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In stating a formula for payment of non-scheduled permanent partial disability, the Arkansas Workmen's Compensation Act provides for compensation "to the injured employee for the proportionate loss of use of the body as a whole."[1] Practically speaking, this meant to Arkansas lawyers for many years that when a physician assessed permanent partial disability at 20% to the body as a whole, that figure represented the loss suffered and the basis of the recovery to which the employee would be entitled.[2] If physicians differed on the percentages, it was simply a matter of reconciling the differences. If one doctor's evaluation was 10%, while another's was 20%, the referee might have concluded that 15% was a reasonable recovery. In any event, the attorneys, the referee, and the Workmen's Compensation Commission were dealing with a figure or figures allocated to an injury by one or more physicians, who were speaking of a *functional, physical* loss of use of the body in a given amount.[3]

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[1]ARK. STAT. ANN. §81-1313 (d) (Repl. 1960).

[2]The Arkansas Act provides that a non-scheduled permanent partial disability shall be apportioned to the body as a whole and that the body as a whole will have a value of 450 weeks. ARK. STAT. ANN. §81-1313 (d) (Repl. 1960). The injured employee receives compensation for the proportionate loss of use of the body as a whole. If the Commission concludes that a claimant has suffered a permanent disability resulting in 20% loss of use of the body as a whole, the claimant is entitled to 90 weeks of compensation. Under ARK. STAT. ANN. §81-1310 (Repl. 1960), compensation may not exceed 65% of the average weekly wage and shall not be greater than $35.00 per week nor less than $7.00 per week. Scheduled permanent partial disability is covered under ARK. STAT. ANN. §81-1313 (c) (Repl. 1960), in which certain permanent injuries are allocated a fixed number of weeks. In a situation involving a scheduled permanent injury, *e.g.*, as an amputated arm, estimated percentages of disability are not involved because the percentage (in terms of number of weeks) is fixed by the statute. This article, for that reason, does not apply to *scheduled* injuries.

[3]By "functional" or "physical" disability, we are of course speaking of disability in a purely anatomical sense. It is a type of disability which has no connection at all with loss of income or loss of earning capacity, but purely with loss of part of the physical effectiveness or usefulness of the body and the ability to perform certain physical acts.

Legally, all of this changed with *Glass v. Edens*.[4] The qualifying adverb, "legally," is used because there seems to be every indication that the vast majority of Arkansas compensation cases which might appropriately concern themselves with the *Glass v. Edens* rule do not do so.[5] It will be the purpose here to review *Glass* and its use in subsequent Arkansas permanent disability cases, and also examine briefly wage-loss or loss of earning capacity, as an element of disability and its development in other states. From the examination of this concept in decisions of other states, some guidelines may be established which will be of benefit in Arkansas.

The Arkansas Rule

Glass v. Edens was a heart attack case in which the permanent partial disability[6] of the claimant, Glass, was fixed at 40% to the body as a whole. Glass, however, contended on appeal to the Arkansas Supreme Court that he was totally disabled. The employer, Edens, argued that "loss of use of the body as a whole" referred only to functional or anatomical loss. But the Supreme Court held that it included "in varying degrees in each instance, loss of use of the body to earn substantial wages."[7] After quoting at length from *Larson on Workmen's Compensation*,[8] the court concluded that "con-

[4]233 Ark. 786, 346 S.W.2d 685 (1961). It must be said here at the beginning, in all honesty, that the court's construction of the statutory phraseology (ARK. STAT. ANN. §81-1313 (d) (Repl. 1960)) was somewhat strained, no doubt for the purpose of bringing Arkansas within the scope of the prevailing law in the majority of American jurisdictions. The phrase, "loss of use of the body as a whole," when viewed from the standpoint of the English language rather than from the standpoint of judicial theory and purpose, seems clearly to mean "bodily loss" in the anatomical sense. However, it is not the purpose of this paper to challenge the basis of the decision.

[5]This is indicative not only from the sparsity of cases on this subject, but also from the statement of the Chairman of the Workmen's Compensation Commission, who wrote in a letter dated July 15, 1964: "For a very great length of time following this decision few attorneys made use of the doctrine. Gradually, more attorneys are developing cases under the doctrine announced in that case. (Glass v. Edens). However, the number of instances is still quite few." Letter from the Hon. Ernest Maner to the author, July 15, 1964.

[6]2 LARSON, WORKMEN'S COMPENSATION LAW §57.10 (1961) states that there are only two categories of workmen's compensation benefits: (1) those for physical injury, and (2) death benefits to dependents. The first category is divided, according to Larson, into (a) wage-loss disability payments, and (b) hospital and medical expenses. Here, of course, we are concerned with category (1) (a).

[7]233 Ark. 786, 787, 346 S.W.2d 685, 686 (1961).

[8]The court's quotation, and the basis for its conclusion, was from 2 LARSON, *op. cit. supra* note 6, §57.10, as follows: "The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: the first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that claimant has not in fact earned anything.

"The two ingredients usually occur together; but each may be found without the other; a claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him

sideration should have been given, along with the medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss."[9] The court cited no previous Arkansas cases since there were none to cite. The court stated that the referee, who apparently had relied on a previous Commission decision,[10] had erroneously considered only medical evidence.[11] Thus, in June, 1961, with the *Glass* case, it became the Arkansas interpretation that resolution of the problem of disability was dependent on the proper balancing of the physical or functional disability on the one hand and the wage-loss factor on the other. This did not mean that functional disability was no longer to be considered, but only that the wage-loss must *also* be considered and these factors "balanced" by the Commission in arriving at the award.

