WAGE DIFFERENTIAL CLAIMS IN ILLINOIS:

ISSUES AND ANALYSIS

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INTRODUCTION

The Illinois Workers’ Compensation Act is frequently confusing and difficult to understand because it is not a jigsaw puzzle where all of the pieces fit together in a neat and orderly fashion. Rather, it is a patchwork quilt of various ideas, suggestions and values which have been assembled over the years by competing interests. The provisions of the Act often represent compromises and are frequently hastily drafted. It is impossible to read the statute and understand its meaning because case decisions have drastically modified the meaning of the statute.

Although the Workers’ Compensation Act was a fairly comprehensive unit of legislation before 1975, multiple changes were made in 1975 to drastically increase benefits. Since that time the courts have struggled to make sense with the numerous inconsistencies and inequities caused by the legislative changes. Further revisions to the statute to resolve the inequities have not resulted in a total solution. Moreover, statutory changes since 1975 have been few and infrequent.

The provisions of §8(d)(1), often referred to as the wage loss section of the statute, are an example of a square patch covering what was a round hole in the fabric of the Workers’ Compensation Act. The provisions have significant application currently, but they are also significantly limited.

The concept of compensation specifically for wage loss is not unique to Illinois. Most states have some wage loss provision. In fact, some states have eliminated permanent partial disability awards and allow compensation for an injury only if an actual wage loss on a permanent basis is proven.

The wage loss concept in Illinois is not new. A wage loss provision has been in the statute since its inception. However, under the original statute, the extent of wage loss benefits were very limited, and, therefore, benefits for wage loss were rarely sought. In 1975, the limitations on wage loss awards were removed and now they are frequently pursued.
TYPES OF PERMANENT DISABILITY COMPENSATION

A. PTD

In Illinois there are basically three types of permanent disability compensation. The first is permanent and total disability under §8(f). Under that provision an individual is entitled to compensation benefits from the date on which he becomes permanently and totally disabled for the remainder of his life. The rate at which compensation is awarded is equal to two-thirds of the average weekly wage. The permanent total compensation rate is limited by the maximum TTD rate in effect on the date of the accident at the top end and the minimum death benefit rate at the low end. If an award is rendered for permanent and total disability, a claimant can apply for and receive annual adjustments for inflation from the Second Injury Fund. (I will not discuss permanent and total disability which is statutory and covered by §8(e)(18).)

B. PPD

The second type of permanent disability compensation which can be awarded comes under §§8(c), 8(e), or 8(d)(2). This type of compensation is based on disfigurement in a compensable area, or a percentage loss of use of a member (arm, leg, hand, etc.), or a percentage loss of use of the man as a whole. Compensation is awarded for a limited number of weeks based on the scheduled number of weeks allotted for the particular member and the percentage loss of use found by the Commission. The maximum PPD rate is set by a formula in the statute and increases annually (July 1) based on the percentage of increase in the state's average weekly wage. The minimum permanent partial disability rate is set forth specifically in the statute. The PPD rate for an individual is determined by multiplying the average weekly wage times 60%.

C. Wage Differential
The final type of permanent disability compensation which can be awarded comes under §8(d) (1) of the Workers' Compensation Act. This is the section which deals with wage loss. Compensation under §8(d) (1) is voluntary and optional based on an election by petitioner. After his return to work, petitioner can elect to seek compensation for wage loss. The employer is not entitled to make the election; the election is only at the discretion of the employee. However, if a claimant elects to receive compensation under §8(d)(1), he is precluded from obtaining compensation pursuant to §§8(c), 8(d) (2) and 8(e). The election to secure wage loss benefits normally occurs at the commencement of the trial on arbitration. Once the election has been made, it should not be subject to change at some later point in time. If an individual receives an award under §8(d) (1), he cannot receive an award under §§8(c), 8(d) (2) or 8(e). Similarly, if compensation is sought pursuant to §§8(c), 8(d) (2) or §8(e), compensation cannot later be sought for wage loss under §8(d) (1).

