

Workers' Compensation Report

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Are Temporary Partial Disability Benefits Subject to a Maximum Rate?

Employees are entitled to temporary partial disability (TPD) benefits when they return to work on a light duty basis and earn less than they would in the full performance of their duties. 820 ILCS 305/8(a). Section 8(a) of the Illinois Workers' Compensation Act, 820 ILCS 305/1, *et seq.*, provides:

When the employee is working light duty on a part time basis or full time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of the accident and the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working.

820 ILCS 305/8(a). TPD benefits operate very similarly to wage differential benefits under Section 8(d)(1), 820 ILCS 305/8(d)(1).

An unusual circumstance can arise when high wage rate employees are brought back to work on a light duty basis for a limited number of hours per week and at an hourly rate less than they previously earned in the full performance of their duties. If a claimant with a high average weekly wage is brought back to work in an effort to integrate the employee back into the workforce but is paid a lesser hourly rate (or salary) and is provided only a limited number of hours per week, then the employee might, in fact, be entitled to a temporary partial disability benefit that exceeds the employee's maximum total temporary disability (TTD) rate. Such circumstances could create a substantial disincentive to returning the employee to a light duty position.

Assume that a management level employee is earning \$130,000 a year. This employee would have an average weekly wage of \$2,500. The hourly equivalent of that employee's average weekly wage would be \$62.50 an hour. Assuming that employee was injured in January 2012, the employee's temporary partial disability benefit would be at a maximum of \$1,261.41 a week. If this employee sustains severe injuries that potentially have both physical and cognitive components, the employee could face many months of rehabilitation. If the employer wishes to bring that person back in a limited capacity in an effort to help integrate the employee back into the workplace, it is possible that the employer might face a situation where the TPD benefit exceeds the maximum TTD rate.

Assume the employer wishes to bring the employee back for 10 hours a week. Because the employee is not able to perform most functions of that employee's prior management position, the employee is placed in an hourly light duty position at \$20.00 an hour for 10 hours a week. This arrangement would generate earnings of

\$200.00 per week. Two-thirds of the difference of the employee's prior earnings (\$2,500) and current earnings (\$2,250) would be \$1,499.85 per week. Accordingly, the temporary partial disability benefit would exceed the maximum TTD rate of \$1,261.41. The financial exposure for the employer or insurer in bringing this individual back on a temporary partial disability basis is in fact *increased* when such limited light duty is provided at a lower hourly rate.

Is the temporary partial disability benefit subject to a maximum rate? Section 8(a) establishes the entitlement to TPD benefits and sets forth a rate of two-thirds of the difference between what the employee would have earned from the gross earnings in the temporary light duty position. Section 8(b)(4) establishes maximum TTD rates. Section 8(b)(4) also establishes a maximum wage differential rate. 820 ILCS 305/8(b)(4). The Illinois Workers' Compensation Act is silent, however, as to a maximum TPD rate. It is, therefore, possible that a high wage rate employee could be entitled to a TPD benefit that actually exceeds the applicable maximum TTD rate.

Public policy in Illinois should provide an incentive for employers to return employees to light duty, even if a limited number of hours are provided at a lower rate. The lack of a TPD maximum creates a disincentive to returning employees to work on a light duty basis under such circumstances.

The TPD benefit in all respects is a wage differential benefit. If an employee reaches maximum medical improvement (MMI) and is returned to work at a lesser rate of pay, the employee's wage differential under Section 8(d)(1) will be subject to a maximum. 820 ILCS 305/8(d)(1). Pursuant to Section 8(b)(4), that maximum will be 100 percent of the state average weekly wage. *Id.* § 305/8(b)(4). Assume this same employee returns to work on a full-time light duty basis in the same position in which the employee was drawing a TPD benefit; that is, the employee returns to work 40 hours a week in the \$20.00-an-hour, light duty position. The employee's average weekly wage prior to the occurrence was \$2,500. Once the employee reaches MMI, that employee is then permanently placed in the light duty position at the wage rate of \$20.00 an hour. The employee's weekly earnings would be \$800.00 a week, creating a reduction in total earnings of \$1,700.00 per week. The Section 8(d)(1) wage differential would be \$1,133.22, but it would be subject to the maximum Section 8(d)(1) differential of \$946.06, based on an occurrence arising in January 2012. Effectively, the employee's weekly benefit would fall from a TPD benefit of \$1,499.85 per week when working 10 hours a week to a Section 8(d)(1) differential rate of \$946.06 while working 40 hours a week once the employee reaches MMI. One must question whether such a result was intended by the General Assembly.

Although cases that would fit within the above hypothetical are rare, they nevertheless do exist. Such patterns will arise most often where an injury produces a cognitive deficit that precludes the high wage employee from returning to management duties previously held by the employee.

Respondents are left to argue before the Illinois Workers Compensation Commission that a maximum rate should be implied under the TPD benefit. It can be argued that the TPD benefit should be subject to the wage differential maximum as the TPD benefit is itself a wage differential. Unfortunately, as to the wage differential maximum rate, Section 8(b)(4) specifically limits the wage differential maximum to differentials calculated under Section 8(d)(1). In addition, the limits on compensation under Section 8(b)(4) do not expressly incorporate TPD benefits as subject to the maximum rates established.

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 years, Brad has become a leader in the field on issues of Medicare Set Aside trusts and workers' compensation claims. He has written and spoken frequently on the issue. He was one of the first attorneys in the State of Illinois to publish an article regarding the application of the Medicare Secondary Payer Act to workers' compensation claims "Medicare, Workers' Compensation and Set Aside Trusts," *Southern Illinois Law Journal* (2002).

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