To determine wage-loss, the court indicated that various factors enter in. Specifically mentioned were the age, education and experience of the employee. In a situation involving, for example, a 60 year-old manual laborer suffering a 25% functional disability in the form of a back injury, the claimant might be unable to obtain employment due to the combination of his limited qualifications, his age, and the injury suffered. If this employee (or a younger man for that matter) were unable to obtain work or perform non-manual labor due to lack of education, intelligence, age, or experience, the result generally would be total disability or substantially larger disability from the standpoint of wage-loss. His recovery of compensation, *i.e.*, his "disability," would depend on the proper emphasis to be given his wage-loss disability when compared to his functional disability. The court leaves the balancing of these factors to the Commission,[12] whose decision presumably would be upheld as long as it were not unreasonable, arbitrary or capricious. The obvious result, however, is that in the type of situation described, the employee is entitled to recover more than his functional disability, although usually less than his wage-loss disability. In most situations, it seems unlikely that the employee could not perform any type of work. Also, consideration should be given to whether he could be trained to perform other work of an equally remunerative nature in which case wage-loss disability might thereby be reduced.

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employment. These two illustrations will expose at once the error that results from preoccupation with either the medical or the wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage-loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage-loss as the test would deprive the claimant in the former illustration of an award, thus not only penalizing his laudable efforts to make the best of his misfortune, but also fostering the absurdity of pronouncing a man non-disabled in spite of the unanimous contrary evidence of medical experts and of common observation. The proper balancing of the medical and the wage-loss factors is, then, the essence of the 'disability' problem in workmen's compensation."

[9]233 Ark. 786, 788, 346 S.W.2d 685, 687 (1961).

[10]The referee's opinion cited DeBin v. Kaiser Engineers, 214 Ark. Workmen's Comp. Comm'n 3 (July, 1960).

[11]233 Ark. 786, 788, 346 S.W.2d 685, 687 (1961).

[12]Mann v. Potlatch Forests, 237 Ark. 8, 371 S.W.2d 9 (1963).

Glass v. Edens has been involved in only two Arkansas Supreme Court cases[13] since the decision was handed down, the chief one of which was *Mann v. Potlatch Forests.*[14] In that case the claimant sought a higher percentage of disability than the 25% permanent partial awarded him by a prior order of the Commission. In testimony before the Commission, the medical witnesses for the respondent attributed the increased disability to pulmonary emphysema, which was unrelated to the original injury. Claimant's medical witness did not mention pulmonary emphysema. On appeal from an adverse opinion of the Commission, the claimant argued that the medical witnesses for the respondent erroneously failed to consider claimant's age, occupation and other factors in evaluating his disability. However, the court said that the *Glass* case places the duty on the Commission, and not the doctor, to consider these elements, and that the record showed that the Commission "was made aware of our holding in the *Glass* case, and we cannot say it did not follow that holding here in arriving at appellant's disability."[15] While the basis for the result in this case seems eminently correct, in that it is ultimately the duty of the Commission to determine reasonably and in good faith whether the wage-loss factor should enter into the disability computation, the language of the decision leaves something to be desired. The court should do more than just assume that the Commission considered these other factors because it "was made aware" of the *Glass* case. If all the Commission has to do to dispose of wage-loss consideration is to indicate that it is aware of the *Glass* case, the same as a testator might disinherit his prodigal son by mentioning him in his will, then *Glass v. Edens* will not amount to any more than the Commission wants it to. Presumably, however, the court felt that the Commission acted reasonably in the *Mann* case in not increasing the percentage of disability based on loss of wages; and presumably if the Commission acted improperly, arbitrarily or unreasonably in failing to consider the wage-loss factor, the court would reverse.[16]

Another aspect of the problem which the *Mann* case should not have glossed over is the use of testimony on the part of physicians

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[13]Mann v. Potlatch Forests, *supra* note 12; Wilson Hargett Constr. Co. v. Holmes, 235 Ark. 698, 361 S.W.2d 634 (1962).

[14]237 Ark. 8, 371 S.W.2d 9 (1963). An oblique reference was made to the theory underlying *Glass* when the Court stated that the Compensation Law was to be construed liberally "to the end that injured employees shall be remunerated for loss of earning power." Clemons v. Beardon Lbr. Co., 236 Ark. 636, 642, 370 S.W.2d 47, 50 (1963). But the *Glass* case was not cited and *Clemons* was a case dealing primarily with the independent contractor relationship.

[15]237 Ark. 8, 10, 371 S.W.2d 9, 10 (1963).

[16]While Commission decisions are accorded the sanctity of a jury verdict, Aerial Crop Care, Inc. v. Landry, 235 Ark. 406, 360 S.W.2d 185 (1962), Arkansas-Best Freight System v. Shinn, 235 Ark. 314, 357 S.W.2d 661 (1962), the Commission cannot act in an arbitrary and unreasonable manner. See Baker v. Slaughter, 220 Ark. 325, 248 S.W.2d 106 (1952). The Act itself is to be construed liberally to effectuate its purposes. Parrish Esso Service Center v. Adams, 237 Ark. 560, 374 S.W.2d 468 (1964); Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964); McGehee Hatchery Co. v. Gunter, 237 Ark. 448, 373 S.W.2d 401 (1963).

bearing upon the wage-loss consideration. While the court quite properly held that physicians are not obligated to take the wage-loss factor into consideration in assessing a percentage of disability (which, of course, means functional, physical, or anatomical disability to physicians), this does not prevent the use of medical opinions bearing upon the physical ability of a claimant to perform certain work. In a situation involving an employee, who through education and experience is equipped only to undertake hard manual labor, medical testimony is an obvious device to establish that the man is unable to perform this type of work. Thus, while the doctor's disability figure is not affected by such testimony, medical testimony may be utilized to lay the groundwork for an assertion of the wage-loss factor or loss of earning capacity.

