



# WORKERS' COMPENSATION COMMENTARY



May 2000

Volume 7 Issue 3

## *The Arcane Alchemy of Temporary Disability*

*By: Dennis J. Baker, Esq.*

TD...we deal with it every day, it looks and sounds so simple. Indeed, aspects are, but there are some twists and turns that deserve mentioning and even the most sophisticated claims professional needs a tune-up on the basics.

When I selected the above topic, my initial thought was that we should be able to provide a straightforward and precise compendium for the workers' compensation professional to follow and understand. I thought that this would be an easy task, because I would merely focus on the provisions of Labor Code §4453. I have read this Labor Code section numerous times in the past, (both for fun and due to litigation needs) and I now have to admit that, on close scrutiny, Labor Code §4453 taken as a whole, as well as its individual parts, is far from a model of clarity. My objective is to provide some fine-tuning, and perhaps a better understanding for calculating average weekly wage. This article consists of a brief background and overview of Labor Code §4453, an analysis of different employment situations for calculating weekly earnings, and a discussion of temporary total and temporary partial disability.

### BACKGROUND AND OVERVIEW OF LABOR CODE §4453

This Labor Code Section is entitled "Computing Average Weekly Earnings". Labor Code §4453 was enacted in 1937 when the legislature overhauled the Labor Code, codifying and revising the law relating to labor and employment relations. This particular Labor Code Section provides four methods for computing average weekly earnings as set forth in sub section (c), with the first three based on actual earnings. The fourth method applies to employment situations where an individual is employed for fewer than 30 hours per week.

During the past 63 years, the legislature has made no change in the four methods for computing average weekly earnings. The fourth method for calculating earnings has spawned a great deal of litigation, which will be discussed in some detail below. I will now set forth an analysis regarding temporary disability benefits as calculated on actual weekly wage basis, and a separate analysis for temporary disability benefits as calculated on the basis of average weekly wages.

### ACTUAL WEEKLY WAGE ANALYSIS

In situations involving long-term full time work-

ers, we calculate the temporary disability rate by taking 2/3 of the actual weekly wage. Of course the actual weekly wage can be increased or supplemented by overtime pay, bonuses, gratuities, board and lodging. When such additional compensation benefits are provided to an employee, then the additional compensation benefits will be considered as earned for services rendered throughout the year, and therefore are to be pro rated over the entire years earnings. For example:

If an employee earns \$40,000 a year, and his earnings are supplemented with a \$10,000 bonus for that year, then his total earnings are \$50,000. These total earnings will then be divided by 52 weeks to compute to a weekly earnings figure of \$961.54. Thereafter, we would take 2/3 of this amount to establish the applicant's temporary disability rate.

The second method for calculating weekly earnings involves a situation where the applicant is working for two or more employers at the same time. We then need to calculate the applicant's total amount of earnings from all employers, but the earnings from employers other than the employer in which the injury occurred may not be taken at a higher rate than the hourly rate paid by the employer where the injury was sustained. For example:

The employee works for companies A and B. The worker's injury occurs at Company A where he earns \$7 an hour. As a result of the injury, the worker is unable to work for either company. At Company B the worker earned \$10 per hour. The weekly wage for temporary disability purposes will be computed based only upon the \$7 per hour wage for the total number of hours worked at both Companies, A and B.

A third method for calculating weekly earnings is utilized when there is an irregular wage rate, such as piecework, commission pay, monthly or quarterly pay. Under those circumstances, we must calculate the weekly wage by taking into consideration an average for a period of time not to exceed 52 weeks. Thus, if there is situation where the applicant is paid a monthly salary, the actual weekly wage can be computed by multiplying the monthly salary by 12 and dividing the result by 52.

Well, that is all pretty straightforward stuff and little disagreement will be encountered with anyone who is acquainted

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with the basic rules. Now, however, it is time to discuss an element of the wage loss issue that is subject to different opinions and has spurred most of the litigation that has discussed the issue of earnings. First, a definition is required.

