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HOW TO DEFEND AND AMEND A WAGE LOSS CLAIM

*Cassens Transport Company v. Industrial
Commission,
Docket #100183, filed February 17, 2006*

In our January, 2005 Newsletter, we discussed the case of *Cassens Transport Company* where the claimant, Edwin Ade, had been awarded wage differential benefits under Section 8(d)(1). More than ten years later, the employer filed a motion before the Commission seeking an order to suspend these payments. However, Section 19(h) permits either party to request a review of any award *within thirty months after such agreement or award be reviewed by the Commission ... on the ground that the disability of the employee has subsequently, recurred, increased, diminished or ended.* Section 8(d)(1) permits the employee to receive compensation *for his wage loss for the duration of his disability.* The employer contended that the term “disability” in Section 8(d)(1) includes economic disability because the section bases compensation on an individual’s loss of earnings.

Although the thirty months had long since passed, the court addressed the impact of Section 19(h):

*From our review of the Act,
we conclude that when the
legislature used the term
‘disability’ in Section 19(h),
it was referring to physical
and mental disability and not
economic disability ...
Section 8(d)(1) states that an*

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injured employee who 'becomes partially incapacitated from pursuing his usual and customary line of employment ... shall ... receive compensation for the duration of his disability. ... Further, we conclude, therefore, that a change in physical or mental condition is a prerequisite for a Section 19(h) petition.'

The supreme court could have merely affirmed the appellate court decision by stating that the 19(h) jurisdictional period had expired. Instead, it chose to concentrate on the fact that Section 8(d)(1), in itself, provides no basis to recall the award. The court stated:

Reading the Act as a whole, we hold that section 8(d)(1) does not specifically authorize the Commission to reopen final installment award for partial disability. Thus, the Commission does not have jurisdiction under section 8(d)(1) to reopen Ade's final award. Our holding is based on the statutory interpretation of section 8(d)(1) and does not affect the operation of other sections of the Act.

Cassens argued that if the Commission does not have the ability to modify an award under Section 8(d)(1), then that statutory language authorizing an employee differential "for the duration of his disability" is meaningless. The court disagreed, stating:

We reject the assertion that the duration clause of section 8(d)(1) is meaningless if it does not grant jurisdiction to modify an award in perpetuity. Rather, the duration clause is meaningful to the Commission's initial determination of the proper award in any section 8(d)(1) case. By its plain language, it allows arbitrators and the Commission the option of determining that a claimant's disability is likely to end, abate, or increase after a certain duration, and awarding compensation accordingly.

...

In the same way that trial judges and juries have one opportunity to set an appropriate tort award for lost wages, arbitrators and the Commission must determine an appropriate wage differential in the original workers' compensation proceeding, without authorization to reexamine an award in perpetuity. As we have noted, permitting employers to litigate ad infinitum does not comport with the Act's overriding purpose of early and thorough compensation for income lost due to job-related injuries. Although Cassens argues that this lack of jurisdiction is purely to the advantage of the employee, we note that the Act similarly gives the Commission no

jurisdiction to reopen an installment award if an employee's wages should fall below the level contemplated in the initial award. Instead, the Act establishes that employees and employers alike must use the opportunity of their initial hearing to present evidence showing the likely duration of an injury and its effect on the claimant's earning capacity.

Cassens argued that a hearing on a possible recall would not be problematic because the claimant's annual income tax return would be available. The court rejected the employer's argument that the wage loss should be measured solely by gross yearly income and noted that additional consideration would be given to wage increases, overtime, and increased hours of work.

Finally, the court concluded:

Cassens' continuing responsibility to pay Ade's wage differential is the remedy that Ade received as part of the statutorily prescribed workers' compensation process; this responsibility is not an injury suffered by Cassens. Even if Cassens has suffered some sort of injury, the legislature has determined that Cassens must seek any relief in the initial proceeding before the Commission or within 30 months thereafter.

EDITOR'S NOTE:

1. One of the least surprising conclusions by the supreme court in its opinion holds that the Commission had no jurisdiction to modify Ade's award. Such a conclusion is obvious because Cassens took ten years to bring up this issue before the Commission when it clearly had only thirty months to do so under Section 19(h).
2. The supreme court is very careful in separating 8(d)(1) from 19(h). The court stated: *The language of section 8(d)(1) does not authorize either party to petition for a review of an award as Section 19(h) does.* Again discussing the limitations of procedures on Section 8(d)(1), the court stated:

Reading the Act as a whole, we hold that section 8(d)(1) does not specifically authorize the Commission to reopen final installment awards for partial disability. Thus, the Commission does not have jurisdiction under Section 8(d)(1) to reopen Ade's final award. Our holding is based on the statutory interpretation of Section 8(d)(1) does not affect the operation of other sections of the Act.
3. If 19(h) is applicable, Cassens would have had thirty months to review a Section 8(d)(1) award. Noting also that the recent statutory amendment extends the 19(h) review period for

“sixty months in the case of an award under section 8(d)(1),” either party would have five years after the award for a 19(h) review.

4. The appellate court clearly states that in 8(d)(1), the legislature “was referring to physical and mental disability and not economic disability,” but this conclusion may be of limited weight because the court should not even have considered it as the 19(h) jurisdictional limitation was sufficient to deny the recall.
5. Even if the supreme court intended to agree with the appellate court that economic disability was not included under section 19(h), it would seem that it would be entirely possible to show a change in the claimant’s physical disability over that five-year period.
6. Employers should also be prepared to emphasize the proof necessary to establish an 8(d)(1) award. Too often, the Commission accepts the claimant’s present wage as the entire basis, even if all parties really understand that he could earn more if he chose. The court’s proof requirements should be kept in mind in every 8(d)(1) case.

To receive an award under section 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. This court has held that the second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee’s take-home pay. In Franklin County Coal Corp. v. Industrial Comm’n the court rejected the employer’s argument that a wage differential under section 8(d) should be measured solely by gross yearly income. Rather, the court looked to factors such as wage increases, overtime, and increased hours of work. Although Franklin and Sroka interpreted an earlier version of section 8(d), the language ‘is earning or is able to earn’ remains the same. Thus, the court’s conclusion that ‘[t]he test is the capacity to earn, not necessarily the amount earned’ remains apt. Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee’s claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity. While this may result in an imperfect award, the legislature has not currently authorized infinite opportunities for correction.

CONCLUSION:

Wage loss cases are often the most difficult. The Cassens case may provide a recall basis for a five year period if there has been a change in the physical or mental disability and a limited possibility for a change in economic disability. Cassens also requires substantial proof or “capacity to earn.”

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Editor