In the other case, *Wilson Hargett Constr. Co. v. Holmes*,[17] apportionment of disability between the heart attack in question and a previous heart attack was involved. The Commission concluded that the disability should not be apportioned,[18] and in reaching its decision as to the amount of disability, it gave weight to the age, education and experience of the claimant, relying upon *Glass v. Edens*. It found the claimant totally disabled at the present and for a period yet to be determined. The Arkansas court held that the Commission correctly followed *Glass*. Although this case was concerned primarily with apportionment of disability between the two heart attacks, it is noteworthy for the continued application of the *Glass* formula.

While other cases might have been concerned with wage-loss,[19] *Mann* and *Holmes* are the only two which have mentioned it since the *Glass* decision.

Development of the Concept in Other States

Arkansas was one of the last states to give consideration to loss of wages or diminution of earning capacity as an element in determining awards for disability. While the Arkansas court in *Glass v. Edens* did not purport to institute a new rule for Arkansas, from a practical standpoint, that was the result. In exploring the decisions of other states, it should be remembered that the manner in which courts determine these cases as well as the rules evolved by the courts and the statutory provisions vary widely from state to state. It is not the purpose here to make a comprehensive examination of the decisions in all states, but simply to point up some of the inherent problems through a consideration of selected decisions.

[17] 235 Ark. 698, 361 S.W.2d 634 (1962).

[18] Based on McDaniel v. Hilyard Drilling Co., 233 Ark. 142, 343 S.W.2d 416 (1961).

[19] *E.g.*, Tiner v. Baldwin, 235 Ark. 1010, 363 S.W.2d 532 (1963), which was concerned, among other things, with permanent partial disability. *Glass v. Edens* was not mentioned by the Arkansas Supreme Court, nor by the Commission in its opinion, 229 Ark. Workmen's Comp. Comm'n 102 (Oct. 1961). The wage-loss factor was apparently not asserted. Since *Glass v. Edens*, however, the factors stated therein should properly be considered in all permanent disability claims (which are not otherwise scheduled).

Larson states categorically that it is "uniformly held . . . without regard to statutory variations" that a finding of disability may stand even when the post-injury earnings of the claimant exceed his pre-injury earnings.[20] Decisions of twenty-three states, the District of Columbia, England and a federal court are cited in support of the statement. Certainly, this is the majority rule and the better rule, because there are other factors which should be considered, *e.g.*, the fact that the injury may provide a deterrent to future employment. Moreover, the term, "wage-loss," should properly be viewed in the broader sense of a loss of earning capacity or the loss of ability to earn substantial wages. This is not necessarily the uniform rule, however. Montana, for example, has stated that disability is not total where the claimant's earning power is not "wholly destroyed" and he can still perform remunerative employment, and if the employee's post-injury earnings are "regular and continuous," he cannot assert disability based on future uncertainties.[21] The Montana court thereby sustained a denial of compensation even though the claimant had a percentage of bodily disability, since "it had not prevented him from engaging in work"[22] for the same or greater wages. Another Montana case denied compensation until such time as the claimant actually suffered monetary loss due to inability to work resulting from the accident.[23] It is apparent that in Montana, the "loss of earning capacity" rule has become so constricted as to deny relief in cases in which recovery would have been granted in Arkansas before *Glass v. Edens,* and afterwards for that matter, based purely upon functional or bodily disability. Similarly, the Texas statute has been interpreted to mean that "partial incapacity cannot exist unless the average weekly wage earning capacity after injury is less than average weekly wages before injury."[24] But in the case of total incapacity, Texas holds that com-

[20]2 LARSON, *op. cit. supra* note 6, §57.21.

[21]McKinzie v. Sandon, 141 Mont. 540, 380 P.2d 580 (1963).

[22]*Id.* at 582.

[23]Gaffney v. Industrial Acc. Bd., 133 Mont. 448, 324 P.2d 1063 (1958). In Shaffer v. Midland Empire Packing Co., 127 Mont. 211, 259 P.2d 340, 342 (1953), Montana had stated that the test was whether there "has been a loss of earning capacity — a loss of ability to earn in the open labor market." The *Gaffney* case indicated that "loss of earning capacity" would be determined purely in dollars and cents with respect to wages before and after the injury. The Montana court reiterated the *Shaffer* language in Obie v. Obie Signs, Inc., 142 Mont. 617, 386 P.2d 68 (1963), but cited Friedt v. Industrial Acc. Bd., 136 Mont. 141, 345 P.2d 377 (1959), to the effect that "until such diminution (in wages) occurs or becomes demonstrably imminent, appellant's actual earnings are the most reliable standard for determining his earning capacity." In Murray v. Elliston Lime Co., 140 Mont. 511, 374 P.2d 229, 230 (1962), the Montana court stated that it would not make the "liberal construction concept a vehicle by which able-bodied workmen can achieve semi-retirement at the expense of insurers." One must necessarily conclude from a fair reading of the Montana cases that whatever semantics may be employed, "loss of earning capacity" in Montana almost invariably refers to less income after the accident than before. See also Graham v. Tree Farmers, Inc., 142 Mont. 483, 385 P.2d 83 (1963) and Lind v. Lind, 142 Mont. 211, 383 P.2d 808 (1963).

