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Wage Loss Compensation and the Search for Comparably Paying Work in a Recession

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The underlying policy of wage loss compensation is to encourage gainful employment. A claimant may receive wage loss compensation if he or she suffers a wage loss as the result of an injury or occupational disease. There are two types of wage loss compensation: working wage loss and nonworking wage loss. "Working wage loss" compensation is permitted when a claimant suffers a wage loss as the result of returning to work at a position that is different than the position he or she had before the injury or occupational disease. "Nonworking wage loss" compensation is permitted when a claimant suffers a wage loss as the result of being unable to find work consistent with his or her physical capabilities.

Reduction in Wage Loss Compensation

Amended Substitute Senate Bill 7 (SB 7) contained many amendments that helped level the playing field for employers, one of which dealt with wage loss compensation. SB 7 greatly reduced the number of weeks a claimant may receive wage loss compensation. Under the former rehabilitation wage loss provision, a claimant was able to receive up to 200 weeks of rehabilitation wage loss, but it was required to be reduced by any wage loss received under Ohio Revised Code 4123.56(B). However, ORC 4123.56(B) merely provided that a claimant may receive wage loss for a period "not to exceed 200 weeks" with no mention that it should be reduced by any rehabilitation wage loss received. Therefore, claimants always would request

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rehabilitation wage loss before ORC 4123.56(B) wage loss, giving them the ability circumvent the rehabilitation wage loss set-off requirement. Claimants potentially could receive up to 200 weeks of rehabilitation wage loss and 200 weeks of ORC 4123.56(B) wage loss under the former law.

The new law removes a claimant's ability to circumvent set-off requirements and cuts the maximum wage loss compensation that he or she can receive by 174 weeks. A claimant can receive up to 200 weeks of working wage loss compensation, but the payments shall be reduced by the corresponding number of weeks in which the claimant receives rehabilitation wage loss payments. Also, under the new law a claimant can receive up to 52 weeks of nonworking wage loss compensation. However, for every week of non-working wage loss compensation above 26 weeks, one week is reduced from the amount the claimant can receive for working wage loss. Thus, for dates of injury on or after August 25, 2006, a claimant's wage loss compensation, whether working wage loss or nonworking wage loss, shall not exceed 226 weeks in the aggregate.

The Economic Climate and Wage Loss Compensation

According to the National Bureau of Economic Research, the United States economy officially entered into recession in December 2007. Through July 2009, the national unemployment rate stood at 9.4%, with analysts projecting the rate to reach 10% by the end of the year. Statewide, the unemployment rate already exceeds 10%. Among Ohio's largest cities, Toledo's June 2009 unemployment rate of 15.6% was the highest. Also, the Toledo Metropolitan Area (defined as Fulton, Lucas, Ottawa and Wood counties) posted a June 2009 unemployment rate of 14.2%; the Columbus Metropolitan Area (defined as Delaware, Fairfield, Franklin, Licking, Madison, Morrow, Pickaway and Union counties) posted an unemployment rate of 9.1%. As unemployment continues to rise, the competition for job openings will become greater and greater. It is likely that such an economic climate will influence an Industrial Commission (IC) hearing officer when determining whether the claimant has satisfied his or her "good faith" job search.

A claimant seeking wage loss compensation must supplement his or her wage loss application with wage loss statements, describing the search for suitable employment. The claimant bears the burden of proving that he or she conducted a good faith effort to search for suitable employment which is comparably paying work. The phrase "comparably paying work" is defined as "suitable employment in which the claimant's weekly rate of pay is equal to or greater than the average weekly wage received by the claimant in his or her former position of employment."

A good faith effort requires the claimant's "consistent, sincere, and best attempts to obtain suitable employment . . . ." The following evidence is to be considered when determining whether the claimant has made a good faith effort:

1. The claimant's skills, prior employment history and educational background;
2. The number, quality and regularity of contacts made with prospective employers;
3. The amount of time devoted to making prospective employer contacts;
4. Any refusal by the claimant to accept assistance from the Bureau of Workers' Compensation in finding employment;
5. Labor market conditions;
6. The claimant's physical capabilities;
7. The claimant's attempt, or lack thereof, to change his or her place of residence in order to find employment;
8. The claimant's economic status and the restrictions it may have on access to resources;
9. The self-employed claimant's documentation of efforts undertaken to produce self-employment income;
10. Any part-time employment engaged in by the claimant and whether that employment constitutes a voluntary limitation on the claimant's present earnings;
11. Whether the claimant restricts his or her job search to employment that has fewer hours per week than his or her former position of employment; and
12. Whether the claimant is enrolled in a rehabilitation program.

Despite the requirement to conduct a broad-based analysis, hearing officers, especially those with reputations for having sympathy for claimants, likely will place the greatest weight on poor labor market conditions when finding that a claimant has made a good faith job search. However, employers can seek relief from such a finding through appeals and ultimately by seeking a writ of mandamus from the Franklin County Court of Appeals. Accordingly, whenever evidence supports a finding that the claimant did not perform a good faith job search, but the hearing officers nevertheless find a good faith job search and award wage loss compensation solely based on poor labor market conditions, the employer should consider seeking a writ of mandamus to order the IC to vacate such orders. For example, in *Johnson Controls v. Indus. Comm.*, the staff hearing officer excused the claimant's good faith job search requirement and awarded working wage loss compensation, stating "the job prospects in the local economy are not such that he would be able to obtain comparably paying work . . . ." The court in *Johnson Controls* granted the employer's request for a writ of mandamus by vacating the IC's order and directing it to address the adequacy of the claimant's job search.

Employers should be prepared to observe an increasing trend of IC orders which find a claimant has made a good faith effort to find suitable employment. Pursuant to factor number five, a hearing officer is permitted to consider labor market conditions, and in light of the current economic climate, a hearing officer likely will be more inclined to determine that the claimant's inability to find suitable employment was justified. However, employers are not without relief, and can appeal decisions and ultimately seek a writ of mandamus when the evidence indicates that the claimant failed to satisfy his or her duty to conduct a good faith search for suitable employment which is comparably paying work.

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