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Flushing Out Financial Information to Assist Your Expert

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Special to the Legal

Personal injury economic damages can be complex calculations. There is no cookie-cutter approach when calculating the damages of a claimant, but there are some recurring financial aspects. In order for the financial expert to calculate a reasonable estimate of economic damages, counsel must be prepared to ask the right questions of a claimant in order to flush out financial information and relevant details that will be useful for their expert. It is the expert's job to calculate an economic loss within a reasonable degree of certainty, and by understanding these topics, you will lay the groundwork for your expert's calculation.

PRE-INCIDENT EARNINGS

We have all seen something like this statement: "Past performance is not indicative of future results." When calculating economic damages in a personal injury matter, the opposite is typically true.

Ask about the claimant's earnings during the year of the accident. Was



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he or she a salaried employee or paid hourly? How much overtime did he or she earn in prior years? If you have already been provided with his or her tax returns, the answers will be easy to verify.

What if there are no, or only a few, tax returns provided? Obtain a copy of the claimant's Social Security earnings statement. It illustrates annual earnings over a person's lifetime. What were the annual earnings over the past two to five years? Look for trends over five, 10 or even 20 years, if possible. This data may indicate a claimant has a job that is cyclical or has steadily increasing or decreasing earnings. This topic becomes extraordinarily more complex if the claimant is self-employed or has income from several different sources.

Ask questions that focus on why a

claimant's earnings are at their current levels. This will bring to the surface answers that are crucial in calculating a base earnings estimate, which is the foundation of most personal injury claims.

POST-INCIDENT EMPLOYMENT

Claimants should be queried on whether they are engaging, or plan to engage, in employment post-incident. If a claimant is able to engage in post-incident employment, economic losses can be mitigated in part or in their entirety. This information not only helps your financial expert; it will help vocational experts as well when determining a person's ability to work and achieve earnings.

If the claimant is in occupational or physical therapy, what are the progress milestones and prognosis? Is there a plan to return to pre-incident employment or is he or she planning on engaging in some other form of post-incident employment? Has the claimant already returned to his or her pre-incident employment or a new occupation? Is he or she working fewer or the same amount of hours? Also, ask whether a claimant has attended

college or vocational classes since the incident.

Conversely, if a claimant is not in the workforce and does not appear to be actively seeking post-incident employment, try to find out more. Has a specific doctor precluded him or her from employment? Is he or she precluded from all employment or just his or her occupation before the incident?

ALTERNATE SOURCES OF INCOME

If a claimant is not in the workforce due to injuries sustained in an incident, he or she could still be receiving income that would offset an earnings loss calculation. Examples of alternate sources of income sometimes include the early receipt of pension benefits, Social Security disability, state disability, private pay disability benefits or donations from a victim's fund. Claimants should be asked how much they are receiving monthly from these sources, if applicable, and when the payments started. As with all sources of income, the claimant's answers should be verified with documentation whenever available.

But what if certain sources of income are not an offset to pre-incident losses? For example, in Pennsylvania, losses cannot be offset by Social Security disability payments. Questions should focus on when the claimant applied for disability. What ailments, conditions or injuries did he or she specify in his or her application to the Social Security Administration, and is it solely related

to the accident in question? Ask for the Social Security acceptance letter, which will state how often they will review the claimant's disability status. The Social Security Administration will review a claimant's disability status more often, every year or two, if they believe there is a positive prognosis for recovery.

FRINGE BENEFITS

Fringe benefits, which are both monetary and nonmonetary, include health care insurance, pensions, profit-sharing and disability insurance, among other benefits, and are a recognized element of damages. Losses are typically confined to the employer-paid portion of benefits and any increase in the amount a claimant must pay for similar benefits post-incident.