#### AVERAGE WEEKLY WAGE

Average weekly wage is a term of art referring to an injured worker's earnings base for earnings capacity that is used to compute compensation benefits. The fourth method for calculating earnings is based upon an average weekly wage, and involves part-time employment situations. It would definitely be a cost saving measure if for each part-time employment situation, specifically situations where employees work less than 30 hours a week, we simply took the actual weekly wage and multiplied by 2/3. However, the fourth method involves determining earning capacity, which, as indicated, has created a fair amount of litigation.

A landmark case, *Rubalcava (1990) 55 CCC 196*, provides a good discussion regarding assessment of earnings capacity. Briefly, this case involved a 19-year old part-time restaurant employee who was earning \$4 an hour at the time of her date of injury. Ms. Rubalcava was also a full-time student with a definite orientation towards a career in accounting. The Court found that the applicant had the capability of achieving her career goal; hence she was considered to have an earnings capacity to warrant temporary disability benefits at the maximum rate instead of a less than maximum rate based entirely upon her earnings at the restaurant. In short, the Court concluded that the applicant's part-time earnings, while working her way through school at the time of her injury, were not indicative of her earning capacity.

A similar analysis for earning capacity may arise in situations involving seasonal employment. Seasonal employees are common in California. The major industries in which seasonal employment is found are education, recreation, and agriculture. If the evidence clearly establishes that the injured worker's sole employment and earning capacity is derived from a particular line of seasonal employment, then there is no loss of future earning capacity and we simply look at applicant's actual earnings for calculation of a weekly temporary disability rate.

Seasonal employment situations have raised the issue of whether or not temporary disability benefits are due during the off season. The factors involved in a determination as to whether or not temporary disability benefits are payable during the off season are: whether the employee was compensated in the past by the employer during the off season, whether there is any evidence of available work or a history of employment with another employer for the applicant during the off season.

The occupation of schoolteacher can fit within the definition of a seasonal employee when a teacher only works during the school year and takes the summer months off. Exclusive of Union contract provisions that may qualify teachers as year around employees, an appropriate fact scenario may disqualify a teacher from receiving temporary disability benefits during the summer months.

In the case of *Torrance Unified School District v WCAB 63 CCC 112*, even though the Court found that the injured teacher was entitled to temporary disability benefits dur-

ing the summer months, the court set forth various factors that might prevent such a finding in the future. In the *Torrance* case, one of the defendant's litigation errors was stipulating that the applicant was a maximum earner, because the Court interpreted the stipulation to establish that applicant's wage payments were continuous throughout the year. I believe that if the evidence establishes: that a teacher is only paid during a nine or ten month school year period, that the temporary disability benefit rate should be calculated by using a 9 or 10-month period rather than a full year period; then, under those circumstances, a defendant should be successful in arguing that the teacher is not entitled to temporary disability benefits during the off season or summer months. This assumes, of course, that there is no evidence of prior off-season earnings and no evidence of reasonably expected off-season earnings in the future.

OK, that wasn't so tough! Want a really contentious area? Try figuring out temporary partial disability entitlement. This is challenging, not only with regard to determining who is TTD and who is TPD but integrating the compensation indemnity with wages being paid on a wage loss from the former earnings.

The definition for total temporary disability is: the period of time following an injury during which the employee is recovering from the effects of the injury and is not able to work. During the healing period, the employee's injuries are reasonably expected to be cured or materially improved with proper medical attention. When the employee is totally temporarily disabled, the employee will receive temporary disability benefits based upon 2/3 of actual earnings or average weekly earnings.

Temporary partial disability occurs when the employee has been released by the treating physician to return to some form of modified work before the healing period is over. If the employee refuses an offer of medically feasible modified work, then, such a refusal will be a basis for terminating temporary disability benefits.

