

Recovering Lost Earning Capacity Under the Workers' Compensation Act

By Douglas Rallo

I. Introduction

Where an employee sustains an on-the-job injury and returns to his former occupation at the pre-injury pay level, he is typically compensated for permanent partial disability, or "PPD." PPD compensation is based on the lost use of his injured body part and calculated according to the schedules in sections 8(d)(2) and 8(e) of the Illinois Workers' Compensation Act.[1]

But what if the injuries are so severe that he can't return to his job and he suffers lost wages or diminished future-earning capacity as a result? In that case, he typically seeks recovery for a portion of those losses using the "wage differential" provisions of section 8(d)(1) of the Act.[2]

Scheduled-loss schemes based on detailed compensation tables, such as those contained in section 8(d)(2) and 8(e), predominated in the original workers' compensation statutes.[3] But over time, courts began to prefer so-called "wage loss" or "wage-differential" awards such as those embodied in 8(d)(1), which reads as follows:

(d) 1. 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.

The Illinois Supreme Court explained its preference for the wage-differential theory in a 1982 case, *General Electric Company v. Industrial Commission*,[4] writing that under the scheduled-loss approach, "the worker is allowed to recover the scheduled amount without having to demonstrate how the expected eventual loss of earnings will come about." However, the court said, "[I]f [a claimant] can prove an actual loss of earnings greater than the schedule presumes, there is no reason why [the claimant] should not recover that loss." [5]

The court's preference for wage-differential awards has evolved into a requirement in cases where there is evidence of lost earning capacity. In *Gallianetti v. Industrial Commission*,[6] the appellate court ruled that "the word 'shall' in section 8(d)(1) leads us to conclude that where a claimant proves that he is entitled to a wage-differential award, the Commission is without discretion to award a section 8(d)(2) award in its stead" [7]

II. Calculating a Wage-Differential Award

To qualify for a wage-differential award under section 8(d)(1), a claimant must show (1) a partial incapacity that prevents him from pursuing his "usual and customary line of employment" and (2) an impairment of earnings.[8] An analysis of judicial opinions indicates that the Industrial Commission should take the following steps to arrive at a section 8(d)(1) award:

1. determine the employee's "usual and customary line of employment" at the time of injury;
2. decide how many hours per week constitute "full performance" of the claimant's usual and customary line of employment;
3. apply a presumption as a matter of law that the claimant would, at the time of arbitration, be engaged in the "full performance" of his usual and customary line of employment, disregarding the claimant's average weekly wage or other actual prior work hours or earnings;
4. for hourly wage employees, multiply the number of hours constituting full performance by the hourly wage-rate for that job classification at the time of arbitration; [9]
5. determine whether the claimant's post-accident occupation is "suitable";

6. for hourly wage employees, calculate the claimant's weekly earnings in the suitable post-accident occupation by multiplying the "full performance" hours as calculated in number 4 above by the hourly pay rate for the new job.

7. calculate the difference between the claimant's full-performance weekly earnings in the "usual and customary line of employment" and his "suitable post-accident employment" weekly earnings.

8. award the claimant two-thirds of the difference per week, subject to the cap of the maximum permanent partial disability rates contained in section 8(b)(4) of the Act, for the duration of the disability.

Courts are approving section 8(d)(1) wage-differential awards with greater frequency. This article reviews court rulings that speak to key steps of the procedure outlined above, along with cases governing how 8(1)(d) applied to temporary employment, whether claimants are required to do job searches, and other issues.

III. Determining the Claimant's "Usual and Customary Line of Employment"

Edward Gray Corporation v. Industrial Commission^[10] represents an appellate court's analysis of what constitutes the "usual and customary line of employment" upon which wage calculations will be based. Obviously, claimants want this "line of employment" to be well paying.