Financial experts can differ on what types of fringe benefits should be included in an economic loss calculation, so it is imperative that you collect as much information as you can directly from the claimant and his or her employer. Did the employer pay any portion of the insurance premiums? What type of retirement benefits were provided? Is a 401(k) or profit-sharing plan offered? Is there an employer match for funds deposited in a retirement plan? Were benefits offered by the employer despite the claimant not being enrolled or using them? Perhaps the claimant is not working, post-incident, but still receiving benefits up to the time of trial.

Verification for such benefits, and the employer-paid portions of each

benefit, can be obtained through employment files, collective bargaining agreements or letters from human resource departments.

UNREIMBURSED BUSINESS EXPENSES

Unreimbursed business expenses are expenses incurred by an employee in the course of his or her employment that are not reimbursed by his or her employer. For those who fit certain criteria, unreimbursed business expenses are considered a tax deduction and can be found on a claimant's Form 1040 Schedule A or Form 2106, an attachment to the federal tax return. Deducting unreimbursed business expenses from an economic loss calculation acknowledges that a claimant, in order to achieve a certain level of earnings in his or her occupation, must be willing to spend a certain portion of his or her income in order to achieve said earnings.

A common example of an occupation with unreimbursed business expenses is the union construction worker. Because of the nature of their work, construction workers will deduct their union dues, cellphone expenses, travel expenses to job sites, work clothes and tools, among other expenses, on their tax returns. These expenses can add up quickly and become significant when viewed in the context of a claimant's annual earnings.

Perhaps the claimant did not file any unreimbursed expenses on his or her tax returns. Ask if he or she pays dues

to an industry organization. Does he or she purchase equipment to perform his or her job? Did he or she have to buy special clothing like scrubs or boots? If a claimant does not claim an itemized deduction for unreimbursed business expenses on his or her tax return, you must use this opportunity to bring the pertinent information to the surface.

HOUSEHOLD SERVICES

Household services are the tasks a claimant performs around the residence, such as laundry, cooking, cleaning, yard work and taking out the trash. This component of damages is often overlooked.

If you have the opportunity to question or depose the claimant or family members, ask about the claimant's past ability to perform household services as well as his or her current ability to perform the same household services. Setting a pre-incident benchmark in order to compare post-incident abilities is an integral part of the economic loss process. Ask questions that quantify the types of household services as you collect information relating to the types of household services.

If the claimant has hired someone to perform household services as a direct result of the incident, obtain copies of the invoices and checks. Sometimes these services were obtained prior to the incident (i.e., cutting the grass) and may not be considered a loss. It is important to know that failing to hire someone to perform household services is not required to prove a loss

of household services.

RETIREMENT AGE AND OTHER WORKLIFE COMPONENTS

Many financial experts calculate an economic loss to a claimant's assumed retirement age. For example, a typical retirement age in an economic loss calculation is 67 years old. Why? Because that is the age Americans born in 1960, or later, receive full Social Security retirement benefits.

But is age 67 realistic? If the claimant works in a physically demanding job, or qualifies for a full pension earlier than age 67, he or she may choose to retire well before his or her full Social Security retirement age. Union workers, such as bricklayers, plumbers and teachers, typically do not work to age 67 — a fact that is often supported by government filings from union pension funds. Make sure you ask the claimant what his or her plans were pre-incident. By obtaining an intended retirement age from the claimant, whether 55 or 75, you will be laying the foundation for a reasonable economic loss calculation.

In addition to retirement, another worklife consideration is participation, which may be affected by family circumstance, pregnancy, pre-existing injury or other factors. Employment is another worklife component that should be queried. Using the earlier example of union craftsmen, such as bricklayers or plumbers, employment can consist of many, sometimes dozens, of different employers annually, as well as months of unemployment

in any given year due to economic conditions. Make sure you have access to union and earnings records to corroborate a claimant's employment.

These topics are fundamentally important when calculating economic damages specific to an individual in personal injury matters. Whether conducting an initial interview or deposing a claimant, the answers to these topics, as they relate to the financial aspects of your specific matter, provide a more accurate and reasonable economic loss calculation. •