[24]Texas Reinsurance Corp. v. Holland, 162 Tex. 394, 347 S.W.2d 605, 606 (1961), based on TEXAS CIVIL STAT. art. 8306, §11 (Vernon Supp. 1964). In 1957, the Texas statute was changed so that compensation for partial incapacity would not be computed on the basis of the percentage of disability.

pensation is paid for loss of earning capacity rather than loss of earnings, and the fact that an employee works and earns wages after the accident is not conclusive as to the question of total incapacity.[25] In Rhode Island, incapacity is compensable only for a loss of earnings resulting therefrom.[26]

Without attempting to catalogue all jurisdictions, it is apparent that some courts determine earning capacity solely by a comparison of pre-injury and post-injury average wages. While the post-injury earnings may create a presumption, as will be discussed later, exclusive use of this rather arbitrary and mechanical method is neither the majority view nor the better practice. In most situations, other factors must reasonably be considered. One court stated that it had adequate information to determine earning capacity where it knew the employee's "previous work history, his education and training, his capacity to work after the accident, the sort of work he was doing, the nature and degree of the injury to his back, its effect on his activities, and his earnings past and present."[27] The court could consider the claimant's lack of education and experience, the limiting effect of the injury, and "use its general knowledge as a basis of reasonable forecast."[28] In Minnesota, although evidence of post-injury earnings creates a presumption of earning capacity, the test is not what the employee earns after the injury but what he is

[25]Maryland Cas. Co. v. Goetz, 337 S.W.2d 749 (Tex. Civ. App. 1960), allowed recovery where an employee suffered gastritis from inhalation of paint fumes, which rendered him permanently allergic. See also Texas Employers' Ins. Ass'n v. Waters, 356 S.W.2d 209 (Tex. Civ. App. 1962) which held that where a millwright fell through a floor, hit a ladder and landed on the next story, he had suffered total incapacity under the evidence, which implies the disability to perform the usual tasks of a workman and not merely the tasks of a particular trade; Hawkins v. Texas Employers' Ins. Ass'n, 363 S.W.2d 788 (Tex. Civ. App. 1963) in which it was held error to instruct the jury that if the claimant can work in *any* employment suited to his experience, he is not totally incapacitated, where evidence showed he had worked in a grocery store, cafe, and barbecue place, before becoming a boilermaker; and Cunningham v. Texas Employers' Ins. Ass'n, 363 S.W.2d 880 (Tex. Civ. App. 1963), in which it was held that a jury was justified in granting total disability to an employee due to a back condition where he had not worked for 16 weeks between a hernia operation and the trial and where the back injury was the cause of his incapacity. Needless to say, claimants in Texas appear to seek recovery for total incapacity wherever possible. The theoretical inconsistency with respect to measurement of partial incapacity as opposed to total incapacity seems obvious.

[26]See Taylor v. Artie's Auto Sales, Inc., 89 R.I. 165, 151 A.2d 380 (1959), in which no error was found in denying compensation to an automobile salesman whose average weekly wages were $4.54 less after the accident than before, where there was no showing that the differential was due to the injury.

[27]Latour v. Producers Dairy, Inc., 102 N.H. 5, 148 A.2d 655 (1959). New Hampshire holds that its statute affords compensation not for injury suffered but for loss of earning capacity, Davis v. City of Manchester, 100 N.H. 335, 126 A.2d 254 (1956), and actual earnings after the injury are not conclusive in determining earning capacity. Dunbar Fuel Co. v. Cassidy, 100 N.H. 397, 128 A.2d 904 (1957). The test is the difference in the average weekly wage before the injury and the average weekly wage the claimant can earn thereafter in suitable work under normal conditions of employment. Joyce v. Chicopee Mfg. Co., 103 N.H. 471, 175 A.2d 521 (1961). See also Desrosiers v. Dionne Bros. Furniture Co., 98 N.H. 424, 101 A.2d 775 (1953).

[28]Latour v. Producers Dairy, Inc., 102 N.H. 5, 148 A.2d 655 (1959).

able to earn.[29] Thus, if he cannot do heavy labor, or cannot obtain employment even if he can perform same, his earning capacity is obviously affected. Turning the situation around, however, the fact that the employee has not worked since the injury is not in itself determinative of the extent of loss of earning capacity.[30] Medical estimates of disability, as well as the consideration of earning capacity, furnish bases for calculation of compensation for partial disability although neither should be used to the exclusion of the other.[31] Mississippi lists the factors to be considered in wage-loss determination as increase in general wage levels, the employee's greater maturity or training since the accident, longer hours worked after the accident, payment disproportionate to the employee's capacity due to sympathy, and the temporary and unpredictable character of post-injury income, in addition to the post-injury wage actually received.[32]

Without proceeding further, it is obvious, as mentioned earlier, that loss of earnings or "wage-loss" in other states customarily refers to a loss of earning *capacity*. There may be a diminution in earning capacity even though the employee continues to work at his old job or similar employment for as much or greater income, since the injury may constitute a deterrent to obtaining and retaining work.[33] As an example, this could be especially true in the

[29]Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546 (1960). Here, the employee could not do heavy labor and could not maintain steady employment, and his earning capacity was obviously affected. This was all traceable to the injury and the unwillingness of prospective employers to hire him because of their fear that he might not be able to perform. See also Richter v. Shoppe Plumbing Co., 257 Minn. 108, 100 N.W.2d 96 (1959).

[30]Bowen v. Chiquola Mfg. Co., 238 S.C. 322, 120 S.E.2d 99 (1961).

[31]Bowen v. Chiquola Mfg. Co., *supra* note 30. The South Carolina court stated that the average amount of post-injury wages furnishes a reasonable basis for comparison with average pre-injury wages in determining diminution of earning capacity, although it is not conclusive. Similarly, medical estimates should not be used exclusively. This is essentially the same conclusion as the Arkansas court reached in *Glass*. See also, Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954).

