

DEFENDING PERMANENT TOTAL
DISABILITY AND WAGE DIFFERENTIALS
11/14/13

PRESENTED BY
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- **If you would like a recording of this or prior webinars, please email Rich at rlenkov@bdlfirm.com**
 - **Defending Repetitive Trauma Claims In Illinois Workers' Compensation**
 - **Traveling Employees in Illinois Workers' Compensation**
 - **Illinois vs. Indiana: 5 Key Issues & How Each State Deals With Them**
 - **AMA Guidelines: A Legal and Medical Perspective**
 - **Preferred Provider Programs**

- **Next Webinar 12/12/13 @ 10:00 AM CST
“Defending Workers’ Compensation Psychiatric Claims”
– With Dr. Alexander Obolsky
[Click Here to Register](#)**

- **Today’s session**
 - **Interactive - Please ask questions**
 - **Special surprise giveaway at the end of the presentation**



Introduction to Permanent Total Disability (PTD)

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Three types of PTD

1. Specific PTD under §8(e)1 8 of the Act
2. Non-specific PTD under §8(f) of the Act on the theory that he is medically unable to work
3. "Odd lot" category of PTD



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1. Specific PTD

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- ❑ Under §8(e)18, loss of:
- ❑ both hands
- ❑ both arms
- ❑ both feet
- ❑ both legs
- ❑ both eyes
- ❑ or suffers the loss of two body parts (one from each category) has suffered PTD
- ❑ These are RARE



Specific PTD Special Rules

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- Case law: no way of terminating specific permanent and total disability benefits once they have been awarded
- A claimant can receive specific PTD benefits even if he returns to work. *Scandrol Construction Company v. The Industrial Commission*, 54 Ill.2d 395 (1973)
- A claimant who suffers 100% loss of use of two specific body parts and suffers a lesser injury to a third body part can receive specific PTD benefits and PPD benefits. *Rodriguez v. City - Department of Water*, 97 IIC 0020



2. Claimant Medically Disabled

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- Second most frequent PTD award
- Based the assertion that Claimant physically unable to work based on medical opinion



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Proof?

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- Requires that a physician opinion that a claimant can never work again because of her medical condition
- Preponderance of the evidence



How Can Employers Fight These?

Fight the Opinion!

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- Independent medical examination
- Force the deposition of the examining or treating physician



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How Can Employers Fight These?

Voc 'em!

10

- Employer must obtain a contrary medical opinion
 - ▣ Establishes that Claimant can work within certain restrictions
- Refer to vocational rehabilitation
- Show non-compliance with vocational rehabilitation
 - ▣ Relieves need for maintenance
 - ▣ Shows Claimant removed self from labor market
- Non-compliance? Failing to:
 - ▣ Turn in job applications
 - ▣ Act appropriately during job interviews
 - ▣ Complete continuing education classes
 - ▣ Attend scheduled meetings with vocational rehabilitation counselor



3. “Odd-Lot” Perm Total

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- Given permanent medical restrictions
- Unable to find work within those restrictions
- Judicially created doctrine



How does Claimant prove an odd-lot?

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- Claimant unable to perform services for which there is a reasonably stable labor market
- Diligent but unsuccessful job search
- Claimant not employable in any well known branch of labor market because of:
 - Age
 - Skills
 - Training
 - Work history



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Burden Shifts?

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- If Claimant is able to prove their case, then the burden shifts to Employer to show there is some suitable work
 - Present vocational assessment showing reasonably stable market based on Claimant's:
 - Physical restrictions
 - Age
 - Education
 - Training
 - Work experience
 - Obtain testimony of IME disputing Claimant's restrictions and/or inability to work
 - Make job offer within Claimant's restrictions



Pop Quiz #1

14

- Paulie Pilgrim, a farmhand, injures his shoulder while harvesting potatoes for the Thanksgiving rush
- Dr. Kwack performs surgery and says Pilgrim can't return to work as a farmer after listening to Pilgrim's description of his job
- Valid FCE, which Dr. Kwack did not review, shows restrictions of lifting no more than 25 lbs
- Written job description states workers need to lift 30 lbs
- Pilgrim makes demands PTD

How can Employer best fight this claim?