THE STATUTE ITSELF

Section 8 (d) (1) of the Illinois Workers' Compensation Act provides:

"If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66 2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

TEMPORARY WAGE LOSS OR TEMPORARY PARTIAL DISABILITY
It must be noted, remembered and emphasized that §8(d) (1) by its specific terms only applies to claims of permanent wage loss. The Illinois Workers' Compensation Act has no provision for temporary partial wage loss. The statute is silent as to such a circumstance, although such circumstances frequently occur in the workplace. This omission is well known, but the legislature has not sought to remedy the problem. The Commission has in past years used §8(d) (1) to justify awards of temporary wage loss. However, recent Commission decisions have consistently held that §8(d) (1) by its terms is not authority for such an award. No appellate court cases have justified a Commission award of temporary wage loss under §8(d) (1).

Frequently, employers must create a solution despite the statutory ambiguity. One alternative used by some employers is to voluntarily pay wage differential on a temporary basis as if the statute actually applied. Most states do provide and require the payment of temporary wage differential benefits.

A second alternative is to pay the difference, if any, between the TTD rate and the temporary lower wage. Since the maximum compensation the IIC can award is the TTD rate, there is significant support for this strategy. The Commission will justify this award by calling it “maintenance” rather than TTD. The need for the employer to create a solution is generally dictated by the amount of the differential. If the differential between the TTD rate and the temporary wage is small, the urgency to create a solution is not strong and the IIC may disregard it. However, if the employee earns $1,000.00 a week and the employer returns him to temporary modified work at $300.00 a week but pays no differential, the employee is at a significant disadvantage compared to being totally disabled. Instead of taking home $666.67 a week in TTD, he is taking home approximately $270.00 a week in wages after taxes, and he's working. Since the Industrial Commission can’t award wage differential, the claimant arguably should get nothing. Since that is an unfair result, I expected the Industrial
Commission would fashion a remedy using the existing statute. In circumstances like this the Commission now awards what they call “maintenance benefits” under Section 8(a) which are essentially TTD. They award benefits equal to the TTD rate, call it maintenance, but give the employer credit for any wages earned by petitioner. There are only a few reported cases involving this situation and they are somewhat contradictory. Essentially, if the difference between petitioner’s temporary earnings and the TTD rate is small, no benefits at all are awarded. If the difference between the temporary earnings and the TTD rate is large, TTD is awarded and the employer is given credit for net wages earned.

In a related circumstance, it is not infrequent for an employee to have two jobs. It is common in these cases where an employee is working two jobs that he suffers an accident which causes the employee to be totally disabled from one job, but not the second job. Arguably, since petitioner is working, he should not be entitled to any TTD. Alternatively, if TTD is awarded, the Commission should award TTD based on the TTD rate for both jobs minus a credit for the wages earned. However, that is not what the Commission has always done. Instead, the Commission has awarded TTD benefits based on the earnings only for the job for which petitioner is disabled as if petitioner didn’t even have a second job. This illustrates again the Commission tendency to fashion a remedy by twisting the statute.

MINIMUMS AND MAXIMUMS

The first question to be addressed is whether a wage loss award is subject to minimum or maximum rates. I don't believe there is any minimum weekly benefit award under §8(d) (1). Consequently, a wage loss award would not be subject to either the TTD or PPD minimums.

On the other hand, it is clear that wage loss awards are subject to maximum rates. Initially, employers contended that the wage differential rate could not exceed the employee's TTD rate. The
Court rejected that contention early and held that the wage differential rate can exceed the TTD rate. General Electric Company v. Industrial Commission, 144 Ill.App.3d 1003, 495 N.E.2d 68 (1986).

The issue of a wage differential maximum was hotly contested by the plaintiff's bar. They argued that wage loss awards had no maximum rates. To impose any limits, claimants contended, would be unfair and contrary to public policy. To impose limits would encourage employers not to provide meaningful rehabilitation. If there was to be any maximum wage differential rate, claimants contended it should be the maximum TTD rate.

Employers contended that wage loss awards were subject to the maximum PPD rates. Surprisingly, this issue did not reach the appellate court level until 1992. In several decisions, the Industrial Commission has ruled that wage loss awards are subject to the PPD maximum. In the case of Bohannon v. Industrial Commission, 237 Ill.App.3d, 989; 606 N.E.2d 527 (1992), the appellate court confirmed the Industrial Commission's ruling on that issue. The court rejected plaintiff's arguments that wage loss awards are unlimited or, if limited at all, are subject to the TTD maximum. Instead, the court held that the maximum wage loss award is equal to the maximum PPD rate in effect on the date of the accident.

