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Can an 8(d)1 award be modified?

By Arnold G. Rubin

In *Cassens Transport Company v. Illinois Industrial Commission*, 2005 WL 95714 (4th Dist., I.C. Div., 2005), the Illinois Appellate Court, in a decision delivered by Justice McCullough, with a concurring opinion by Justice Holdridge, addressed the vexing issue as to whether or not a final award under Section 8(d)1 may be modified in a subsequent proceeding at the Illinois Industrial Commission.

It is well established that in order for one to qualify for a wage differential claim pursuant to Section 8(d)1 of the Act, a claimant must prove: (1) Partial incapacity which prevents the pursuit of his usual and customary line of employment and, (2) Impairment of earnings. If impairment of earning capacity is established, then the employee is entitled 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. Therefore, Section 8(d)1 clearly sets forth that there are two (2) separate elements for recovery: Physical incapacity and impairment of earning capacity. As to the duration of an 8(d)1 award, Section 8(d)1 clearly provides that benefits are to be paid "for the duration of his disability."

In *Cassens Transport Company*, claimant was awarded 8(d)1 wage differential benefits in the amount of \$203.55 per week. The award of the Industrial Commission eventually became a final award.

Thereafter, more than 30 months after the decision became final, the employer, on May 29, 2003, filed a motion before the Industrial Commission seeking an order to suspend

wage differential benefits. The employer had filed the motion pursuant to Section 8(d)1 of the Act. The basis for the motion to suspend wage differential benefits was the assertion of the employer that claimant had failed to respond to a request to provide income tax returns to determine whether a wage loss still existed. On October 7, 2003, the motion of the employer was denied, based on *Petrie v. Industrial Commission*, 130 Ill.App.3d 165, 513 N.E.2d 104 (1987). In the *Petrie* case, it was determined that when the legislature used the term "disability" in Section 19(h), it was referring to physical and mental disability and not economic disability. The Industrial Commission relied on *Petrie* in order to make the determination that the disability as used in Section 8(d)1 referred to only physical and mental disability. Since there was no claim by the employer that there was a change in claimant's physical condition, the Industrial Commission found that there was no basis for suspending the wage differential payments. The decision of the Industrial Commission was affirmed by the circuit court. The circuit court, in support of its decision, relied upon an Industrial Commission decision, *Joessel v. Chicago Park District*, 98 IIC 0129, as well as the appellate court decision of *Manis v. Industrial Commission*, 230 Ill.App.3d 657, 595 N.E.2d 158 (1st Dist. 1992).

An appeal was taken from the circuit court to the appellate court by the employer, contending that the Industrial Commission improperly interpreted the meaning of disability under Section 8(d)1 of the Act. The appellate court emphatically rejected the position of Respondent. Respondent was attempting to modify the 8(d)1 award on the basis of a change in economic circumstanc-

es. The employer contended that disability under Section 8(d)1 of the Act should encompass economic standing. The appellate court cited to the *Petrie* case in order to conclude that a change in a physical or a mental condition is a prerequisite for a Section 19(h) Petition. The appellate court once again refused to adopt Professor Larson's all-encompassing interpretation of the term "disability."

The appellate court held that there was no basis to limit the interpretation of disability as set forth in the *Petrie* case to only Section 19(h). The court held "disability" has the same definition for purposes of review of wage differential benefits under Section 8(d)1. Accordingly, the appellate concluded that the Industrial Commission and, therefore, the appellate court, lacked subject matter jurisdiction to review the motion as filed by the employer.

The appellate court further explained its rationale on determining that the Industrial Commission was without jurisdiction in this case. First, the employer acknowledged that the petition was brought to modify the award under Section 8(d)1 and not 19(h). The appellate court pointed out that 8(d)1 is not one of the two provisions which allows the Industrial Commission to re-open or modify a final decision. (It should be pointed out that the appellate court referenced two sections under the Illinois Workers' Compensation Act which allowed for the re-opening or modification of a final decision. The appellate court referenced 19(h) and 19(f). The author points out that modifications are also allowed under Section 8(f), as relating to permanent total disability claims, see *King v. Industrial Commission*, 189 Ill.2d 167, 724 N.E.2d 896 (2000)). In the instant case, Section 8(d)1 did not al-

low the employer to file a petition to modify the award under Section 8(d)1. That, in and of itself, provided a basis for the Industrial Commission to determine that it was without jurisdiction in this case. A second basis for the rationale for determining that the Commission was without jurisdiction was that even if the Industrial Commission assumed that the action was brought under Section 19(h), it failed to file the petition within the jurisdictional 30-month period. For those reasons, the appeal of the employer was dismissed. The decision of the Industrial Commission was vacated and the employer's motion to suspend wage differential benefits was dismissed.

Implicit in the majority decision and concurring opinion is that an 8(d)1 award may be modified under 19(h), within thirty (30) months, based on a change in either physical or mental condition. There is no basis for

modification based on a change in economic disability.

In a special concurring opinion, Justice Holdridge concurred with the majority's conclusion that the appeal should be dismissed for lack of jurisdiction. Justice Holdridge reasoned that there was no basis to address the merits of the claim since the Workers' Compensation Commission lacked jurisdiction to hear the employer's motion. Then Justice Holdridge noted that the conclusion set forth in the majority decision regarding jurisdiction did not preclude an employer, beyond the 30-month period prescribed in Section 19(h), from terminating wage differential benefits at the employers own peril, on a belief that the claimant no longer satisfies the continuing disability element of Section 8(d)1. This is clearly a warning to employers that they may be subject to penalties if there is an attempt to terminate wage differential

benefits based on a belief that the employee no longer has a continuing disability, as defined under the Act, if filed more than 30 months after the final decision of the Industrial Commission.

The holding in *Cassens Transport Company* is consistent with the previous holding of the appellate court in *Forest City Erectors v. Industrial Commission*, 264 Ill.App.3d 436, 636 N.E.2d 969 (1st Dist.1994). In that case, the appellate court, in a decision issued by Justice Rarick stated "that while the employer is barred from bringing a new action should the claimant's wages increase, the claimant is also barred from bringing in action should his wages decrease. The appellate court reasoned that both the claimant and the employer equally share the risk of changes in the claimant's income. The appellate court cited to the *Petrie* case in support of its position. ■

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