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# EARNINGS AND TEMPORARY DISABILITY: OLD CONUNDRUMS, NEW COMPLICATIONS

In 2006 the Fifth District Court of Appeal expressed the opinion that the calculation of the temporary disability benefit was “a fairly simple calculation.” *Signature Fruit v. WCAB (2006) 71 CCC 1044*. We commented shortly thereafter that “Obviously these justices never had to sit at a claims desk!” *Legal Briefs*, November 2006. As it turns out, the correct calculation of earnings as a basis for temporary disability, and the provision of temporary disability at the correct rate, are still some of the most complex issues faced at the claims desk.

### **The Ins and Outs of Earnings**

Indemnity payments are based on 2/3 of an injured worker’s “average weekly earnings.” It was most likely this seemingly simple concept that prompted the comment in *Signature Fruit*. On the face of it, it seems straightforward. Would that it were so.

Temporary disability payments are conceptually designed to replace lost earnings while unable to work. The threshold question is therefore “But for the injury, what would this individual now be earning?” This, however, begs a certain amount of predictability based on *some* evidence which can be deemed a reliable predictor of future pay.

### **Using Pre-Injury Earnings**

The common starting point is that the best predictor of future earnings is past earnings. The common response is to therefore ask the employer to provide a wage statement showing the 52 weeks of earnings prior to the injury, and to then use the average of those numbers to predict future earnings, 2/3 of which is to be replaced by temporary disability during recovery. There are a number of pitfalls, however, which can catch the examiner unaware.

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First, there is the issue of a change in earnings situation within the 52 week period, either due to hourly wage increases or some other factor which demonstrates that only a certain portion of a time period should be utilized in the mathematical averaging. If an employee gets an hourly wage increase in week 26, for example, it is required that the hours worked be averaged over the 52 weeks, but multiplied by the last hourly rate. Likewise, a wage *decrease* (not uncommon these days) would be good evidence that the average weekly earnings would be *lower* than the 52 week average of all earnings.

### **Using Earning Capacity**

More subtle but equally complicating the process is the question of post-injury earnings. If the employee continues to work after the date of injury and gets a raise (but is not making the maximum statutory wage) and then goes off work, which earnings become the basis for calculating the TD benefit? Even more difficult: What if the employee goes off work on the date of injury but was employed pursuant to a contract that guaranteed periodic wage increases on specific dates? Does that affect the earnings calculation even though the employee was subsequently not able to enjoy the raise because of his or her disability leave?

In 1962 the California Supreme Court published its decision in the landmark case of *Argonaut vs. Industrial Accident Commission* (Montana) , 27 CCC 130. The Court referenced what is now LC §4453(c) as the statute which provides four alternative methods for calculating earnings. Which method one selects is to be determined by the

number of days and hours worked prior to the injury, or whether there are two or more concurrent employments involved, or if the earnings are irregular, or (and this is the “gotcha”) where “for any reason the foregoing methods of arriving at the average weekly earning cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100% of the sum which *reasonably represents the average earning capacity* of the injured employee....” Said the *Montana* Court: “Earning capacity, for the purposes of a temporary award may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse.”

In *Goytia vs. WCAB* (1970) 35 CCC 27, the Supreme Court *en banc* ruled that it was not only permissible but required that post injury earnings be considered as part of the process of determining earning capacity as a basis for indemnity payments. That earning capacity may be clearly anticipated as of the date of injury where there is a union contract in place which provides for non-contingent pay increases on specified dates subsequent to the start of temporary disability.

In *Kaiser Foundation Hospital/Santa Rosa Medical Center, Petitioner vs. Workers Compensation Appeals Board* (2000) 65 CCC 567, the Court of Appeal enunciated the principal that such anticipated and guaranteed

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pay increases related back to earning capacity as of the date of injury or start of TTD. “If the employee's actual earnings do not reasonably and fairly reflect his or her true earning power, average weekly earnings may be determined on the basis of his or her earning capacity at the time of the injury. Labor Code § 4453(c)(4). In *Lujan vs. WCAB* (1985) 50 CCC 693, average weekly earnings were required to reflect post injury earnings, which exceeded actual earnings at time of injury. In *Thrifty Drug Stores, Inc. vs. WCAB* (Kaye) (1979) 44 CCC 809, the average weekly earnings were adjusted to reflect wage increases that would have been received under a union contract had applicant not been injured. The *Kaye* approach remains valid to calculate earning capacity for wage increases or decreases during the period of temporary disability that could be "reasonably anticipated" at time of the injury. *Grossmont Hospital vs. WCAB* (Kyllonen) (1997) 62 CCC 1649. This rationale is all the more appropriate here, where the record establishes that the practice of regular union-negotiated wage increases was in effect and “reasonably anticipated” at the time of injury, and applicant actually returned to work and received pay at the higher rate before having to again go off on temporary disability.”

### **Seasonal Employment**

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

The 5th Appellate District Court issued its opinion in *Signature Fruit vs. 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.”

### **Hofmeister and the Indemnity Rate**

Labor Code §4661.5 expressly requires that when a payment of temporary disability after two or more years (from the date of injury), the weekly earnings amount of such payment shall be at the statutory rate on the date of "payment."

Thus, where temporary disability is paid more than two years from the date of injury, the statutory rates governing payment are those in effect on the date the check is mailed. *Hofmeister, v. Workers Compensation Appeals Board et. al.* (1984) 49 CCC 438.

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It is important to note, however, that this statute has nothing to do with earnings, or the calculation of earning capacity. It only refers to the legislated rates (minimum and maximum) in effect more than two years post injury. It will not prevent, for example, an increase in TTD indemnity as of the date of a contracted pay increase where the injured worker's earnings were not already at maximum. It will, by contrast, prevent an increase in indemnity payments for an employee whose earnings were at maximum and where by statute (or due to SAWW increases) the indemnity rates are increased during the first two years following the date of injury.

### **Speaking of SAWW**

Once again, there has been an increase in the State Average Weekly Wage (SAWW), which in turn will affect the maximum and minimum indemnity rates payable for temporary disability. The new maximum rate: \$986.69, up from the current \$958.01. This is an increase of about 3%. Minimum payments will be \$148, up from the current \$143.70.

The increases take effect on January 1, 2010. They would apply (as discussed above) to any situation where temporary disability is being paid more than two years after the date of injury, and also to those cases where the date of injury occurs in 2010. For a more complete discussion of the application of SAWW to various benefits, visit our website at [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com) and select "Recent Events," and then open our July, 2009 article, "The Cola Wars" and our

October 2007 article "Some Things You Need to Know for 2008."

Article by Howard Stevens, Orange Office

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