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Pop Quiz #1

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How can Employer best fight this claim?

- A. Object to Dr. Kwack's reports
- B. Offer Pilgrim a job within his restrictions
- C. Refer Pilgrim to an IME and vocational rehabilitation
- D. All of the above



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ANSWER D

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- ❑ Objecting to Dr. Kwack's reports will force the deposition.
- ❑ Referring Pilgrim to an IME will clarify his restrictions.
- ❑ Voc rehab could help place Pilgrim in a new job
- ❑ Offering him a job will help to dodge a PTD award.



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Sham Job Offers

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- ❑ Job does not exist in any other company in any form
- ❑ Job offers wages inconsistent with same job in similar environments
- ❑ Job offers wages inconsistent with what worker is qualified to earn based upon job
- ❑ Job offers full-time hours but does not offer sufficient duty responsibilities



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Sham Job Offers

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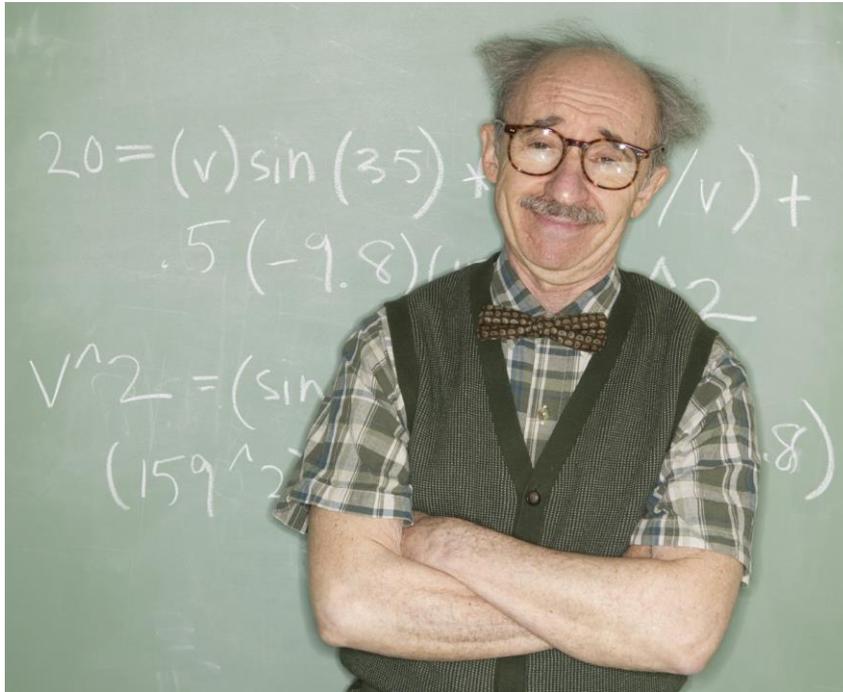
- Experience or training the worker receives will not qualify them to be employable with any other entity on a current/future basis
- Claimant not evaluated for performance or subject to any salary increase based upon objective criteria
- Vocational evaluation indicative of total disability
- Vocational rehabilitation has otherwise failed



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Calculating Perm Totals

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- Claimant who receives PTD award from the Commission receives compensation for life
- A PTD award is paid at Claimant's TTD rate
- Statutory minimum rate is 50% of SAWW at the time of accident



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Future Cash Value (FCV)

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- Claimant's life expectancy can be determined from actuarial tables
- $FCV = (2/3 AWW)(52 \text{ weeks})(\text{life expectancy})$



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Present Cash Value (PCV)

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- PCV of claim for PTD establishes what claimant's claim is worth in today's dollars
- $PCV = (\text{yearly PTD benefit})(PCV \text{ modifier})$

