



When wage loss doesn't seem to add up

Bad injury, bad documentation: Putting together the wage loss picture

BY MARYANNE B. COOPER

Past and future wage loss. What was and would have been versus what is and will be. Significant wage loss can drive case value. In a best-case scenario, your seriously injured client is a high-wage earner with indisputable wage loss. But how often is wage loss more nuanced? When wage loss is not crystal clear, it's time to scrutinize the details. Arm yourself with the appropriate tools to maximize the claim. Gather information. Be creative. Listen carefully to your client for clues. The same goes for lost earning capacity. To simplify the discussion, the term wage loss encapsulates both concepts here.

The starting point: Jury instructions

With many journal articles devoted to statutes and case law, it's worth a quick reminder to use jury instructions. The jury instructions are what the actual decision makers will hear, after all. Use them when first developing the case and revisit them throughout.

Two instructions to review in the wage loss context are CACI 3903C and 3903D. Both are summarized below.

CACI 3903C: Past and Future Lost Earnings

CACI 3903C allows plaintiff to recover damages for past (and future) lost earnings if plaintiff proves the amount of income/earnings/salary/wages [choose

those that apply] that plaintiff has lost to date (or will be reasonably certain to lose in the future) as a result of the injury.

CACI 3903D: Lost Earning Capacity

CACI 3903D is particularly useful when a wage loss claim requires more creativity because 3903D addresses the loss of plaintiff's ability to earn money. Under 3903D, to recover damages for the loss of the ability to earn money as a result of the injury, plaintiff must prove the reasonable value of that loss. It is *not* necessary that plaintiff have a work history.

Self-employed client

Although better than an unemployed client, a self-employed client may raise eyebrows on the other side when



it comes to a wage loss claim. But sometimes one finds a case with a self-employed client allows for creatively portraying damages in a unique situation. And unique situations may lead to better settlements and verdicts.

While this first example focuses on an oral surgeon, much of the analysis is appropriate for a small business owner, a consultant, the gig economy, or anyone whose income varies greatly depending on the individual's own production capacity.

Oral surgeon example

Several years ago, our firm took an oral surgeon's case that other firms had turned down. We were told the others felt the wage loss was too speculative. We are gluttons for punishment, though. And we took the case.

The workup took significant effort, including numerous hours with an economist and the client's bookkeeper, picking through all aspects of the client's business. No detail was too small. In the end, when it came time to explain the various ways in which the client's work had been impacted, the claim was far from speculative. The numbers added up, and the client was adequately compensated for his loss.

Working more

Defendant claimed the client had no wage loss because the client was making the same amount as before the injury. Defendant glossed over changes in the client's life overall – and specifically the impact on the client's work. In contrast, we highlighted the precise details and demonstrated the client's loss of his ability to earn money, even though it was temporarily masked by his extraordinary effort.

The surgeon's arm injury made working in certain positions painful. This meant long surgeries were no longer possible. Much like trial prep, the prep and post-surgical work for a long surgery is about the same as a short surgery. The

way the surgeon was able to make the same amount was by doing many more short surgeries, translating to a significant increase in work hours for the prep and post.

Given the nature of his work, the surgeon was unable to take enough painkillers to get through his days without substantial pain. Not only did he have to work harder, he had to endure pain while doing it. He also increased the likelihood of future injury when holding his arm in unstable positions for long periods of time.

A further challenge was protecting the client's privacy during discovery. Depositions of those who referred the client business were handled delicately. We tried to balance the benefits of obtaining relevant information to support the claim against the possibility of fewer referrals if the client's business colleagues were fully informed of his situation.

Overhead concerns

Post-injury, the client's additional surgeries each week entailed more paperwork and more patients in and out of his office. His overhead remained. His fixed costs weren't scalable. He still had to pay the lease for his office space, insurance, employees' salaries, benefits, and other overhead costs.

The surgeon did not have the option of reducing his hours when his arm bothered him. Instead, he was forced to work hard, endure the pain, or close up shop. All or nothing. One can guess which option he picked. He needed to meet his overhead costs and help keep his household going.

Identifying with high-income clients

The oral surgeon's case brought up another challenge: that of high-income clients. A jury may have difficulty identifying with clients earning far more than the jurors will earn in their lifetimes. How does one ask for appropriate damages when the jurors cannot relate?

Some find it useful to start with lower numbers. For example, they prime the jury by discussing an earning differential between \$50/hour and \$30/hour. Once they get the jury's acceptance – when jurors have agreed they could award damages if an injury caused someone to make \$30/hour when they used to make \$50/hour – then the attorney asks how the jury would feel about an annual earning differential between \$500k and \$300k. Adjust the pay rate analogy for the jury according to venue.

Test your themes – focus groups and facial scanning software

Depending on the expected value of a case, a focus group may be a useful tool to test themes and gauge what is likely to resonate with a jury. Does someone earning a substantial amount deserve compensation for wage loss? Does someone earning as much post-incident deserve compensation?