The Edward Gray Corporation court held that "[t]he determination of what constitutes a claimant's 'usual and customary line of employment' is a question of fact for the Commission and its determination thereof will not be set aside on review unless it is contrary to the manifest weight of the evidence."^[11]

In the Edward Gray Corporation case, the claimant suffered low back problems while working for several employers. After being injured while working for one of those prior employers, Pangere Corporation, he underwent a functional-capacity evaluation. That test established that he should observe restrictions on stooping, climbing ladders, and certain kinds of lifting before returning to ironwork. The evaluation also noted that he did not meet the maximum lifting requirements of the Pangere job but that he could return to ironwork if the job was modified.

His treating physician released him to return to work with restrictions, but he did not return to Pangere. After a short stint at a less physically demanding job, he began working for Edward Gray Corporation (Graycor), performing ironwork fabrication at the Ford assembly plant in Chicago. On his job application, he indicated that he suffered from no physical conditions that would affect job safety or performance.

Claimant's job required him to lift heavy aluminum sheeting and bend over to use a chain saw. As a result of that work, the claimant experienced low back pain radiating down into his right leg. He sought medical treatment and left the ironwork trade, finding work as a porter at approximately \$304 per week, compared to the \$1,002 per week he had made as an ironworker.

He filed an application for adjustment of the claim and was awarded wage-differential benefits by the arbitrator. The commission adopted that award and the circuit court confirmed. On appeal, the employer argued that the commission erred in determining that claimant's "usual and customary line of employment" was ironwork. Graycor reasoned that since the claimant was placed on restrictions that incapacitated him from doing ironwork as a result of the Pangere injury, then ironwork could not, as a matter of law, have been his usual and customary line of employment at the time of the Graycor injury.

The appellate court disagreed and noted that the post-Pangere functional-capacity evaluation did not preclude him from returning to ironwork, but stated only that he could not perform some of the lifting required by the Pangere job and could not return to that position unless job modifications were made. The functional-capacity evaluation was also limited to a vocational analysis of the Pangere job requirements, not Graycor's.

The court wrote that even if the functional-capacity evaluation raised an inference that the claimant could not return to ironwork, the inference was rebutted by the claimant's return to Graycor and full performance of his ironwork job for 57 days prior to his injury. The claimant also testified that he had been an ironworker for 30 years and Graycor offered no evidence to the contrary.

The court held that since "[t]he evidence gives rise to more than one inference, ... the question of whether iron-working was [his] usual and customary line of employment was one of fact for the Commission." Because the commission's finding was not "contrary to the manifest weight of the evidence," the wage-differential award was affirmed.[12]

IV. Determination of "Full Performance" of the Usual and Customary Line of Employment

The next step is to decide what constitutes "full performance" of the usual and customary line of employment - the more hours, the better from the claimant's standpoint, since compensation is based on this "full performance" amount. In so doing, the question arises whether "full performance" must always be a 40-hour workweek. Case law indicates that the number of hours that constitute "full performance" of the prior occupation is a question of fact that depends on the proof at trial, subject to review with a manifest-weight-of-the-evidence standard. For a "decision to be against the manifest weight of the evidence, a review of the record must [show] that [a] conclusion opposite to that reached by the Commission was clearly the proper result." [13]

In determining full performance of an ironworker's job in *Forest City Erectors v. Industrial Commission*, [14] a witness testified at arbitration about the amount of work available to ironworkers. The secretary-treasurer of the Iron Workers' Union local testified that a normal workweek for a journeyman ironworker is fulltime, not seasonal, and that ironworkers can work 52 weeks per year. Thus, the arbitrator had a reasonable evidentiary basis to conclude that full performance was 40 hours per week and was justified in using a 40-hour workweek in making his section 8(d)(1) calculation. [15]

V. The "Presumption" of Full Employment in the Usual and Customary Line of Employment

Once full performance of the usual and customary line of employment is ascertained, the law imposes a "presumption" that the claimant would be engaged in the full performance of the usual and customary line of employment at the time of arbitration. [16]

However, where the claimant fails to show what he could be earning in the prior occupation as of the time of trial, but only introduced evidence of his earnings on the date of injury, it is within the proper exercise of discretion for the commission to use the injury date figure, rather than to speculate on any possible change in wage rates between the date of accident and time of trial, or deny a wage-differential award to someone who was otherwise entitled to it. [17]

VI. "Suitability" of the Post-Accident Occupation

Section 8(d)(1) requires that the post-accident position used in the wage-differential comparison be a "suitable" employment or business. This term was construed by the appellate court in *Fernandes v. Industrial Commission*. [18] In *Fernandez*, the claimant was employed as a structural ironworker. While working on a roof, he tripped on a welding cable and fell off, suffering a wrist fracture dislocation that required surgery.