If the employee returns to work and sustains a wage loss, the employee will be entitled to partial indemnity (i.e., partial temporary disability) on a wage loss basis in addition to his earnings during his recovery. We have found computing temporary partial disability to be particularly vexing problem for many claims professionals. (Not to mention attorneys!)

To attempt to shed some light on this subject, an example is provided below based upon the present maximum temporary disability rate of \$490 a week, which, in turn, is derived from a maximum weekly earnings amount for compensation purpose of \$735 a week. (Two-thirds of \$735 is \$490, the current maximum temporary disability rate.) If a worker earns more than \$735 a week, the temporary disability rate remains at a maximum of \$490.

In order to calculate temporary partial disability, we need to consider the applicant's average weekly earnings with a cap at \$735, and subtract the weekly amount earned during the applicant's partial temporary disability. The net figure is the wage loss, and the final calculation is to take 2/3 of that wage loss to establish the amount of partial temporary disability owed. The following example should provide further clarification:

An applicant earns a \$1,000 a week on the date of injury. He is released to return to modified work, which results in reduced earnings, because of reduced productivity, or the number of hours worked. During

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the period of temporary partial disability, the applicant earns \$500 a week. The wage loss is computed by taking the maximum earnings for the maximum temporary disability rate, since the applicant is a maximum earner and subtracting the partial earnings. The calculation is \$735 minus \$500 equals \$235 wage loss x 2/3 equals a partial temporary disability rate of \$156.66.

In the following example the applicant would not receive any partial temporary disability benefits:

The applicant's average weekly wage is still \$1,000 a week, and when he returns to work on a modified basis, he earns \$735 a week. The applicant has now earned the same amount as the maximum average weekly wage for maximum temporary disability of \$490 a week, and therefore the applicant does not qualify for any temporary partial disability benefits, even though he has a wage loss of \$265.

There is a statutory limit of 240 compensable weeks within a period of five years from the date of injury with respect to payment of temporary partial disability benefits. Thus, an applicant is not entitled to temporary partial disability benefits after receiving such a benefit for more than 240 weeks, or after five years from the date of injury.

There is no statutory limitation for receipt of temporary total disability benefits, assuming that the Board still has jurisdiction.

For dates of injury after January 1, 1991 there is no minimum rate for temporary disability benefits. For instance, when an applicant earns less than \$126 a week, his temporary disability rate will equal his actual weekly earnings, so that if the applicant earns \$50 a week, his temporary disability rate is \$50.

A defendant's liability for total temporary disability benefits will terminate under any one of the following circumstances:

1. The injured worker returns to work.
2. The injured worker is released to return to modified work and the employer provides modified work.
3. The injured worker is found permanent and stationary.
4. The injured worker retires from the labor market, and the decision to retire was not as a result of the industrial injury.
5. The injured worker has died.

CONCLUDING REMARKS

I truly empathize with the claims examiner's responsibility, of making a prompt decision, to correctly calculate an injured workers weekly wage in order to pay at the correct temporary disability rate. The task is truly complex when you have seasonal employees, part-time workers, commissions and

collateral benefits to take into consideration. I believe in significant admitted injury cases, it is better to make an overpayment error on the temporary disability rate rather than to risk the possibility of a penalty situation for an underpayment. Under circumstances where a defendant has over paid TD at a higher rate than the applicant is entitled to, a credit may be claimed against permanent disability. Such a credit is within the discretion of the WCAB, but will generally be regarded favorably.

When I commenced this article, I was aware that I could probably write a mini treatise with case law citations and statutory analysis. I had to do a considerable amount of editing to condense this topic into our Newsletter format. Consequently, I enthusiastically invite your inquiries, comments, and feedback.

*NEXT NEWSLETTER:*

*Some tips on dealing with lien claimants.*

*Report from cyberspace:*

*Our website is under construction, boy, this takes a lot longer than we thought... Stand by for our launch in the next 60 days (I'm told!)  
J. Martin*

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*This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.*