Many find a focus group can be beneficial in figuring out what jurors think is important, and what questions jurors may have that were not considered. One may also learn which attitudes and experiences predict how jurors will form opinions about a case.

Online or virtual focus groups may often be a cost-effective way to obtain this information if an in-person focus group isn't warranted. With the money saved doing an online focus group, one may decide how to focus the case early on, and then again closer to trial.

At the other end of the spectrum, a high-value case may justify putting significant resources into jury research. One of the newer tools available is facial scanning software that reads mock jurors' facial expressions. The data then can be analyzed – along with nonverbal behaviors – to detect implicit biases and feelings that jurors do not want to express. Yet another tool to help maximize damages.



The unemployed (but actively searching) client

As a child, I knew my father had to work Monday through Friday, from nine to five. He was a computer programmer, with little flexibility in his schedule. He changed jobs a few times over his career, but that was the exception, not the rule. And he would obtain a new job before leaving his old one. Being voluntarily unemployed was rare for most in those days.

Unemployment is different these days, particularly in Silicon Valley. Changing jobs frequently is often a way to make more money, be part of the next big IPO, or otherwise gain status. Transitions to new jobs happen much more regularly, making periods of unemployment between jobs less of a stigma than before: until a client is injured while between jobs. Then, defendants will quickly dismiss any notion of the client's ability to earn money. Defendant will do so even when the injuries are impeding the client's return to work.

Tools to educate the other side

As with the surgeon example, an unemployed client is an opportunity to focus on the details, be creative, and educate the other side. Provide comprehensive documentation to support the client's pre-incident compensation over several years. Consider discussing job transitions during that time to demonstrate how periods of unemployment between jobs are typical in the industry. Have experts demonstrate how the injuries are interfering with the client's ability to get back to work (or to do the same type of work). Have those familiar with the industry show what your client likely would be earning if not for the injury.

Evaluate how client's cognitive deficits impact job search

Clients who once commanded large compensation packages and now are unable to find comparable employment may be suffering from a decrease in cognitive abilities, an impairment of their mental

processes. If so, consider all the appropriate treaters and experts who may help develop a clear picture of how the client has changed as a result of the injury.

A client may be a high-functioning individual who has a head injury and related cognitive deficits. Even with the deficits, the client still may be much more intelligent than average. But just because the client is still extremely capable doesn't mean the client is without deficits. Make those distinctions clear to the other side. Consider interviewing supervisors, colleagues, classmates, family, or whoever else has information about how the client has changed.

If one suspects a traumatic brain injury (TBI), it's common to consult with a neurologist and neuropsychologist. But has the client also been treated by a psychologist? A treating psychologist may offer detailed information related to depression or PTSD that may help explain the client's inability to get a new job.

Another expert to consider if a client has a TBI is an endocrinologist – a doctor specializing in glands and hormones. Brain trauma may interfere with the pituitary gland's hormonal processes. An endocrinologist can help determine whether the client is suffering from pituitary dysfunction arising from a TBI.

The executive recruiter as a witness

If your client has been working with an executive recruiter, ask the recruiter why he believes your client remains unemployed. How long would the recruiter expect a similar candidate's job search to take? Has the client's search been going on too long, making potential hirers wary? Has anything changed since the last time your client worked with the recruiter?

It is also important to evaluate whether there are any reasons for the unsuccessful job search aside from the client's injuries. For instance, does the client have a difficult personality? Or are the client's skills no longer relevant in the industry? These are the type of red

herrings defendant will throw out, hoping something will stick. If you are prepared to show why defendants are wrong, they won't get far with these attempts to limit damages.

Consult an Entrepreneur-In-Residence (EIR)

Another option is to consult with an Entrepreneur in Residence or an Executive in Residence. These positions typically are held by successful entrepreneurs in venture capital firms, startups, or private equity firms. The individuals in these roles are in high demand and may not be willing to get involved in litigation. But if willing, they can offer significant insight into the industry and the dynamics at play when valuing your client's wage loss. A consulting EIR could be well suited to testify regarding the typical compensation earned by someone in the client's position within the industry.

Don't let privacy take a back seat

Being a zealous advocate is admirable. But always be mindful of a client's privacy concerns, particularly when working in a small geographic area. A client may be sensitive to privacy concerns within the industry. The concerns may involve future funding, or non-disclosure agreements with investors. The disclosure of sensitive information may not be worth the trouble it creates. A good life is always better than a good lawsuit. Problems can be avoided by obtaining a client's explicit permission before permitting defendants to dig into past employment relationships and any sensitive matters that may entail.

W-2 employees

Developing a wage loss claim is often easiest when one's client is a W-2 employee. In a W-2 status, the client's employer sends a W-2 form to the employee, and the IRS, reporting the client's annual wages and taxes withheld. Assuming there's a differential – the client is making less money now – documentation is



clear. It's difficult for a defendant to dispute wage loss when the numbers are on a W-2.