The claimant's treating physician was of the opinion that he could not return to his occupation as an ironworker. The claimant told his vocational rehabilitation specialist that he was interested in attending truck-driving school. On his own, the claimant applied for truck driving jobs that paid between \$9 and \$12 per hour but was turned down. The rehabilitation specialist found several possible positions, including truck driving and security guard that paid between \$4 and \$9 per hour. The claimant accepted the security guard position, which paid \$4.30 per hour. At the time of his injury as an ironworker, he had been receiving \$16.75 per hour.

The Industrial Commission awarded the claimant a section 8(d)(1) wage differential, specifically finding that the security guard position fell within the range of jobs found by the rehabilitation specialist, and that the job constituted "suitable" employment within the meaning of the statute. In the appellate court, the employer contended that the commission should have used the \$9-\$12 per hour figure which claimant testified that he could have made as a truck driver, rather than the \$4.30 per hour job he received as a security guard.

The court affirmed the commission's factual determination that the security guard position was "suitable." It reasoned that the lower paying security guard position was within claimant's capabilities and work restrictions, and the rate of pay was within the range of pay for jobs located by the rehabilitation specialist. The court also relied on the fact that it would require improper speculation about possible earnings in the theoretical truck driver position, to use the \$9-\$12 per hour figure. It held, therefore, that the commission's determination of suitability of the lower paying security guard position was not against the manifest weight of the evidence.[19]

VII. Interpreting the Phrase "Is Earning or Is Able to Earn"

Assuming the post-accident occupation is deemed "suitable," section 8(d)(1) requires a determination of how much the claimant "is earning or is able to earn" in that position. The appellate court analyzed that phrase in *Smith v. Industrial Commission*.[20]

In *Smith*, the claimant injured her shoulder while working as a security supervisory officer for Burns Security. After shoulder surgery, claimant was medically disabled and unable to pass her required weaponry certification test. Her employer then offered, and she accepted, a position as a senior watch-person, which did not require her to carry a weapon and was less physically strenuous than her prior supervisor's job.

The claimant's starting salary as a senior watch-person was \$9.75 per hour. Because of three separate pay raises all in the month of March 1996, she was receiving \$15 per hour at the time of arbitration. This was the same amount she had received in her pre-accident position as a security supervisory officer. Other senior watch-persons had the same duties as she did but they did not receive raises to \$15 per hour; their pay remained \$9.75.

The arbitrator awarded wage-differential benefits, but the commission vacated that decision and awarded claimant permanent partial disability (PPD) benefits instead. The circuit court confirmed the PPD award.

On appeal, the claimant argued that the employer artificially raised claimant's post-accident wages to avoid granting a wage-differential award. To resolve that dispute, the court had to decide whether the claimant's artificially set wages were an amount she "is earning or is able to earn" in the suitable, post-accident senior watch-person job. The court held that it was not.

It relied on the definition of "earn" found in *Black's Law Dictionary*,[21] which was "[t]o acquire by labor, service, or performance. To merit or deserve." Since the employer in *Smith* established a sham wage for the claimant, the court ruled that "[wages] artificially raise[d]...above what is normally paid for such services are not 'earned' based upon 'labor, service or performance.'"

The court determined that claimant "was able to earn" \$9.75 per hour as a senior watch-person, consistent with the results of her functional-capacity evaluation.

The court also focused on the employer's improper motive in raising wages in an attempt to avoid a wage-differential award. It wrote that "[t]his fact, in and of itself, supports a finding that claimant's earning capacity was \$9.75 per hour." The circuit court was reversed and the arbitrator's wage-differential award was reinstated.

