

EXAMINER'S ANALYSIS OF QUESTION NO. 9

With respect to the first question, the fact Jack has no actual post injury earnings does not mandate a full rate of weekly compensation benefits because the measurement of Jack's post injury wage earning capacity is not dependent on "whether or not wages are actually earned." MCL 418.301(4)(b).

The Worker's Disability Compensation Act (Act) provides: "a disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training." MCL 418.301(4)(a). "Wage earning capacity" is defined as: "wages the employee earns *or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned.*" MCL 418.301(4)(b) (Emphasis added); cf. *Lofton v Autozone, Inc*, 482 Mich 1005 (2008).¹

Here, Jack concedes his physical restrictions do not prevent him from working at reasonably available lower paying jobs suitable to his qualifications and training. The jobs are clearly suitable to his qualifications and training; he had previously performed them. Since he still has a post injury wage earning capacity at a lower wage level, he would be entitled to a partial rate of compensation that takes into account the amount of his post injury wage earning capacity. MCL 418.301(8) ("If a personal injury arising out of and in the course of employment causes partial disability..., the employer shall pay... weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury..."). A partial rate is payable regardless of whether Jack is exercising his post injury wage earning capacity to actually earn wages.² No calculation of a partial rate is necessary to answer the question.

With respect to the second question, Jack is obliged to submit to the medical examination. The Act obligates an employee who has given notice of an injury to submit to an examination by a licensed Michigan physician, if requested by the employer, so long as the examination is furnished and paid for by the employer. MCL 418.385.

¹ The statutory law in effect on the date of injury applies to this question. The statute relevant to this partial disability issue has been in effect for approximately ten years, since 2011 PA 266.

² There are some circumstances where a partially disabled employee may collect a full rate (e.g. unsuccessful job searches), but such circumstances are beyond the question posed.

If Jack refuses, his right to compensation is suspended and may be forfeited. *Id.* The statute says in relevant part:

After the employee has given notice of injury and from time to time thereafter during the continuance of his or her disability, if so requested by the employer or carrier, he or she shall submit himself or herself to an examination by a physician or surgeon authorized to practice medicine under the laws of the state, furnished and paid for by the employer or carrier. . . . If he or she refuses to submit himself or herself for the examination, or in any way obstructs the same, his or her right to compensation shall be suspended and his or her compensation during the period of suspension may be forfeited. [MCL 418.385.]

Here, Jack gave Big Auto notice of his injury, Big Auto has requested Jack submit to an exam by a local (mid-Michigan) licensed physician at its expense. Jack is obliged to submit himself to the exam or face the statute's suspension and possible forfeiture of his weekly compensation.