This is an important and critical decision in cases of wage differential and also where a claim is being made for possible permanent total disability. In the case of the high wage earner who is claiming permanent total disability, employers should do everything possible to prove that the employee could return to at least minimum wage work. For example, if an employee was earning $1,100.00 per week and is found to be permanently and totally disabled, the employer must pay permanent total disability benefits at a rate of $733.33 per week. However, if the employer can prove that the employee can return to even minimum wage work, the rate for wage differential drops to only $542.17 per week, the current PPD maximum. In the past, employers assumed that the wage
differential rate was unlimited or limited only by the TTD maximum. In a case of a high wage earner, rehabilitation was considered useless if the employee could only be returned to a minimum wage job. In such a circumstance, the employer opted not to provide vocational rehabilitation since the rate of wage differential would be no less than the continuing TTD rate. Now, once the employer can show that an individual can return to work, the maximum weekly rate for any wage differential, no matter how great, will be equal to the PPD rate in effect on the date of the accident.

**CALCULATING THE WAGE DIFFERENTIAL RATE**

The calculation the wage differential rate can be challenging and difficult. Pursuant to the terms of the statute, you must begin by determining the wage petitioner would be earning at the present time if he had not been injured. From that wage you must subtract the wage petitioner is currently earning or is able to earn whichever is greater. *General Electric Company v. Industrial Commission*, 144 Ill.App.3d 1003, 495 N.E.2d 68 (1986). The difference between those two figures is the wage differential. The wage differential rate is then calculated by multiplying the wage differential by two-thirds.

The first figure used in this calculation is not the employee's average weekly wage. *Old Ben Coal v. Industrial Commission*, 555 N.E.2d 1201 (1990). More often than not the average weekly wage is lower than the wage petitioner would have earned but for the accident. Normally, the Industrial Commission will look to an employee's job classification and see what that job classification is currently paying on an hourly basis. However, that is not always the case. A separate and distinct investigation is needed to determine what petitioner's earnings would have been if not injured. The employer must consider raises that an employee would have received if he were employed in the same classification. However, the Commission will use petitioner’s average weekly wage or his hourly wage at the time of the accident in the calculation if petitioner does not provide evidence as to what

Petitioner must affirmatively prove wage increases in his job class to get that additional benefit. The Industrial Commission will not and cannot speculate on potential raises. Cases involving union workers generally prove the most difficult for employers to dispute. The Commission will consider and accept a current union contract as to current hourly rates. Absent a contract the employer should challenge claims in which merit or performance raises are alleged.

It is not sufficient simply to learn petitioner's current hourly wage. In making the wage differential calculation, it is not always necessary to merely multiply the current hourly rate for petitioner's prior job times 40 to wind up with the figure as to what petitioner would currently be earning. In calculating what petitioner's current earnings would be had he not been injured, you do not necessarily need to calculate current average weekly earnings using the same prescriptions and limitations that are set forth in §10. Although you can use the §10 formula as a guideline, you should work to calculate a current weekly wage that is as low as possible giving due consideration to the nature of petitioner's employment. This often will require imagination and creativity.

For example, in making a wage differential calculation, let's assume at the time of the accident that petitioner earned $10 per hour. However, when you calculated his average weekly wage, it was only $350. Assume that after an accident petitioner returned to work but is able to earn only $8 per hour. At the time of his return to work his former job is paying $12 per hour. Currently, petitioner is working 40 hours a week and is therefore making $320 per week. Petitioner's attorney will argue that the wage differential is $4 per hour or $160 per week. This creates a wage differential rate of $106.67 per week ($160 x 2/3 = $106.67). However, based on petitioner's average weekly wage, it appears he only worked an average of 35 hours a week. If that were true, his current hourly wage
even at $12 per hour would only be $420 per week, creating a wage differential of only $100 per week and a wage differential rate of only $66.67. Brown v. Frank Scheck, 88 IIC 185.