[32]Karr v. Armstrong Tire & Rubber Co., 216 Miss. 132, 61 So. 2d 789 (1953), which reversed and remanded because these factors were not considered, despite the fact that the claimant was making a higher wage after the accident than before. The Mississippi statute quoted in this case specifically compared average earnings before the accident with the wage earning capacity thereafter. See also, Elliot v. Ross Carrier Co., 220 Miss. 86, 70 So. 2d 75 (1954), in which the Mississippi court held that a stipulation that the claimant was 25% disabled did not mean a 25% disability in wage earning capacity and that the factors listed in the *Karr* case must be considered. A similar case is Garris v. Weller Constr. Co., 132 So. 2d 553 (Fla. 1961), in which the Florida court held it error to find loss of earning capacity to be the same percentage as the percentage of functional disability unless this conclusion is based on a consideration of the elements which determine earning capacity.

[33]*See e.g.*, Smith v. Perry Jones, Inc., 185 Kan. 505, 345 P.2d 640 (1959); Peschka v. Wilkinson Drilling Co., 192 Kan. 126, 386 P.2d 509 (1963); and Howerton v. Goodyear Tire and Rubber Co., 191 Kan. 449, 381 P.2d 365 (1963). In Batte v. Stanley's, 70 N.M. 364, 374 P.2d 124 (1962), the New Mexico court held that earning as much or more after an injury as before is not conclusive that a worker's earning ability is not impaired. Thus, where the employee's earnings were reduced 17%, an award of 60% disability was sustained because of a finding that the claimant was "probably disabled" from doing any manual labor and was not qualified to do anything else. The statu-

case of an employee who suffers a heart attack or back injury and returns to work. If subsequently laid off, other employers would be reluctant to hire him because he would be a bad risk.

When talking about "earning capacity," as we have seen, the cases are not dealing entirely with the before and after earnings of the injured employee, although those figures have significance. Earning capacity refers to the ability to earn substantial wages over a continuous, indefinite period of time. The courts or commissions are therefore faced with the necessity of making a present determination, based on the available facts, of the employee's future earning potential or, conversely, his future earning deficiency. As to the weight to be given the post-injury earnings, Larson states that this figure creates "a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity."[34] Larson points out that a number of factors may make post-injury earnings unreliable, such as the increase in wage rates since the accident, longer hours worked by the employee after the accident, payment of unrealistic wages by the employer out of sympathy, the temporary or unpredictable character of the wages, or greater training since the injury.[35] Also, the probable future effect of an injured back or other bodily defect must be considered in that the employee may have an increasingly difficult time performing his work and competing in the labor market. All of these considerations enter into determination of the award. Obviously, however, if the employee is back at work at his old job, making as much money as he made previously, the presumption must necessarily be that there is no loss of earning capacity.[36] The burden should be placed upon the

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tory definition of disability in New Mexico relates to the wages the employee "earns or is able to earn." See also note 28, *supra*.

[34]2 LARSON, *op. cit. supra* note 6, §57.21.

[35]2 LARSON, *op. cit. supra* note 6, §§57.21, 57.31-.35.

[36]See 2 LARSON, *op. cit. supra* note 6, §57.22. Larson refers to this as a "strong presumption," and while that appears to be true in some states, in others it would seem to be no more than an inference. Certainly, some states allow the presumption to be overcome more easily than others. While Montana obviously gives great weight to the before and after earnings (see note 22, *supra*), Kansas does not hesitate to grant recovery even though the post-injury earnings are as high as the pre-injury earnings. In Smith v. Perry Jones, Inc., 185 Kan. 505, 345 P.2d 640 (1959), the Kansas court allowed recovery based on substantial medical testimony even though there was no diminution in wages, stating that a bodily disability is a "definite loss" and a "deterrent to his obtaining and retaining work." In Howerton v. Goodyear Tire & Rubber Co., 191 Kan. 449, 381 P.2d 365 (1963), the court stated that a partially incapacitated employee does not forfeit his right to recovery by remaining in the same employment at the same wages, and that loss of earnings may result from ineligibility to obtain work as well as from inability to perform. In Tabor v. Tole, 188 Kan. 312, 362 P.2d 17 (1961), the court reversed the reduction of an award because it felt the lower court had based the reduction on the fact that the claimant had obtained a teaching position at higher wages. Kansas defines disability as the inability to perform the same work as before the injury. See also Shepherd v. Gas Serv. Co., 186 Kan. 699, 352 P.2d 48 (1960), and Daugherty v. National Gypsum Co., 182 Kan. 197, 318 P.2d 1012 (1957). New Hampshire follows the standard rule that there may be a loss of earning capacity even though there is no reduction in earnings, but if the court concludes that his post-

claimant to overcome this presumption with persuasive evidence. Of course, the mere fact that the employee had returned to work at the same wages would not prevent a recovery in Arkansas based upon *bodily* or *functional* disability, although the amount of the award would normally be reduced unless the presumption were overcome.

Some differentiation is made between states on the basis of whether the employee is able to perform his former job or has taken new employment. The result is that in a few states, where the employee is receiving the same or higher wages, but in a different job, there is deemed to be a loss of earning capacity, because he cannot perform his old job.[37] In most states this is not true.[38] It seems unrealistic to equate loss of earning capacity with inability to perform the same type of work, since the theory relates to the general ability to earn substantial wages rather than the ability to perform a specific type of work. This is particularly true where the injured employee is earning more and has a greater potential in his new job. Of course, there may be situations in which the former work is the only kind the claimant can perform, and then there is a definite loss.

If an employee is able to perform odd jobs, but is unable to obtain or hold regular employment due to injury suffered, this does not prevent a finding of total disability from the standpoint of earning capacity nor does it necessarily require that an earlier adjudication of total disability be reduced to partial disability.[39] This is simply another facet of the principal that the basic test is that of earning capacity, rather than the amount earned. Obviously, where

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injury wages reflect his true earning capacity, it is immaterial that he cannot perform his former job or others for which he was previously qualified. Joyce v. Chicopee Mfg. Co., 103 N.H. 471, 175 A.2d 521 (1961).