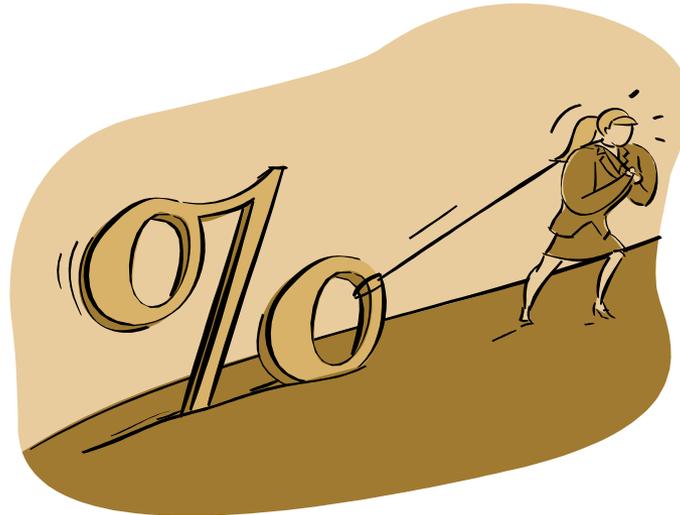


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Present Cash Value – Interest Rate

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- Not identified in IL WC Act
- PCV modifier is based on the chosen interest rate
- Negotiated between the parties
- Typically between 6 and 8%



Settlement of PTD– Claimant's Side

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- Claimant prefers lump sum to weekly benefit
 - ▣ Weekly benefit – PTD awarded weekly
 - ▣ Lump Sum – PTD awarded in full

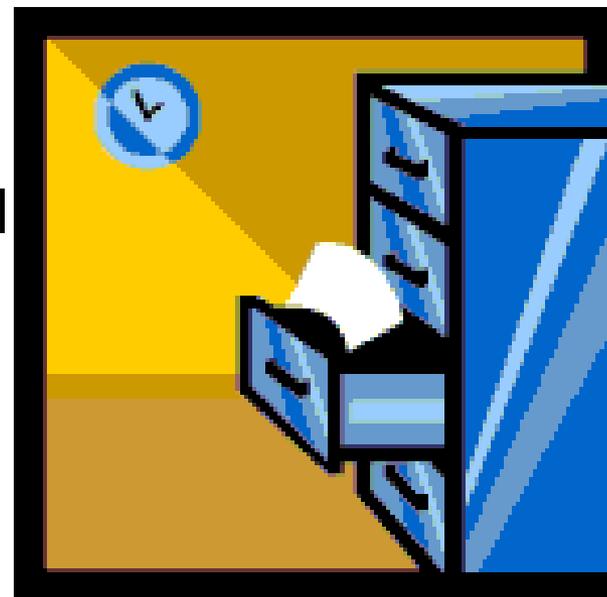


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Settlement of PTD Claims – Employer's Side

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- A closed file is a good file
 - ▣ Claimant could live well beyond their life expectancy
 - ▣ Claimant could develop additional medical problems related to the injury and expose Employer to additional expenses



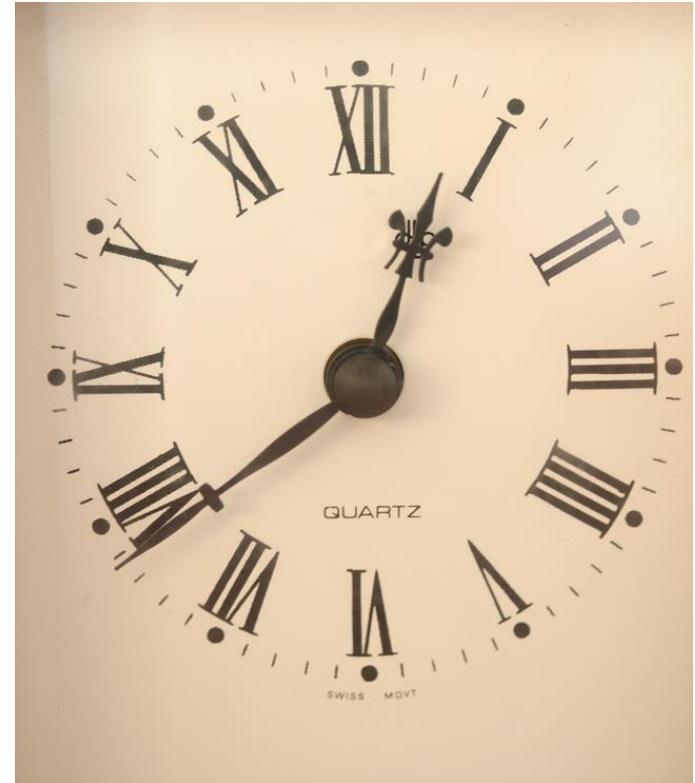
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Post Award Motions