Similarly, I feel you should be able to reconsider re-evaluating the way you calculate earnings for a construction worker or other seasonal type worker. Although pursuant to §10 of the Workers’ Compensation Act, an artificially high average weekly wage is created for the purposes of calculating TTD, the same result should not necessarily apply in the wage differential setting. Instead of focusing on average weekly earnings for the days and weeks worked, focus instead on total annual earnings over the years. Despite increases in hourly rates, the difference in total earnings during the course of a year for an individual who gets a regular 40-hour a week job compared to an individual who is working seasonally may be minimal. To investigate, demand tax records for past years and see an individual’s actual yearly earnings.

However, you must keep in mind the appellate court decision in Forest City Erectors v. Industrial Commission, 264 Ill.App.3d 436, 636 N.E.2d 969 (1994). The petitioner in Forest City was employed as an ironworker allegedly on a full-time basis earning $20.27 per hour. After a work injury he was unable to be an ironworker and eventually was employed earning $6 per hour. Before the accident petitioner worked an average of 44.7 hours a week for 14 weeks and presented evidence that his employment was not seasonal. However, the employer showed that in the years prior to the accident petitioner normally worked 1,000 to 1,500 hours per year on average. The employer contended that the wage differential should be based on the average hours worked in the industry not just the individual employer. The Industrial Commission and the Appellate Court disagreed and awarded the full wage differential benefit. (40 x $20.27 = $810.80 minus $240 (40 x $6.00) = $570.80 x 2/3 = $380.53 reduced to $313.51 PPD maximum). Would the result have been different if
petitioner failed to prove his employment was full-time such as a carpenter or concrete worker whose work is clearly seasonal?

On the other hand, you do not need to speculate with respect to promotions or advancements. *Deichmiller v. Industrial Commission*, 147 Ill. App.3d 66, 497 N.E.2d 452 (1986). If an employee is an apprentice at the time of the accident, his wage differential is based on current apprentice earnings rather than current journeyman earnings. The Industrial Commission cannot speculate that an apprentice would have become a journeyman.

The situation can become more complex if petitioner worked two jobs. If such is the case and petitioner is disabled from both jobs, he may well argue entitlement to full differential even though he has only returned to a 40-hour a week job. In such a circumstance, the differential should be calculated based on the average hourly wage which petitioner could be earning compared to his current hourly wage, unless for some reason petitioner is limited from working more than 40 hours a week. Otherwise, you must force petitioner to get a second job. (See *Jose Fermainn v. Sears Technology Service*, 95 IIC 434 -- wage differential denied where petitioner didn't prove injury precluded return to second job.)

**WHAT COULD PETITIONER EARN, WHAT IS HE ABLE TO EARN**

In disputing these cases it is important to recognize that the wage differential is based on what petitioner could have earned if he had not been injured compared to what he is able to earn currently. Frequently, there will be an issue as to what wage petitioner can currently earn. Often the Commission will merely rely on the actual earnings petitioner is receiving. However, in the event petitioner voluntarily accepts a lower-paying job despite having an ability to obtain a higher paying job, the Commission should award wage differential based on the job petitioner could have obtained if he were so inclined. Petitioner cannot simply accept or seek a lower-paying job and assume he will
get a higher differential award. *Durfee v. Industrial Commission*, 195 Ill.App.3d 886, 533 N.E.2d 8 (1990). In *Durfee*, petitioner had an accident working as a repairman and never returned to work as a repairman despite a trial release by his treating doctor. Petitioner never attempted a return to work as a repairman, but instead sought employment as a school administrator at his church. Since petitioner never attempted to return to regular work, his wage loss claim was denied and petitioner was awarded compensation under §8(d) (2). On the other hand, it is very difficult to convince the IIC that petitioner could have obtained a higher paying job where petitioner finds employment after working with an employer-chosen rehabilitation firm.

However, if an individual qualifies for a wage differential award and seeks lower paying work, he won't be denied a wage differential award; instead, his wage differential award will be limited to the differential based on what he could have earned. In the case of *William Rutledge v. Industrial Commission*, 242 Ill.App.3d 329, 611 N.E.2d 526 (1993), petitioner suffered a work injury and could not return to his original job duties. However, the employer gave petitioner alternate duty. Petitioner worked the alternate duty for several months, but then moved out of state and took a part-time job. At the time of trial, petitioner proved that his original job as a surface grinder paid $11.30 an hour. His alternate job as a stockroom worker paid $7.63 an hour. After petitioner moved out of state, he earned $5.00 per hour on a part-time basis 20 hours a week.