[37]Michigan, Louisiana, Nebraska and Kansas so hold. See Kaarto v. Calumet & Hecla, Inc., 367 Mich. 128, 116 N.W.2d 225 (1962) (an injured employee denied recovery because he could perform his former occupation, even though it was depressed due to economic factors and he could do very little else); Lindsey v. Continental Cas. Co., 242 La. 694, 138 So. 2d 543 (1962); Corley v. Childs Big Chain, 146 So. 2d 251 (La. App. 1962); Swaney v. Marquette Cas. Co., 139 So. 2d 74 (La. App. 1962); Tilghman v. Mills, 169 Neb. 665, 100 N.W. 2d 739 (1960); and the Kansas cases cited in note 35 *supra*.

[38]White v. Industrial Comm'n, 87 Ariz. 154, 348 P.2d 922 (1960); Clark v. Henry & Wright Mfg. Co., 136 Conn. 514, 72 A.2d 489 (1950); City of Hialeah v. Warner, 128 So. 2d 611 (Fla. 1961); Pullman Co. v. Industrial Comm'n, 356 Ill. 43, 189 N.E. 874 (1934); Quincy Retirement Bd. v. Contributory Retirement Appeal Bd., 340 Mass. 56, 162 N.E.2d 802 (1959); Frennier's Case, 318 Mass. 635, 63 N.E.2d 461 (1945); Joyce v. Chicopee Mfg. Co., 103 N.H. 471, 175 A.2d 521 (1961); Silke v. Walter, 65 N.J. Super. 36, 166 A.2d 837 (1960); Chromey v. Argentieri, 10 App. Div. 2d 749, 197 N.Y.S.2d 642 (1960); Lane v. General Tel. Co., 85 Idaho 111, 376 P.2d 198 (1962); Lozano v. Archer, 71 N.M. 175, 376 P.2d 963 (1962); Smith v. Swift & Co., 212 N.C. 608, 194 S.E. 106 (1937); McQueen & Johnson v. Morgan, 190 Okla. 219, 122 P.2d 155 (1942); Rennard v. Rouseville Cooperage Co., 141 Pa. Super. 286, 15 A.2d 48 (1940); Standard Sur. & Cas. Co. v. Sloan, 180 Tenn. 220, 173 S.W.2d 436, 149 A.L.R. 407 (1943); Greeneville Cabinet Co. v. Ramsey, 195 Tenn. 409, 260 S.W.2d 157 (1953); Federal Underwriters Exch. v. Simpson, 137 S.W. 2d 132 (Tex. Civ. App. 1940).

[39]2 LARSON, *op. cit. supra* note 6, § 57.51. This is the so-called "odd-lot" doctrine.

the evidence reveals that the claimant is incapable of holding regular employment, he has incurred a substantial wage-loss disability or loss of earning capacity which may well be "total" depending on the circumstances. Similarly, where the inability to obtain regular employment results from the injury sustained, the conclusion must necessarily be the same as in the situation in which the employee is unable to work.[40] Of course, the burden is on the claimant to establish that he has attempted to find employment and has been unable to do so as a result of his injury,[41] and the employer may defend on the basis that the claimant did not accept suitable employment or that suitable employment is available and the claimant did not make reasonable efforts to locate same.[42]

Guidelines for Arkansas Practice

From the foregoing it is apparent that Arkansas has only scratched the surface in considering the problems involved in the determination of wage-loss disability. These issues will no doubt be developed to a greater degree, however, as lawyers become more aware of the implications of *Glass v. Edens*. It is therefore worthwhile to consider the rules developed in other states in an Arkansas context.

Arkansas apparently will not be burdened with the preoccupation with wage-loss indulged in by some jurisdictions. As some of the foregoing cases indicate, recovery in some states is tied almost exclusively to loss of earning capacity.[43] But the *Glass* decision states, and the better view is, that the proper determination is reached through a balancing of wage-loss disability with physical, functional disability. The court has said that it would be an injustice to consider only one of these elements to the exclusion of the other. The problem in Arkansas is to promote and require consideration of the wage-loss factor along with functional disability. For this to be developed properly in Arkansas, in line with the *Glass* decision and the prevailing view in the majority of American jurisdictions, the following principles or guidelines should be utilized:

1. In *all* cases involving permanent total disability or non-scheduled permanent partial disability, consideration should be given to (a) functional, physical disability, and (b) wage-loss disability.

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[40]Wright v. Purepac Corp., 82 N.J. Super. 100, 196 A.2d 695 (1963); Quiles v. New Jersey Metals Co., 37 N.J. 91, 179 A.2d 393 (1962); Texas Employers' Ins. Ass'n. v. King, 346 S.W.2d 380 (Tex. Civ. App. 1961). *But cf.* Fryman v. Moore Bridge Co., 366 P.2d 949 (Okla. 1961).

[41]Prince v. Industrial Comm'n, 89 Ariz. 314, 361 P.2d 929 (1961); Schnatzmeyer v. Industrial Comm'n, 77 Ariz. 266, 270 P.2d 794 (1954); Fawley v. Doehler-Jarvis Div. of National Lead Co., 342 Mich. 100, 68 N.W.2d 768 (1955); Pelchat v. Portland Box Co., 155 Me. 226, 153 A.2d 615 (1959); Gee v. Burlington, 120 Vt. 472, 144 A.2d 797 (1958).

[42]See 2 LARSON, *op. cit. supra* note 6, §57.66.

