

Workers' Compensation Report

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Calculating the Credit for Prior Amputation Payments

Frequently claimants who have suffered an amputation will later pursue a percentage loss of use of the extremity, person-as-a-whole, or a wage differential award. In many instances, such awards are justified under the particular facts of the case. In such instances, the employer is entitled to a credit for the prior payment of amputation benefits. In certain circumstances, however, an issue may arise as to whether the credit should be based on the number of weeks paid in amputation benefits versus the actual dollar amount paid by the employer. A difference in those calculations can arise where the employee's Permanent Partial Disability (PPD) benefit rate is less than the statutory minimum amputation rate.

Where there is no dispute that the claimant's amputation "arose out of" and "in the course of" his employment, the employer must pay the statutory benefits for amputation no later than the time in which the employer reasonably knows the extent of the amputation. *Greene Welding & Hardware v. Illinois Workers' Compensation Comm'n*, 396 Ill. App. 3d 754, 757-758, 919 N.E.2d 1129 (4th Dist. 2009). Because of this accelerated payment requirement, it is likely that the employee will receive the entirety of their amputation benefit prior to seeking or receiving an award based on loss of use or wage differential.

Where an employee's average weekly wage is relatively low—for example \$400.00 a week—the employee's minimum statutory amputation benefit will often exceed the applicable PPD rate. As an illustration, an employee incurring an injury during the first six months of 2011 would have a minimum weekly amputation benefit of \$466.13. The petitioner's PPD rate, however, would be \$240.00 ($\$400 \times .60$). If we assume the petitioner experienced a traumatic amputation of 50 percent of the thumb and index fingers, the total payable in amputation benefits would be 59.5 weeks (half of the 119 total weeks) at a minimum rate of \$466.13. Assuming no dispute as to the accident "arising out of" and "in the course of" the employment, the employer would be obligated to *immediately* commence such payments, and the total amputation benefit payable would be \$27,734.73 (59.5 weeks \times \$466.13).

In such a case it is highly likely that the claimant will also pursue recovery based upon a percentage loss of use of the hand. Using the above example, an award for loss of use would be calculated based upon a PPD rate of \$240.00 a week and a percentage of the total weeks allotted for a hand, 205 weeks. Assuming the arbitrator awards 65 percent loss of use of the hand (133.25 weeks) at a PPD rate of \$240.00, the award would be \$31,980.00. If the employer is entitled to a credit for the 'amount' of the amputation benefit already paid (here, the \$27,734.73), the net owed to the petitioner is \$4,245.27.

The petitioners' bar, however, has argued that the proper credit for the prior amputation benefit should instead be based on the number of weeks paid and not the dollar amount paid. Under that

argument, the PPD award of 65 percent loss of use of the hand is 133.25 weeks. The prior amputation benefits were paid based on 59.5 weeks representing 50 percent loss of use of the thumb and index finger. Accordingly, the loss of use of the hand award leaves a net award after credit of 73.75 weeks payable at the PPD rate of \$240.00, thereby totaling \$17,700.00.

There is no case law directly supporting petitioners' counsel argument or rationale. Rather, they argue, in part, that principles of statutory construction require arbitrators to give effect to the intent of the legislature. According to the petitioners' bar, the minimum amputation benefit is higher than the minimum PPD benefit because the legislature intended to provide an enhanced benefit to the petitioner where amputations occur. That legislative intent, it is argued, should not be subverted by allowing a credit for the full 'dollar amount' paid as opposed to merely the number of weeks paid.

Petitioners have cited *Illinois Workers' Compensation Comm'n v. Hayes*, 11 I.W.C.C. 0124, 2011 WL 883854, in support of the proposition that the Commission affirmed the decision of an arbitrator where the credit for the amputation of two toes was less than the 'total dollar' the employer would have paid in automatic amputation payments. In *Hayes*, the petitioner sustained a fracture to his right great toe and amputations to his second and third toes. At arbitration, the parties *stipulated* that the employer would have a credit for prior PPD payments of \$8,645.78. If the employer had, in fact, paid 26 weeks of amputation benefits at the minimum amputation rate of \$461.78, the total paid prior to arbitration would have been \$12,006.28. The petitioners' bar, therefore, argues that *Hayes* stands for the proposition that the arbitrator must calculate the credit based on the 26 weeks of amputation benefit (at a PPD rate) as opposed to the total amount paid.

This argument, however, is not mathematically credible. If the credit had been calculated based upon 26 weeks at a PPD rate of \$299.28, the credit would have totaled \$7,781.28 as opposed to \$8,645.78. Since the amount of the credit was stipulated to by the parties, the decisions of both the arbitrator and the Commission failed to set forth the methodology used in arriving at the credit.

There are no reported decisions where the Commission or appellate court has squarely addressed a contested issue as to whether the amputation credit should be based upon the total dollar amount paid or the weeks paid multiplied by the applicable PPD rate. However, the Appellant Court Second District opinion in *Payetta v. Industrial Comm'n*, 339 Ill. App. 3d 718, 791 N.E.2d 682 (2d Dist. 2003), is instructive. There, the appellate court addressed the issue of whether an employer would be entitled to a credit for the prior payment of amputation benefits where the arbitrator later entered an award for a wage differential under Section 8(d)(1). The petitioner had argued that the employer should not be entitled to a credit as they failed to prove the "nature of the payments" and that the payments were similar to the payment of group medical benefits wherein no such credits are allowed. *Payetta*, 339 Ill. App. 3d at 722. The court was not persuaded by the petitioner's argument and allowed the credit. In addressing the calculation of the credit, the court noted that the Commission held that the employer was entitled to a credit for the statutory amputation payments further noting that the Commission stated that the employer should have a credit "on all amounts paid, if any, to or on behalf of the petitioner on account of said accidental injury." *Id.* at 720. The appellate court affirmed the awarding of the credit in the amount of \$50,436.11. Thus, the credit was calculated on the 'amount' paid, not the number of weeks paid.

Calculating the credit based upon the dollar amount paid as opposed to the weeks paid is, in fact, entirely consistent with Illinois precedent. Contrary arguments offered by the petitioners' bar are simply unsupported by the case law and Commission precedent.

About the Author

Bradford J. Peterson is a partner in the Urbana office of *Heyl, Royster, Voelker & Allen, P.C.* Brad concentrates his practice in the defense of workers' compensation, construction litigation, auto liability, premises liability and insurance coverage issues. In recent

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