The arbitrator awarded petitioner two-thirds of the difference between his average weekly wage as a grinder, $452.00 ($11.30 x 40), and his out-of-state job paying $100.00 per week ($5.00 x 20). The difference was $352.00, creating a wage differential rate of $234.67.

The Industrial Commission reversed and denied wage differential entirely, stating that petitioner had self-limited his employment without medical necessity or justification. No wage differential was granted. The circuit court reversed and awarded petitioner two-thirds of the
difference between his original job as a surface grinder and his subsequent job in the stockroom based on a 20-hour work week. The wage difference would be $11.30 minus $7.63 equaling $3.67 x 20 for a total of $73.40. The wage differential rate would then be $48.93. The appellate court confirmed the circuit court's decision. The appellate court stated the Industrial Commission was wrong in completely denying wage differential. However, the award of wage differential granted was significantly less than what had been awarded by the arbitrator. This decision shows that extensive analysis is needed in all wage differential claims. Petitioner's actions can have a significant bearing on his entitlement to a wage differential award.

One case demonstrates that it is virtually impossible to deny a wage differential claim on the basis that an employee could not reasonably have expected to hold his position for the foreseeable future. Albrecht v. Industrial Commission, 271 Ill.App.3d 756, 648 N.E.2d 923 (1995). Ted Albrecht was an offensive lineman for the Chicago Bears. He was drafted in 1977 and played 5 years through the 1981 season. In 1982 he was injured in training camp doing exercises and never played again. His 1982 salary was 130,000.00. He began a travel agency and worked as a sportscaster and earned about $80,000.00 annually. Albrecht claimed a wage differential award but it was denied by the arbitrator, IIC and circuit court. They all felt that a PPD award was appropriate. Nevertheless, the Appellate Court reversed and held that petitioner had a reasonable basis for assuming continued employment as a professional football player, ignoring testimony from the general manager that the average career of an offensive lineman is less than 10 years. The court held "we conclude that professional football players are skilled workers contemplated under the statute and that any shortened work expectancy in claimant's career would not preclude him from a wage differential award." This means petitioner is entitled to a wage differential award for the duration of his disability,
as if he could have reasonably expected to be playing professional football in his 40s, 50s, 60s, etc. It is a ridiculous result, but it is the current state of the law.

Another recent case is even more disturbing. In *Smith v. Industrial Commission*, 308 Ill. App.3d 260, 241 Ill.Dec. 468, 719 N.E.2d 329 (1999), the Court affirmed an award of wage differential benefits even though petitioner was earning the same amount at trial as she was at the time of the accident. The case is a strange one. Petitioner suffered an injury as a security supervisor while earning $15 per hour. As a result of the injury, petitioner could not work as a supervisor and her wages were cut to $10 per hour. Shortly before trial, the employer raised petitioner’s wages back to $15 per hour so that she had no wage differential. The Commission viewed the pay raise as a ruse to avoid a wage differential award and rejected the evidence as to petitioner’s current earnings. The Appellate Court agreed with the Industrial Commission’s conclusions. This represents a classic case of bad facts making bad case law.

An even newer case law is more disturbing and will lead to more wage differential awards. We have long claimed that an employee must return to work in order to obtain a wage differential. We claimed that it was speculative to award a wage differential to an individual who had not returned to work anywhere. We claimed petitioner had to prove a valid job search. We argued that without that job search petitioner was only entitled to PPD. We routinely won those cases and only faced a PPD award since the Commission was reluctant to award PTD where the claimant was released to light work and felt a wage differential award was unavailable. The IIC position has changed and will continue to change based on the case decision of *Gallianetti v. Industrial Commission*, 315 Ill.App.3d 721, 734 N.E.2d 482, 248 Ill.Dec.554 (2000). In *Gallianetti*, petitioner was employed as a tree trimming crew foreman and earned almost $900.00 per week. He suffered a work injury when he was struck with shotgun pellets in his left elbow and had 3 different but fairly minor surgeries on the arm.
and elbow. Despite surgery, he continued to have symptoms. In October, 1994 petitioner had an FCE and the treating doctor opined that petitioner was at maximum medical improvement at that time but could not return to his regular job. Petitioner could do only sedentary work with his left arm. From September, 1994 to September, 1995, petitioner made virtually no job search. He contacted the union on four occasions in an effort to get work but was unable to find work. He saw his doctor again in October, 1995 and January, 1996 and was prescribed medication but was to return on an as needed basis. Petitioner looked for work intermittently and eventually was employed earning $5.50 per hour at a garage.