[43]*E.g.*, the Montana and New Hampshire cases cited in notes 22 and 26 *supra*. See also Taylor v. Artie's Auto Sales, Inc., 89 R.I. 165, 151 A.2d 380 (1959); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959).

2. The term "wage-loss disability" is synonymous with loss of earning capacity or loss of ability to earn substantial wages.

3. In determining "wage-loss disability": (a) If the claimant's post-injury earnings are as high or higher than prior to the injury, this creates a presumption that there is no wage-loss, but the claimant may rebut this presumption by evidence that his injury or disability has seriously limited the work available to him (based on age, education or experience), will operate as a deterrent to future or continued employment or advancement, that claimant's hours worked are longer, that the remuneration since the accident is due in whole or in part to sympathy, that his post-injury income is temporary or unpredictable, that general wage levels have increased or that greater training or maturity entitles him to receive more than he is receiving; and (b) if the claimant is not working and claims inability to earn substantial wages, consideration should be given to his age, education, experience, capacity to perform or to be trained to perform other less strenuous work, his previous work history, medical testimony as to his ability or capacity to perform certain types of work, whether the claimant has sought suitable employment, what employment is available to the claimant, and whether the claimant's injury will deter or prevent employers from hiring him.

4. In balancing wage-loss disability with physical disability, no mathematical formula can be established with respect to the emphasis to be given each factor due to variation in circumstances, but (a) in a case involving total or substantial wage-loss and a lesser percentage of physical disability, the amount of recovery will necessarily be increased over that allowable for physical disability only; and (b) in a case involving no loss of earning capacity, or an amount smaller than the percentage of physical disability, the ultimate recovery will normally be diminished.

Some comment is perhaps merited on point 4(b). In a previous brief mention of the *Glass* rule, the comment was made that the case was a "windfall" for claimants' counsel.[44] But what is sauce for the goose is sauce for the gander. If inability to earn wages increases recovery, then in like measure the ability to work should diminish recovery. This would seem to be the obvious conclusion from Larson's statement, which the Arkansas court adopted, that "the proper balancing of the medical and the wage-loss factors" is "the essence of the disability problem" and that it is improper to insist on either element as the exclusive test.[45] The conclusion seems inescapable that a "proper balancing" of these factors should normally enable the respondent to reduce the award in situations in which there is a total absence of wage-loss disability, or in which the wage-loss disability is substantially smaller than the physical disability.[46]

[44]Wright, *Defendant's View of Workmen's Compensation Heart Cases*, 16 ARK. L. REV. 234, 237 (1962). The *Glass* case was only given passing mention and the full ramifications thereof were not considered.

[45]2 LARSON, *op. cit. supra* note 6, §57.10.

[46]A clear-cut illustration would involve a back injury suffered by a clerical or office employee. The wage-loss implications might be minimal or totally

As in the case of circuit and chancery courts, opinions of the Workmen's Compensation Commission are not published and are not generally available to Arkansas attorneys.[47] Yet, the great majority of compensation claims are not appealed, and the Commission's decision is final. In a few Commission decisions, the *Glass* rule has entered into the determination, particularly with respect to the proof necessary to increase recovery due to wage-loss. In *Holland v. Mobley Constr. Co.*,[48] the evidence developed that the claimant had an eighth grade education, had performed only manual labor prior to his heart attack and was untrained for other work. The claimant had gone back to work for the same employer in an office job at a higher wage. The Commission noted that the medical proof established only a 15% anatomical disability, and then stated:

> However, we must consider the fact that claimant's opportunity for future employment has been appreciably reduced by his physical condition which is attributable to his employment . . . . The Commission would be benefited by testimony on behalf of the parties by experts in the employment and economic fields in cases such as this. Thus, we would have the benefit of expert opinion evidence regarding future wage loss factors. However, in this case, we do not have the benefit of such evidence. We are of the opinion that the claimant's future possibilities for earning wages equal to that which he was receiving at the time of his attack have been reduced because he can no longer perform the duties for which he is qualified by his limited education, his employment background, and his lack of specialized training.[49]

The Commission then awarded 25% permanent partial disability. This case clearly indicates that as far as the Commission is concerned, Arkansas will follow the principal enunciated earlier in this article that wage-loss refers to loss of earning capacity and that the fact that the employee is back at work at higher wages in less strenuous work will not prevent a recovery where his injury provides a deterrent to future employment. Presumably the Commission concluded that the presumption of no wage-loss due to increased post-injury earnings had been refuted by the fact that the claimant could no longer perform the heavy labor for which he was qualified and due to his education and experience was limited in his employment potential. However, as mentioned earlier, equal or higher post-injury wages create a presumption that there is no wage-loss, and this must be refuted by substantial evidence to the contrary.

The Commission in the *Holland* case felt it could have profited from additional testimony of an economic nature on the adverse ef-

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absent. This is not to say, of course, that this rule would be limited to office or clerical employees. Reduction of the award due to absence of wage-loss is far better and fairer to all concerned than the policy followed by many states (as mentioned previously) of denying compensation altogether in the absence of loss of earning capacity.

[47]A set of opinions of the Workmen's Compensation Commission may be found in the University of Arkansas Law Library in Fayetteville, as well as in the Justice Building in Little Rock.

[48]251 Ark. Workmen's Comp. Comm'n 252 (Aug. 1963).