The next example relates to a union worker, but the analysis is not limited to union workers. It is relevant for any client who continues to advance professionally during the pendency of a case, often due to factors other than merit.

Union workers

Although more straightforward than self-employed and unemployed clients, even W-2 employees can pose challenges when working up a wage loss claim. One example is an injured union worker with a third-party claim against the general contractor.

A union worker may have been injured when he was earning wages at the lower end of the union worker scale. By the time his case is ripe for resolution, the client may be earning more than he did at the time of the injury. Defendants may use this information to argue there has been no wage loss.

It's a predicament. A union worker will typically receive incremental wage increases as he becomes more competent. The worker may make more money over time even with significant injuries and limitations. The strong desire to earn a living often encourages the worker to continue in a job despite the pain, and despite the likelihood of reinjury.

Union workers move through several stages during their careers, starting at the apprentice level. After an apprentice is sufficiently skilled, the worker may move up to a journeyman position, and eventually to a foreman position where he is in charge of the crew. Challenges may arise in working up your wage loss claim when a worker has progressed over time to a higher level and is earning more money, despite significant injuries. The client may be making serious accommodations or asking co-workers to assist on more physically demanding aspects of the work. Though it is often an unsustainable situation in the

long term, defendants will use the information as best suits their position.

Another complication arises when a worker has a foreman title for a project but has no others working under the foreman. No journeyman. No apprentice. The foreman title may be only for that discrete project. Afterward, the worker may go back to a journeyman role. In that situation, the foreman likely is doing a significant amount of physical labor. But defendants try to categorize the foreman position as higher paying and less demanding physically than a journeyman role. Properly categorizing a worker will help refute any mistaken assumptions the other side makes.

Educate the other side when they don't understand the nuances between the different stages of union work, and the fluidity between them. Educate opposing counsel. Educate the adjuster. Consider which experts and information can help flesh out the issues and increase the value of your wage loss claim.

Vocational Rehabilitation Consultant

A vocational rehabilitation consultant can evaluate a client's ability to stay in the same job or suggest other jobs that would be a better fit given the injuries. The client may no longer be qualified for their union job. If not, the loss of union benefits and future wages can be substantial.

The consultant may also evaluate job openings in a specific geographic region. If a client has been out of work for some time, there may no longer be job openings in the same line of work, at the same level. If there are no journeyman iron-worker positions available, for instance, and the client was a journeyman iron-worker at the time of injury, defendants will have a harder time arguing a failure to mitigate.

In researching available job options for the client, a consultant can help provide the jury with several alternatives. These alternatives – often at different pay rates – are useful if the case gets to trial. Counsel may then appear more flexible to

the jury when presenting wage loss under several scenarios, compared to an often more rigid analysis by defendants.

A vocational consultant will also consider a client's background as it relates to chance of being hired for other jobs. What are some possible hurdles the client may face? Is lack of education a factor? Does the client have a criminal history which will complicate the job search? Is the client a recovering addict who is limited in terms of certain pain relievers, even though rehabilitated? There are a host of factors to consider. A consultant will evaluate the relevant data and help demonstrate how various factors will influence the client's ability to return to work.

Functional Capacity Evaluation (FCE)

If a client has suffered injuries that are likely to interfere with her ability to return to the same job, a Functional Capacity Evaluation may be helpful to measure deficits. The FCE tests the client's ability to perform tasks that simulate the client's job duties. It helps determine the extent to which the client can perform the tasks on a regular basis.

If a knee injury prevents your client from working as she did prior to the incident, the FCE can provide data on the degree of difference between the injured knee and the other knee. Physical measurements of the calf and thigh, difference in strength between the legs, and other details can help make the abstract more concrete.

The FCE is also helpful in providing hard data to the other side. If it's defendant's position that a client can keep working, business as normal, the FCE data may indicate that working at the same level for years to come will likely increase chance of injury and lead to more medical treatment down the line.

Caveat: Creativity is a tool – it won't impart magic powers

Creativity can be an effective tool, but one may not be able to find wage loss in every situation. Some cases just



don't have it. Pushing the bounds of creativity runs a risk. If counsel is not perceived as believable in one area, it can bleed over to other areas. Losing credibility with the other side will decrease the likelihood of maximizing damages.

One size doesn't fit all

Self-employed. Unemployed. W-2 employee. Different types of employment may require different approaches when working up a wage loss

claim. While some of the tools may differ, there are common threads that run throughout. Attention to detail, creativity, focus, flexibility, and good experts should serve one well in any case.

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household, and through her practice helps ensure that those who use active transportation – transit, walking, and bicycling – are appropriately compensated when they suffer injuries caused by others. In addition to a full law practice, Maryanne serves as the editor of Plaintiff Magazine, a role she has held since 2010. ☒