App.3d 807, 821 Ill.App.3d 1274, at 1278 (4th Dist. 2005).
[55] 820 ILCS 305/19(h).
[56] *Cassens*, *supra*, note 53, 821 N.E.2d at 1277 (citing 820 ILCS 305/19(h) (This provision was amended in 2005 to 60 months)).
[57] *Cassens*, *supra*, note 53, 821 N.E.2d at 1278.
[58] *Id.*, 821 N.E.2d at 1276.
[59] *Id*. 821 N.E.2d at 1276 (citing *Petrie*, *supra* note 52, 513 N.E.2d at 109).
[60] *Cassens*, *supra*, note 53, 821 N.E.2d at 1276.
[61] *Id.*, 821 N.E.2d at 1278 (Holdridge, J., specially concurring).
[62] *Id*.
[63] 820 ILCS 305/18; 820 ILCS 305/19.
[64] 820 ILCS 305/19(f).
[65] 216 Ill.2d 547, 837 N.E.2d 909 (2005).
[66] 820 ILCS 305/19; *Alvarado*, *supra*, note 64, 837 N.E.2d at 915.
[67] 820 ILCS 305/8(f).
[68] *Cassens*, *supra*, note 51, at 424.
[69] *See Sroka v. Indus. Comm'n*, 412 Ill. 126, 105 N.E.2d 716 (1952).
[70] *Franklin County Coal Corp. v. Indus. Comm'n*, 398 Ill. 528, 76 N.E.2d 457 (1947).
[71] *Cassens*, *supra*, note 51, at 424.

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