[49]*Id.* at 254.

fect of the claimant's injury on his future employment possibilities. In *Adney v. Brown-Olds Plumbing & Heating Corp.*,[50] the Commission felt that these facts were fully developed. In that case, the claimant contended for permanent total disability from the standpoint of wage-loss. He was only able to work part-time after the injury and performed no work at all for months at a time. When he did work, he generally performed lighter or clerical work due to his condition. Eventually, he obtained steady employment performing light work for an air conditioning company. The claimant was 39, had an eleventh grade education, and his only experience was in plumbing and pipefitting. Two orthopedists testified that the claimant could not perform heavy lifting, and both gave him 10% permanent partial disability. Five journeymen pipefitters, the supervisor of plumbing at the University Medical Center, and a master plumber all testified to the effect that the claimant could no longer perform his old work and in fact could only do about 10% of the tasks involved in plumbing or pipefitting. The witnesses generally concluded that this rendered him unemployable for such work. The respondent offered no contrary evidence. The Commission awarded 45% permanent partial disability and stated these conclusions:

> This is the first case to come before the Commission in which the facts have been exhaustively developed under the doctrine announced in the case of *Glass v. Edens*. The Commission has, in some previous cases, had occasion to render decisions in which there has been less extensive proof on behalf of the claimant under this concept of the law. * * *
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> In support of the respondents' position, the undisputed fact is that the claimant has been working in the plumbing industry at lighter work for wages equal to or greater than those which he was receiving at the time of his injury. It would, we think, be manifestly unjust to refuse to give such a fact very earnest consideration as one of the several factors to be considered in determining the extent of permanent disability.[51]

The Commission then quoted from *Glass* to the effect that the essence of the problem was the proper balancing of the medical and wage-loss factors. This attempt at balancing provided the Commission with "its greatest difficulty," but it stated that it arrived at the 45% figure by taking "into account all of the factors which we have discussed." Presumably the recovery would have been greater had the claimant not found steady employment performing light work at equal or higher wages. Also, the Commission apparently viewed the presumption of no wage-loss, created by the fact that the claimant was now employed at equal or higher wages, as having been refuted at least in part by the testimony that the claimant could no longer perform heavy work and had been rendered incapable of performing the duties of a journeyman plumber and pipefitter.[52] Thus,

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[50] 255 Ark. Workmen's Comp. Comm'n 248 (Dec. 1963).

[51] *Id.* at 259.

[52] This should not be interpreted as adoption of the rule mentioned in note 37 *supra*, in which compensation is granted if the employee cannot perform his former job. Apparently, the emphasis on this factor was due to the fact that this was the only type of work the claimant was trained to do. His earning capacity had obviously suffered since he had become seriously limited in the range of jobs available to him.

despite current employment, the Commission apparently felt that the claimant's earning capacity had been substantially diminished and his injury provided a deterrent to future employment, which thereby justified an increased award. A valid criticism of the *Adney* and *Holland* cases, however, is that the Commission did not ostensibly give sufficient consideration to the presumption of absence of wage-loss resulting from each claimant's demonstrated earning capacity.

Pickle v. Paul Hardeman, Inc.,[53] also involved a situation in which the claimant alleged 50% permanent partial disability based on wage-loss. The employee was 28 years old, had not completed high school, and had been a construction worker for 10 years. After his first injury he had returned to work for a short period and had been discharged because his work was unsatisfactory. He was later reinjured, or the previous injury aggravated, while working for a second employer. His employment had eventually been terminated, and he had worked only about 50% of the time in the approximately 7 1/2 months preceding the hearing. The proof showed a substantial decline in annual earnings. The assistant business manager for the union testified that the claimant's job turnover had greatly increased since his injury and that he could keep the claimant employed only about half of the time on light work. Medical testimony set the claimant's anatomical disability at 10% to 15%. The Commission's award was 20% permanent partial disability. The Commission stated it was "incumbent on the claimant to establish that he will in the future sustain wage losses in proportion to the degree of permanent disability which he seeks us to allow."[54] The Commission felt that this had not been thoroughly accomplished, but:

> There are some factors that partly support the claimant's position. He has sustained a wage loss. He has less than a high school education, and is limited in his experience and training. The medical proof reflects that he cannot do some of the hard, heavy work involved in his occupation. The commission also has the testimony of the claimant himself, which supports his contention that from a wage loss standpoint he is to some extent permanently disabled more than the 10% to 15% anatomically which the physicians have given him.[55]

The conclusion one must necessarily reach from a comparison of the *Adney* and *Pickle* cases is that in the handling of claims for permanent disability, the claimant should not only assert the *Glass* doctrine, but should also offer substantial proof of wage-loss or inability to perform work for which he is qualified, thereby resulting in a decrease in earning capacity and a reduction in future employment potential. This proof is best provided through proof of actual wage-loss, testimony of physicians as to the inability of the claimant to perform heavy work, testimony of those experienced in claimant's field as to his inability to perform that type of work, and testimony of personnel or employment experts as to the claimant's present and future prospects for employment based on his circumstances.

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[53] 259 Ark. Workmen's Comp. Comm'n 73 (April 1964).
[54] *Id.* at 84.
[55] *Ibid.*

CONCLUSION

The element of loss of earning capacity provides a fertile field for development in Arkansas compensation cases. This aspect should be considered in all workmen's compensation cases in Arkansas which involve claims for permanent disability (but which are not otherwise scheduled). Since the Supreme Court has said that wage-loss is an element to be considered along with physical disability, the Commission should inject this consideration into all claims for permanent disability which are filed, and if the attorneys have not offered proof on the subject additional evidence should be required prior to the decision. For since the *Glass* decision, this is a consideration which must be weighed as a part of the final determination, and a proper and legally acceptable conclusion as to permanent disability cannot be reached otherwise. Furthermore, the absence of wage-loss is as relevant as its existence, and to ignore this factor is to omit an essential feature of the equation. Over the long run, if the rule is wisely and reasonably applied, the result should be a more accurate determination of disability.