Respondent apparently never offered vocational placement services. Respondent did obtain and offer a labor market survey identifying potential jobs for petitioner including tree trimming supervisor, exterminator, storage rental clerk, and security guard. The jobs had varying rates of pay, but none equaled petitioner’s prior earnings. After a hearing, the arbitrator awarded petitioner TTD through January, 1996 and 60% loss of use of the man as a whole. The Industrial Commission on appeal reduced petitioner’s TTD and awarded TTD only to October, 1994 when petitioner became medically stable. The Commission affirmed the award of 60% loss of use of the man as a whole. Since respondent had paid TTD after October, 1994, the Commission granted the employer credit for all excess TTD paid as against the PPD award.

Petitioner appealed to the circuit court and the award was confirmed. Petitioner appealed to the appellate court which reversed. The appellate court ruled that petitioner was entitled to a wage differential award and that the Industrial Commission’s denial of a wage differential award was improper. The court stated that the statute prefers wage differential awards over PPD awards. The court ruled that the Commission was obligated to make a wage differential award unless petitioner waived his right to a wage differential award. The court stated, “We conclude that the plain language
of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity.” The court ruled that the evidence showed that petitioner was clearly entitled to a wage differential award despite petitioner’s apparent minimal job search.

Respondent argued that petitioner wasn’t entitled to a wage differential award because of his failure to document a job search. The court ruled that the claimant did not need to present documentation of a job search. The court held, “There is no affirmative requirement under section 8(d) (1) that a claimant even conduct a job search. Rather, as discussed above, a claimant need only demonstrate an impairment of earnings. Evidence of a job search is but one way to show impairment of earnings.” The court reviewed respondent’s labor market survey. The court noted that the labor market survey listed 21 different employers in four types of positions, but only one of the employers had an opening within claimant’s restrictions. There were jobs listed that paid more money than petitioner was earning, but those jobs allegedly were not available to petitioner.

However, the court did not overturn the Commission’s reduction of the TTD award. Further, the court upheld the Commission’s granting of credit for the TTD overpayment as against the PPD award. The court ruled it would be improper to grant petitioner a windfall because of an erroneous TTD overpayment. Such a result would discourage the prompt payment of benefits.

It doesn’t get any worse that this. The Commission normally considers a valid job search a prerequisite to prove a lack of employability. In this case, the petitioner apparently did no job search for an entire year other than to contact the union on four occasions. Such a minimal job search hardly justifies a wage differential award. Contrary to the court’s assertions, the Commission must have the option of awarding wage differential benefits or PPD if petitioner fails to prove wage differential. If the Commission has no discretion but to award wage differential or nothing at all, that would be more
detrimental to petitioner than the option of getting a wage differential or a PPD award. Based on this decision, the Commission arguably has no such discretion. That doesn’t make any sense.

Moreover, this decision appears to put petitioners at risk if they chose to seek a wage differential award. If the Commission has no discretion to award PPD if petitioner fails to prove a wage differential award, it appears the Commission must deny benefits entirely to a petitioner who seeks but fails to prove a wage differential claim. That’s absurd.