VIII. Job-Search Issues and Proof of Lost Earning Capacity

The purpose of a section 8(d)(1) wage-differential award is to compensate an employee for his reduced earning capacity.[22] Employers have met with mixed success in their efforts to impose a job-search requirement on employees seeking to establish a loss of earning capacity.

The employer's argument was rejected by the appellate court in *Gallianetti v. Industrial Commission*.[23] The *Gallianetti* court held that "[t]here is no affirmative requirement under section 8(d)(1) that a claimant even conduct a job search. Rather, ... 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 took a somewhat different tack in *Durfee v. Industrial Commission*.^[24] In *Durfee*, the claimant was an equipment repairman who sustained an adductor strain of the left groin while attempting to move a piece of sheet metal. His treating physician placed no physical restrictions and allowed him to try returning to work as a repairman; however, he chose not to do so. Rather, he pursued an interest in religious work, taking a job as a religious school administrator at a much lower salary. The arbitrator denied a wage-differential award and the commission adopted the arbitrator's decision.

The appellate court affirmed the denial of section 8(d)(1) benefits. The court noted the requirements for proof of lost earning capacity and explained that as follows:

The petitioner did not attempt to return to work...but elected to remain in a job which he enjoyed and which coincided with his clerical interests. Although he stated that this was the best job he could find, there is no evidence that he attempted to obtain a position as a computer operator or any other form of employment. Based on the foregoing, the Commission could have reasonably concluded that the petitioner, while having suffered an injury, had not shown a loss in earning capacity.

Note that although the *Durfee* court criticized the claimant's effort to seek higher-paying work, it said that the lack of job search efforts merely prevented him from proving a loss of earning capacity as a matter of evidence and that attempting to return to work was not a legal requirement under section 8(d)(1).

The appellate court recently considered wage-differential search issues with reference to both *Gallianetti* and *Durfee* in *Pietrzak v. Industrial Commission of Illinois*.^[25] In *Pietrzak*, the claimant worked in the transportation industry and had experience in all areas of the business, including dock supervision, dispatching, and sales. While working for the employer, the claimant's duties were to travel to different locations to get new facilities running and to solve terminal problems. He was paid \$1,000 per week and had the use of a company car valued at \$7,500. The commission denied a wage-differential award, and the claimant appealed.

On appeal, the *Pietrzak* court noted that "although claimant testified to the symptoms he still had, there was no evidence that, even with his restrictions, he was incapable of performing management duties with a transportation company." In addition, the court contrasted the claimant's acceptance of a lower paying job with only the second company he contacted in his job search against the vocational rehabilitation counselor's job survey, which found 43 available positions in a two-week period, and her opinion that the claimant could find work in the transportation industry earning between \$35,000 to \$50,000 per year. Since the commission could reasonably rely on that evidence to find that he did not prove his earnings were impaired as a result of his disability, its finding was not against the manifest weight of the evidence. Therefore, its denial of a wage-differential award was upheld.

IX. Section 8(1)(d) and Temporary Employment

Wage-differential awards under section 8(d)(1) are available to employees despite the temporary nature of their pre-accident work. This principle is illustrated in *Albrecht v. Industrial Commission*,^[26] where claimant was a fifth-year offensive lineman for the Chicago Bears when he sustained lower back injuries at training camp. In 1983, he resigned because of physical inability to perform satisfactorily and began a travel service.

Both the arbitrator and commission denied section 8(d)(1) relief. The trial court confirmed the denial. It relied on trial testimony that the average playing time of an offensive lineman is less than 10 years, and concluded that the claimant was "in a position of temporary employment, not a career where he could anticipate continued employment as long as he desired." Thus the court found that "[w]here no evidence exists that Petitioner would have continued in his usual and customary line of employment, earning his pre-injury wages, an award of wage-differential is not appropriate." The claimant appealed.