Section 8(f)

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- Claimant returns to work or is able to return to work, Employer can stop paying benefits
- File a petition requesting the termination of benefits
- Occasional income allowed
- No time limit



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Post Award Motions

Section 19(h)

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- Focuses on disability
- Disability has decreased or diminished
- Material change in Claimant's condition
- Time limits
 - ▣ 30 months of original award
 - ▣ 60 months for wage differential awards



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Wage Differential Awards

What Must Claimant prove?

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- A partial incapacity which prevents the pursuit of his/her “usual and customary line of employment,” AND
- An impairment of earnings
- If Claimant is released to return for a “trial” at his original job, but refuses to do so and elects to take a lower paying job which he “enjoys,” he cannot obtain a wage differential recovery



Pop Quiz #2

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- ❑ Christopher injures his arm while working on the Mayflower
- ❑ Chris accepted a lower paying job as a deck hand “swabbing the poop deck”
- ❑ Chris refused to apply for higher paying position with the British government
- ❑ The British government approved the deck hand job and advised the voc counselor to close the file

What award did Christopher get at the Appellate level?



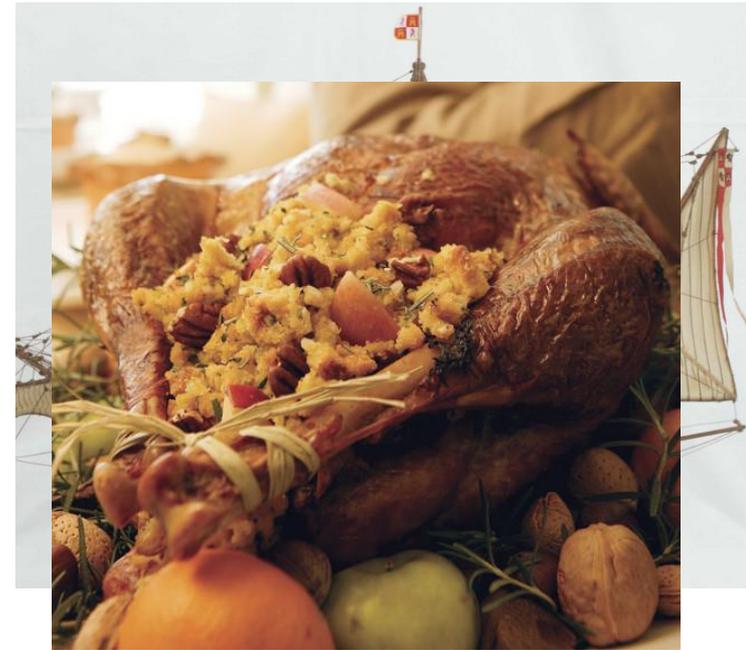
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Pop Quiz #2

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What award did Christopher get at the Appellate level?

