



Forensic Accounting

Calculating Future Damages for an Undocumented Plaintiff

By Marion Wickersham, CICA

According to the Centers for Disease Control and Prevention, about 30.8 million people visited emergency rooms for unintentional injuries in 2015,¹ and death from unintentional injury is the third-leading cause of death in the United States after heart disease and cancer.² It is not surprising that personal injury litigation is on the rise, and so too is the need for experts to quantify economic damages.

When calculating economic damages in a personal injury lawsuit, one main component is the lost earning capacity of the individual. Estimating earning capacity can be challenging as there are many variables to be considered. There is no definitive formula, but among those who have a work history, a primary element in evaluating earning capacity is their historical earnings and their record of employment. It becomes much more difficult if those records don't exist – as may be the case with undocumented workers.

In Pennsylvania, there is no case law that directly establishes how to calculate future earnings for an undocumented immigrant in personal injury litigation, but there is case law regarding undocumented immigrants and similar damages, such as wrongful termination and back pay, unemployment benefits, and workers' compensa-

tion, which are commonly used in personal injury litigation cases.

In *Cruz v. W.C.A.B. (Kennett Square Specialties)*, which pertained to workers' compensation benefits, it was determined that it is the employer's burden to prove that an employee's loss of earning capacity is due to his or her citizenship status and not the alleged disability. This case is silent on future damages, but it could be interpreted that if a person's undocumented status is unknown or not proven, damages could be calculated in U.S. dollars until their citizenship is proven otherwise. This also makes the case for calculating losses in both U.S. dollars and the wages of the plaintiff's country of origin, as both estimates could be reasonable based on the facts of the case.

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Legal counsel will provide the CPA with the applicable state or federal laws that ought to be applied. However, you may be calculating future lost earning capacity assuming two different bases: the United States and the country of origin.

The methodology of calculating damages based on an undocumented worker's country of origin is supported by a popular industry publication relied upon by many forensic experts, Gerald D. Martin's

Determining Economic Damages. It indicates that it is acceptable to calculate future lost earnings of an undocumented immigrant in their native country's currency and wage rates.

Using detailed websites such as World-Data.info, the CIA's The World Factbook, or the country's governmental website, one can determine specific occupation salaries and other earnings data, such as fringe benefits, medical costs, and living expenses, that can be used in a side-by-side comparison of the country of origin and the United States. Important information must be gathered in the discovery process for the individual, such as age, occupation, education, and employment and earnings history, among other issues, to perform foreign country research to match the discovery criteria. The average wages and work life age for a construction worker in Pittsburgh is far different than someone in Brazil, for example; yet these computations would be shown side by side, and the trier of fact would decide damages based on whether the individual would stay in the United States or go back to his or her native country.

Calculating an undocumented worker's lost wages in the United States with little or no historical data, such as tax returns, W-2 or 1099 tax forms, or pay stubs, is

challenging. Without tax or earnings documentation, you may have to rely on verbal testimony about an individual's earnings or industry statistics about the "average" earnings of someone with that occupation. However, relying on verbal testimony or the use of statistics in place of documents that should be kept in the ordinary course of business is not certain and may not be representative of an individual's past earning capacity. You need to question why tax returns and earnings records were not maintained. Good judgment by the expert must be exercised when relying on verbal

testimony and statistics alone to establish the lost earning capacity of an undocumented worker.

Ultimately, determining the earning capacity of any person – whether a U.S. citizen or an undocumented immigrant – poses challenges. Each case needs to be analyzed and addressed on its individual facts and circumstances, and it is important not to make any legal conclusions about citizenship status. Therefore, the most logical estimate of an undocumented worker's future earning capacity would be to estimate damages in both U.S. dollars and the

wages of the native country, and leave it up to the trier of fact to determine which one is acceptable. 

¹ www.cdc.gov/nchs/fastats/accidental-injury.htm

² www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_05.pdf

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