The appellate court reversed the denial of a wage-differential award. The court noted that many at-will workers in the economy are not guaranteed employment from year to year. Among others, the court rejected the employer's argument that the position of professional football player was a "temporary" career and "beyond the realm of the skilled worker" contemplated by those cases that awarded section 8(d)(1) wage-differential benefits. The *Albrecht* court noted that section 8(d)(1) did not speak to situations

of shortened work expectancy and there was no indication that this paragraph was intended to exclude employees in those circumstances.

The court opinioned that it was more common in the contemporary workforce for an employee to change jobs several times than to practice a trade over the course of a lifetime. As a result, the court ruled 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-loss differential award under section 8(d)(1)."

X. Recovering Wage-Loss Benefits Despite Higher Post-Accident Earnings

A loss of earning capacity can be shown even when the claimant has a higher paying post-accident job because actual earnings are irrelevant to a diminished earning capacity case. For example, in the common law case of *Buckler v. Sinclair Refining Company*,^[27] the plaintiff claimed loss of earning capacity (as opposed to loss of income) from a personal injury auto accident. Though the plaintiff's income tax returns showed an increase in income, the appellate court ruled that "[a]n increase in salary...has no essential relationship to earning capacity and, therefore,...evidence of actual income was properly excluded."

And, in *Robinson v. Greeley & Hansen*,^[28] the court explained that in Illinois "[d]amages should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury, and the difference in the actual earnings of plaintiff before and after the injury does not constitute the measure."

The court held likewise in *Morris v. Milby*,^[29] stating that "the plaintiff need not prove a concrete drop in wages following the injury to claim damages for impaired earning capacity" and noted that other courts had held "evidence of the plaintiff's income to be irrelevant" in some circumstances.^[30]

The Illinois Supreme Court case of *Franklin County Coal Corporation v. Industrial Commission*^[31] has applied these same principles in wage-differential cases under the Workers' Compensation Act. In Franklin County, the claimant was a machine operator in a coalmine for the employer prior to the occurrence he had worked a 35-hour week, 228 days total. The year after he returned to work he changed his job, which resulted in his workweek increasing to 54 hours (because of overtime) and his total yearly workdays increasing to 288.

The Supreme Court held that the amount claimant received yearly, arrived at by analyzing different hours (including overtime) and weeks worked, "is not the proper basis of comparison." The court found that "increased wages, hours worked, resulting in a larger yearly income, is not the test to be applied in ascertaining whether the employee is entitled to an allowance for [wage-differential]."^[32]

The Franklin County Coal Company case requires that a claimant's "overtime" and "greater number of hours worked" be excluded from the post-accident earnings calculation.^[33] This holding was reiterated in *Sroka v. Industrial Commission*,^[34] in which the Supreme Court considered a fact situation precisely opposite that of Franklin County. In *Sroka*, the claimant's yearly wage after the injury, was lower than before the injury, but his hourly rate was higher. In calculating the pre-injury earnings, the claimant had included overtime worked but had not included it in the post-injury calculations. The court reaffirmed Franklin County and stated that overtime should be excluded from the calculation whether it benefited the employer or the employee, held that the claimant had not suffered a loss in earning capacity, and therefore was not entitled to a wage-differential award.

Professor Larson also writes that earning capacity is different from actual earnings and that "the concept of wages he 'is able' to earn cannot mean definite actual wages alone."^[35] The Illinois Act uses the language "is able" in section 8(d)(1). Professor Larson also wrote that "[i]t is uniformly held,...without regard to statutory variations in the phrasing of the text, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident."^[36]

XI. Post-Award Modification Issues

In *Rutledge v. Industrial Commission*,^[37] the issue on appeal was whether a previously established wage-differential benefit is terminated by a job change that resulted in a further reduction in wages. In *Rutledge*, the claimant was a surface grinder earning \$11.30 per hour. As a result of exposure to toxic chemicals and lubricants, he developed dermatitis and was placed into a position in employer's stockroom where he earned \$7.63 per hour. Based on that reduction in wages, he established a right to a wage-differential award. However, prior to arbitration he quit his \$7.63 per hour Illinois job and moved to Michigan, where he worked part-time doing light maintenance for \$5 per hour.

