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Temporary Disability in 2007 New Rates, New Dates, and New Issues

As all seasoned claims examiners know, when temporary disability benefits are paid more than two years after the date of injury, the payments are to be governed by the rates in effect on the date the payments are made. This automatic "two year increase" is mandated by Labor Code Section 4661.5. Its intent was to make sure that injured workers get the benefit of maximum rate increases while on extended temporary total disability.

The labor code requires that temporary disability benefits be paid at a rate of 2/3 of average weekly earnings, subject to minimum and maximum limits (LC4653). Over the years the legislature has made changes to the maximum legally recognizable earnings rate, but it has been a very long time since there

has been any legislated change to the formula by which indemnity is calculated. It remains at 2/3 of average weekly earnings.

The problem is that SB 749 (signed into law by Governor Gray Davis in 2003) provided for potential automatic increases in the maximum recognizable average weekly earnings for the purpose of calculating TTD payments. That legislation tied increases in maximum allowable earnings to increases in the "state average weekly wage". That term is further defined to mean the average weekly wage paid by employers to employees covered by unemployment insurance. For the first time since SB 749 was enacted, there has been an increase in the reported state average weekly wage. The increase was 4.96% and

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according to the DWC, this will bring the maximum recognizable weekly earnings to \$1322.49 from its current maximum of \$1260.00. That means a new maximum TD rate of \$881.66 for dates of injury on or after 1/1/2007. It also affects the *minimum* TTD rate, rising to \$132.25 from its present \$126.00.

However, this *also* means that, for any open cases where TTD is being paid at maximum or minimum limits and we are more than two years post date of injury, the payments must be increased when they are made after January 1st, 2007.

Examiners will be required to exercise due diligence to make sure the benefit payments are increased and to avoid penalties under LC 5814 for unintended underpayments.

Although the two year “cap” on TTD payments may impact some of these cases, there are a number of cautionary notes, not the least of which is the date from which the two years is counted. For a complete discussion of this issue, see our article “*Temporary Disability: Can 104 Really Be More?*” in the [May 2006 edition of Legal Briefs](#). Additionally, there is now some consensus that, in 2007 there will be serious consideration for modifying the TTD cap, either by direct legislation or by AD rules which “interpret” the application of the statute. The most likely target will be to carve exceptions for cases where TTD is prolonged during treatment disputes

(especially 2nd opinions regarding proposed surgery).

While we are at it, we need to point out that it is not just temporary disability rates that will be affected after January 1st:

Life pension rates and total permanent disability benefits (paid at the TTD rate for life) for dates of injury on or after January 1, 2003 (the date SB 749 went into effect) must also be increased by 4.96%.

This is going to require some careful calculation. No simple chart lookups here - We will all just have to “do the math!”

This also means some upward pressure on overall claims costs, although statistically the effect should be relatively small in the face of the other significant decreases already enjoyed by carriers and employers in California due to the passage of SB 899 in 2004.

Other issues have resurfaced with regard to the calculation and payment of TTD that have recently been addressed by the courts. Not the least of these has been the age-old riddle of how to handle average earnings calculations (and thus the TTD benefit calculation) for seasonal workers. The debate has been whether it was proper to average the *annual* earnings and pay 2/3 of that calculation, or in the alternative to treat the job as though it were temporary employment, and cut the TTD benefit when the “season” ends. Either method arguably addresses the

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premise that TTD benefits are supposed to be an equitable wage replacement mechanism.

On September 1st of this year the California 5th Appellate District Court issued an opinion in *Signature Fruit v. WCAB (2006) 71 CCC 1044*, holding that during the off season, where there is evidence that the employee has no off-season history of earnings and no evidence that he or she would have been working absent the industrial injury, no TTD is payable. TTD payments “in season” would be based on average earnings “in season.” Interestingly, the Court commented that the case presented “a unique twist” on what would have otherwise been “a fairly simple calculation.” Simple? Obviously these justices never had to sit at a claims desk!

If you have questions about the application of these principles to any of your open files, feel free to give us call.



We Wish All Our Readers A Most Happy Thanksgiving

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