Subsequent case law helps some. Despite the language used in the Gallianetti case, the court reached a different result in Pietrzak v. Industrial Commission, 329 Ill.App.3d 828, 769 N.E.2d 66 (2002). In Pietrzak, petitioner was employed as a transportation manager and suffered a back injury. He underwent a course of treatment and was given permanent restrictions. He did a very limited job search and found a job paying only $650.00 a week. His prior wage was $1,144.23. Respondent presented a labor market survey and testimony from a vocational specialist that jobs were available to petitioner without wage loss. The arbitrator awarded wage loss but the Commission reversed and awarded only 20% man as a whole. Petitioner appealed but the Appellate Court affirmed. The Court found that the Commission was justified in finding that petitioner did not prove an impairment of earning capacity even though he was working at a lower paying job. This decision emphasizes the need to aggressively fight wage differential claims and hire a good vocational specialist to perform a quality labor market survey. The specialist should be prepared to investigate and challenge the quality of petitioner’s job search.

Unfortunately, there are other bad cases that we have to recognize and deal with. In one case the court found that even if a claimant is physically unable to do the job he is hired to perform, he can be entitled to wage differential benefits once he claims an injury and does not return to work at his old job. Edward Gray Corp v. Industrial Commission, 316 Ill.App.3d 1217, 738 N.E.2d 139, 250
Ill.Dec.175 (2000). The petitioner was hired by Graycor as an ironworker on August 11, 1994. On his employment application, petitioner lied and stated he had no physical conditions which would affect job safety or performance. In fact, petitioner had several prior back injuries in 1986, 1998 and 1989. He received settlements of 8% and 32% loss of the man as a whole, a total of 40%. He had a functional capacity evaluation (FCE) in 1989 which limited him to a medium level of work. After all his settlements and contrary to his alleged restrictions, petitioner went back to work as an ironworker for four years until he injured his back again in April, 1994. He had conservative treatment followed by another FCE in August, 1994, which showed that he couldn’t perform his regular work duties. His employer refused to allow him to return to work because petitioner could not do full duty as an ironworker. He then sought and obtained a job with Graycor. Within two months of starting work at Graycor, on October 7, 1994, petitioner complained of back pain while working. He received conservative treatment for his back. He had another FCE in February, 1995 which revealed (what a shock) that he could only perform work at the light-medium physical demand level. Petitioner found a job paying $304.00 per week compared to his prior work as an ironworker which paid him $1,000.00 per week and claimed the maximum wage differential benefits. The arbitrator awarded maximum wage differential benefits and the Industrial Commission affirmed.

The employer appealed, claiming than a §8(d) 1 award was inappropriate since petitioner even prior to his employment wasn’t qualified to work as an ironworker. Both petitioner’s and respondent’s vocational experts testified that medical restrictions dating back to 1987 indicated petitioner didn’t have the functional ability to work as an ironworker. The appellate court rejected these arguments and confirmed the decision of the Industrial Commission. The court noted that although petitioner had a functional evaluation in July, 1994 which established lifting restrictions, the evidence only showed that petitioner couldn’t work for his former employer and not that petitioner
couldn’t work as an ironworker for a different employer. The court found it impressive that petitioner actually worked for Graycor for almost two months before being injured. The court felt it unfair to deny wage differential benefits to petitioner since the primary purpose of the Act is to require that the cost of industrial accidents be borne by industry rather than its individual employees. The court held, “To adopt Graycor’s position and deny an injured employee benefits under the circumstances of this case would be contrary to the purpose of the Act, and would discourage employees from attempting to return to work by penalizing those who do.” I know the employer must take the employee as it finds them, but I can’t see how this employer should have such a huge responsibility for a condition it did not create.

**CHANGING AN §8(d) (1) AWARD**

Once a wage differential award is entered, it is difficult to get it changed. The Industrial Commission previously ruled that petitioner cannot file a §19(h) petition seeking an increase in the wage differential rate based solely on economic changes. In the case of *Thomas Browne v. Frank Scheck & Sons*, 84 WC 9086 (order entered 8-26-91), petitioner filed a 19(h) petition after an 8(d) (1) award. Petitioner argued that the wage rate for the job he had prior to the accident had increased significantly. Therefore, the wage differential rate was much higher than it had been at the time of arbitration. The 19(h) petition was denied on the basis that it could only be awarded for changes in petitioner's physical condition, not solely an economic change.