- A. Percentage of an arm
- B. Percentage MAW
- C. Wage Differential
- D. A large helping of Stouffer's Stuffing



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ANSWER C

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- ❑ The Appellate Court found that Claimant proved up a wage differential
- ❑ The Court based its decision on the fact that Employer approved of the job and advised the voc counselor to close their file
- ❑ Arbitrator awarded 45% of an arm
- ❑ Commission awarded 40% MAW



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Calculating Wage Differentials

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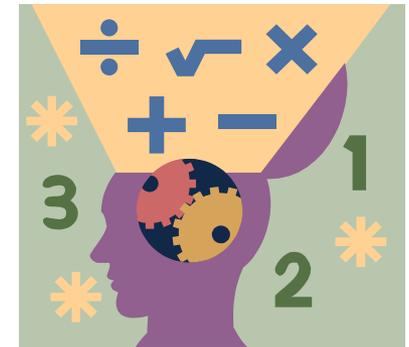
- Accidents pre-9/1/11 wage differentials are awarded for life
- Accidents post-9/1/11 are limited to 5 years or until Claimant reaches age 67, whichever is later

$AWW - \text{New wage} = \text{Differential}$

$\text{Differential} \times \frac{2}{3} = \text{Weekly Award Rate}$

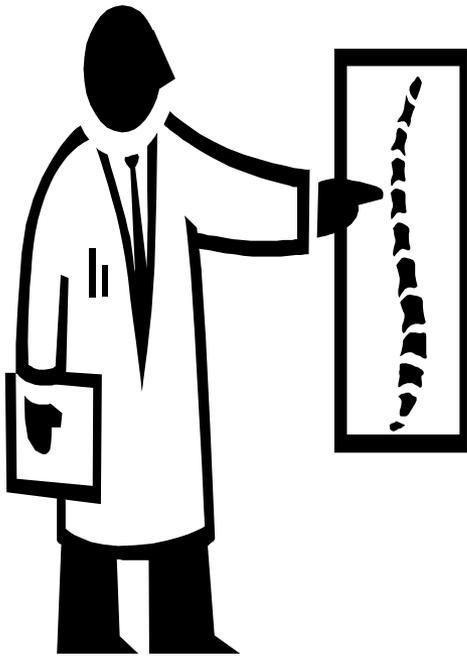
$\text{Weekly Award Rate} \times 52 = \text{Yearly Rate}$

$\text{Yearly Rate} \times \text{Claimant's life expectancy (or post 9/1/2011 until Claimant is 67 or 5 years, whichever is later)} = \text{aggregate exposure}$



Houston v. Illinois Workers' Comp. Comm'n, 2012 IL App (5th) 110117WC-U

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- Ironworker underwent cervical spine surgery
- Treating doctor gave permanent restrictions
- Claimant started voc rehab and applied to 400 jobs
- Claimant not hired anywhere
- Voc counselor stated he could find at least minimum wage jobs
- Arbitrator awarded PTD benefits at \$1,019.73/week (almost \$1.3 million in aggregate exposure!)
- Commission reversed and Appellate Court affirmed
- Job search was “not *bona fide*”
 - Court found that Claimant failed to prove PTD because he applied for jobs outside of his background/education, would not take minimum wage jobs, and would not apply for jobs he felt were beneath him. “Here is the last job sent to me by [voc counselor]. Petco? Cracker Barrel? Why not put a clown’s outfit on and wave to people on the side of the road at Chuck E. Cheese?”
- Claimant was found to be a wage differential at \$550.47/week (liability almost cut in half!)

Pop Quiz #3

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- Hiawatha, a tribe hunter for AXE Tribe is injured after slipping while chasing a boar
- Hiawatha subsequently undergoes a spinal fusion by Medicine Man, and claims that he is permanently totally disabled and makes a PTD demand
- AXE Tribe's IME says Claimant is limited to lifting 15 lbs with limited bending/squatting/stooping
- FCE verifies the IME's restrictions

What is AXE Tribe's best course to mitigate exposure?



Pop Quiz #3

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What is Axe Tribe's best course to mitigate exposure?

- A. Negotiate the PTD value down with OPC
- B. Start voc and try to place Hiawatha in a new job
- C. Give Hiawatha a new peace pipe and hope that he settles
- D. Try the case and argue for an award under Section 8(d)(2)



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ANSWER B

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- Anytime Claimant is seeking to prove an odd lot PTD, Employer should aggressively attempt to prove a wage differential themselves via labor market survey, vocational testing, etc



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How Can Employers Mitigate Exposure?