The issue was whether he had self-limited his employment and earning capacity without medical justification by taking the lower paying Michigan job, thus disqualifying himself for the wage-differential award he would otherwise have been entitled to had he stayed in Illinois.

The appellate court pointed to statutory language that a claimant is entitled to wage-loss benefits "for the duration of his disability." It found there was no evidence that claimant's disability status had changed because he took a lower paying position. The appellate court concluded that his right to a wage-differential benefit was not terminated by his job change and affirmed the circuit court order in his favor.

The question of wage-differential awards has also been raised in connection with section 19(h) of the Act. ^[38] Section 19(h) provides as follows:

As to accidents occurring subsequent to July 1, 1995, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any times within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee had subsequently recurred, increased, diminished or ended.

In *Petrie v. Industrial Commission*,^[39] the claimant was mowing his employer's lawn when the mower got stuck in a ditch. When he attempted to free it, the blades amputated portions of the fingertips of his right index and middle fingers. He returned to work for his employer but was eventually laid off when the department in which he worked closed. After doing some "odds and ends work," he started his own business repairing household appliances.

After a hearing on his application for adjustment of claim, he was awarded compensation for permanent partial disability under the "person as a whole" provisions of section 8(d)(2) of the Act. Neither party sought review of the arbitrator's ruling. Approximately one year later, he filed a petition seeking modification of the original "person as a whole" award, arguing that he was entitled to a section 8(d)(1) wage-differential award instead, based on an increase in his "economic disability."

He testified at the section 19(h) hearing that the only evidence of a change in his physical condition was that the fingernails and nail beds on each of his injured fingers "came over the tips." He predicated his "economic disability" claim on the fact that the fingernail problem required him to spend three or four times longer to accomplish the same job as before.

On appeal, the question was "whether an increase in economic disability alone is a proper basis for modification of an award pursuant to section 19(h) of the Act." Although Professor Larson's view is that such economic disabilities are a sufficient change in condition to support an increase in benefits,^[40] the appellate court rejected that interpretation. Focusing specifically on relevant provisions of the Illinois Workers' Compensation Act and applying principles of statutory construction, the court ruled that "when the legislature used the term 'disability' in section 19(h) it was referring to physical and mental disability and not economic disability...We conclude, therefore, that a change in physical or mental condition is a prerequisite for a section 19(h) petition."

Since the claimant sought a wage-differential award only because of economic disability, 19(h) relief was denied.

XII. Conclusion

With courts increasingly favoring wage-differential awards under section 8(d)(1) of the Act, it becomes even more important for lawyers to understand this theory of recovery. Because the Workers' Compensation Act provides a limited system of recovery for job related injuries, section 8(d)(1) serves as a vehicle for the achievement of more complete justice for injured claimants.

This article is devoted with love and thanks to my mother, Mary Rallo, for her wisdom, support, laughter, encouragement, and generosity.

[1] 820 ILCS 305/8(e).

[2] 820 ILCS 305-8(d)(1).

[3] See A. Larson, Workers' Compensation § 58.23, at 10-257 (1981) ("Larson")

[4] 89 Ill 2d 432, 433 NE2d 671 (1982).

[5] ID. 499 NE2d at 673-74.

[6] 325 Ill. App. 3d 721, 734 NE2d 482 (3d D 2000).

[7] Id. 734 NE2d at 488. "[C]ompensation under section 8(d)(1) is barred only if compensation is actually awarded under section 8(e)." General Electric Company v. Industrial Commission, 144 Ill App 3d 1003, 496 NE2d 68 (4 th D 1986).

[8] Albrecht v. Industrial Commission, 271 Ill App 3d 756, 648 NE2d 923 (1 st D 1995).

[9] For salaried employees, the weekly salary paid at the time of arbitration for claimant's usual and customary line of employment should be used. This salary should be compared with the weekly earnings in the suitable post-accident employment as set forth in paragraph 6.

[10] 316 Ill App 3d 1217, 738 NE2d 139 (1 st D 2000).

