W&
DB

Calculating Temporary Partial Disability Benefits

Part two of a three-part series regarding common pitfalls when calculating indemnity benefits

A. Jacob Perkinson, Esquire

August 1, 2018

When a claimant returns to work earning less than her pre-injury average weekly wage, she is typically entitled to temporary partial disability benefits (TPD), unless the claimant is an undocumented worker, in which case, she is not entitled to TPD. The TPD rate is calculated by taking two-thirds (⅔) of the difference between the claimant's pre-injury average weekly wage and the average weekly wage she earns once returning to work. Va. Code § 65.2-505 explains that TPD is a "weekly" benefit, meaning it is paid on a weekly basis. However, the TPD rate is often a moving target. A claimant's earnings can vary from week to week making calculating TPD benefits a cumbersome and costly task over time. Fortunately, the Commission does not always require weekly adjustments to the TPD rate.

If the claimant will receive TPD for 13 weeks or less, the TPD rate can be calculated by averaging her gross wages earned during the first two weeks of returning to work. If the claimant will receive TPD for longer than 13 weeks, the TPD rate can be calculated by averaging the gross wages earned during the preceding 13-week period. In this situation, the TPD rate will need to be modified every 13 weeks. The Commission will typically use the method that maximizes compensation. In some situations, the Commission may require weekly modifications of the TPD rate without regard to efficiency or cost consideration.

Remember, if the claimant is under an award for ongoing TPD, you are required to continue paying TPD at the rate established by the Commission. The Commission does not allow you to unilaterally change the TPD rate based on the claimant's change in earnings without requesting that the Commission also change the outstanding award. If you want to decrease the TPD rate, you must either file an employer's application for hearing or an award termination and an award agreement form reflecting the new rate.

It is also important to remember the 90-day rule applies to both employers *and* claimants; you can only seek a retroactive adjustment of the TPD rate for a 90-day period preceding the filing of an application seeking such adjustment. Therefore, it is very important to regularly review ongoing wages and TPD rates and make any adjustments in a timely manner.

Lastly, if the claimant returns to work earning an amount less than her pre-injury average weekly wage, she may have a duty to market her residual work capacity before being eligible for temporary partial disability benefits.

Please call our office if you have any questions about calculating or modifying TPD.

Keep an eye out for the third installment in this three-part series regarding calculating indemnity benefits, which will focus on permanent partial disability benefits.

Whitt & Del Bueno, P.C.
4200 Innslake Drive, Suite 201
Glen Allen, Virginia 23060
(804) 864-9660
www.whittanddelbueno.com