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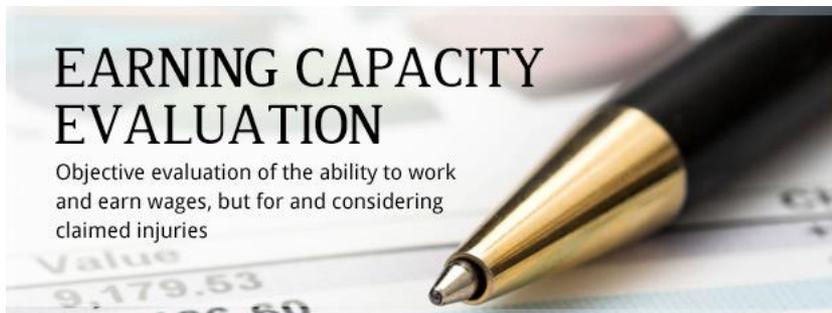
- Broaden the area of a job search
- Consider paying wage differential benefits weekly rather than in a lump sum
- Include contract language in wage differential settlements indicating that the parties agree Claimant will never return to pre-injury job. Settlement payments are, in part, consideration for that agreement



How Can Employers Mitigate Exposure?

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- Focus on evidence of earnings capacity when calculating wage differential
- Consider whether the current economy has reduced the future loss of earnings capacity (CBAs)
- Work closely with a vocational specialist
- Verify legitimacy of permanent restrictions via IME, FCE and surveillance



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Questions?

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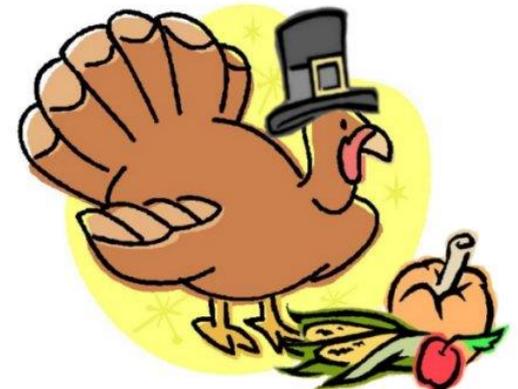
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Surprise Giveaway!

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Type your answer into the questions box...



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Surprise Giveaway!

40

When do Canadians celebrate Thanksgiving?

- A. Same day as the United States
- B. The third Tuesday in November
- C. The second Monday in October
- D. January 26 (Wayne Gretzky's* birthday)



*spelling corrected post-webinar
to avoid being thrown into
"Mountie jail in Canada"



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Answer C

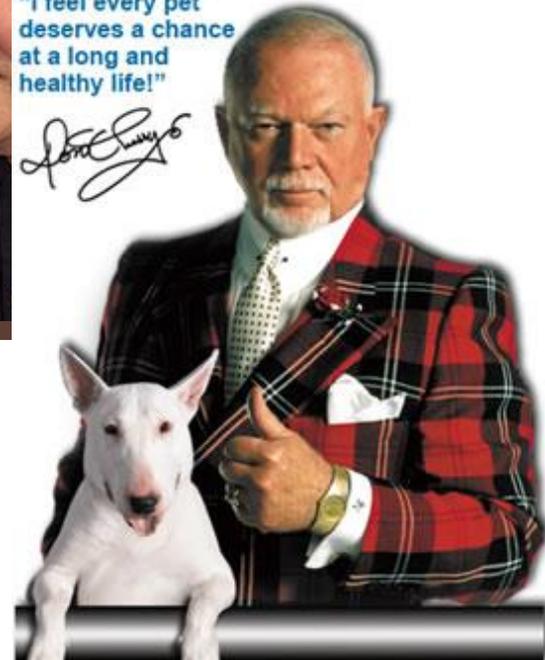
41

- This year Thanksgiving in Canada was celebrated on 10/14/13



"I feel every pet deserves a chance at a long and healthy life!"

John Elway



AND THE SPECIAL SURPRISE GIVEAWAY IS...

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...complete on-the-go Thanksgiving dinner!



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