Correspondingly, an employer can't obtain a change in a §8(d) (1) award unless it alleges a change in petitioner's physical or mental condition, not just economic circumstances. In *Drury v. Royal Crown Bottling*, 93 IIC 287, the employer filed a 19(h) petition to reduce a §8(d) (1) award, claiming petitioner's earnings had increased since the prior award. Petitioner admitted he was earning more money but claimed he was working longer hours. Even though the employer proved a decrease
in wage loss, the 19(h) petition was denied. The Industrial Commission held that the employer in a 19(h) petition must prove a change in petitioner's physical condition, not just his economic circumstances.

This decision must be challenged. There is no difference here than in the case of a permanent total disability in which the petitioner returns to work. The employer must be able to challenge a continuing §8(d) (1) award. However, in view of these decisions, it's necessary to delay §8(d) (1) hearings as long as possible to ensure that the differential, if it exists, is truly permanent. Some petitioner's attorneys really push §8(d) (1) trial as soon as petitioner returns to work. The employer in these cases must present evidence not only of petitioner's current earnings but also his potential future earnings.

Finally, petitioner can't file a §19(h) petition after a §8(d) (1) award to seek conversion to §8(d) (2) benefits. *Deichmiller v. Industrial Commission*, 90 IIC 1848.

**HOW LONG IS THE TAIL**

A critical question which is unanswered is the length of time a wage differential award must be paid. In cases of permanent total disability, compensation benefits must be paid for life. The Act ignores the fact that individuals are entitled to social security disability, social security pension, and other personal or company sponsored retirement and pension programs. Under §8(d) (1), benefits are to be paid for the *duration of the disability.* Most claim this is a lifetime benefit. Arguably, the disability which equates to the wage loss ends when petitioner voluntarily removes himself from the work force. Arguably therefore, the benefits don't continue for life but only until retirement. This argument finds support from the Rutledge decision. In Rutledge, at the time of the accident petitioner worked 40 hours a week. However, he eventually returned to work at 20 hours a week. He was awarded differential benefits at a rate based on 20 hours a week. Following that reasoning, if
petitioner was only working 10 hours a week, his wage differential rate should be based on 10 hours a week. If he was working 0 hours a week, there should be no differential owed. That's what occurs when petitioner retires or otherwise withdraws from the workforce. We don't pay TTD to petitioners who are not seeking work; why should we pay wage differential? Although that reasoning makes sense to me, based on the Albrecht decision, I am not sure I could get the appellate court to agree with me. The court has already said that wage differential benefits don’t end at age 65. Fritz v. Industrial Commission, 165 Ill.App.3d 550, 518 N.E.2d 1289 (1988).

Consequently, in calculating the present value of a wage differential award, one can argue for a cutoff date at age 65 or 70. There are no appellate cases which support a limit on the length of time benefits must continue. However, there must be some limit short of lifetime benefits.

CONCLUSION

Wage loss claims are now extremely popular. Claimants' attorneys used to rarely demand wage differential unless they were substantial because the fees to be earned from a wage differential award were more limited. However, many attorneys now look to create wage loss claims any time a claimant is given permanent restrictions. If the attorney can argue that petitioner can’t return to regular work, the claimant is urged to find a low paying job and then claim wage loss. It is critical to evaluate all restrictions and determine the accuracy. Even in cases where petitioner cannot return to his prior job, we must investigate and evaluate petitioner’s ability to perform other work and obtain evidence as the earning power of petitioner in alternate jobs. Such evidence should be considered by the Commission. We must investigate early and avoid being pushed to trial in wage loss cases prematurely. We know it is tough to fight a wage loss award once it is entered. Therefore, all competent evidence must be developed and presented at the hearing before the arbitrator.
Recent appellate court decisions have not favored employers in this arena. Both the *Gallianetti* and *Edward Gray* cases show the Appellate Court to be extremely sympathetic to wage differential claims. The Commission will be encouraged to write more wage differential awards not fewer. Each case could have been easily decided in favor of the employer and it was not. If we are to find hope in defending wage differential claims, it must come from the legislature because the courts are not helpful at all.

Despite the unfavorable statute and case law, we generally can be conservative in evaluating these cases for settlement. Unlike cases of permanent total disability, claimants are more likely interested in settling wage loss claims and getting a lump sum. These claimants tend to believe they will earn more in the future, and therefore, they are more likely to accept a lump sum that is more conservative.