[11] Id, 738 NE2d at 143. For a finding of fact to be "contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent," Caterpillar, Inc. v. Industrial Commission, 228 Ill App 3d 288, 591 NE2d 894 (3d D. 1992).

[12] See also Deichmiller v. Industrial Commission, 147 Ill App 3d 66, 497 NE2d 452 (1 st D 1986).

[13] Stapleton v. Industrial Commission, 282 Ill App 3d 12, 668 NE2d 15 (5 th D 1996).

[14] 264 Ill App 3d 436. 636 NE2d 969 (1 st D 1994).

[15] Consolidation Coal Company v. Industrial Commission, 265 Ill App 3d 830, 639 NE2d 886 (5 th D 1995).

[16] See, e.g. Old Ben Company v. Industrial Commission, 198 Ill App 3d 485, 555 NE2d 1201 (5 th D 1990). See also Forest City Erectors, 636 NE2d 969. However, the court in Pluto v. Industrial Commission, 272 Ill App 3d 722, 650 NE2d 631 (1 st D 1995), reached a different result and used the claimant's average weekly wage" in making a section 8(d)(1) wage-differential calculation. But the court did not discuss the Old Ben Coal Company or Forest City Erectors cases, and seems to be a departure from the proper analysis of this issue. Wage-differential awards under section 8(d)(1) are capped at the maximum permanent partial disability rates set forth in section 8(b)(4) of the Act. Bohannon v. Industrial Commission, 237 Ill App 3d 989, 606 NE2d 527 (1 st D1992).

[17] Fernandes v. Industrial Commission, 246 Ill App 2d 261, 615 NE2d 1191 (4 th D 1993).

[18] Id. 615 NE2d at 1196.

[19] See also *Pluto v. Industrial Commission*, 650 NE2d 631.

[20] 308 Ill App 3d 260, 719 NE2d 329 (3d D 1999).

[21] 5 th ed. 1979.

[22] *Fritz Electric Company v. Industrial Commission*, 165 Ill App 3d 550, 518 NE2d 1289 (5 th D 1988).

[23] 734 NE2d 482.

[24] 195 Ill App 3d 886, 553 NE2d 8 (5 th D 1990).

[25] 2002 WL 598394 (Ill App 1 st D).

[26] 648 NE2d 923.

[27] 68 Ill App 2d 283, 216 NE2d 14 (5 th D 1966).

[28] 114 Ill App 3d 720, 449 NE2d 250 (2d D 1983).

[29] 301 Ill App 3d 224, 703 NE2d 121 (4 th D 1998).

[30] *Id.* 703, NE2d at 123. It is proper to instruct the jury on loss of future earning capacity even though plaintiff was earning \$3,000 more per year at the time of trial, than he earned in the year before the accident. *Jackson v. Illinois Central Gulf Railroad Company*, 18 Ill App 3d 680, 309 NE2d 680, 688 (1 st D 1974).

[31] 398 Ill 528, 76 NE2d 457 (1947).

[32] *Id.*, 76 NE2d at 461.

[33] *Id.* Even though the 1947 Franklin County Coal Company case interpreted section 8(d)(1) prior to the statute's most recent amendments, the issue, was loss of earning capacity, a common law concept which has been judicially applied to an 8(d)(1) analysis, and which ah the same applicability then and now. Moreover, the appellate court has relied on Franklin County Coal Company as viable precedent subsequent to the statute's most recent amendments. In *Albrecht*, 648 NE2d 923, and *Smith*, 719 NE2d 329.

[34] 412 Ill 126, 105 NE2d 716 (1952).

[35] *Larson* 57.21 (a), at 10-95 (Vol 2A, 1990) (cited in note 3).

[36] *Id.* 57.21 © at 10-101. See also *Ticha v. Glenbar Masonry*, 99 IIC 0101.

[37] 272 Ill App 3d 329, 611 NE2d 526 (1 st D 1993).

[38] 820 ILCS 305/19(h).

[39] 160 Ill App 3d 165, 513 NE2d 104 (3d D 1987).

[40] *Larson*, § 81.31©, at 15-554.30 (1983) (cited in note 3).