

## Managing Claims for TTD and TPD Under Florida's Post-October 2003 Statute

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Florida's workers' compensation statute provides for an employer to compensate an employee who suffers a compensable accidental injury in the course and scope of his employment during his recovery period, if the compensable condition is severe enough to cause the employee a disability that results in lost wages. These indemnity benefits are payable not to exceed an employee's date of maximum medical improvement or 104 cumulatively paid weeks and are classified as temporary disability benefits, of which there are two types: temporary total (TTD) and temporary partial (TPD).

While "disability" is statutorily defined as "incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury," it has been left to the courts to determine whether the employee's accidental injury is the cause of the employee's claimed subsequent wage loss. This article will address strategies available to employers, carriers, and their servicing agents under the post-October 2003 Florida workers' compensation statute that can enable them to realize reduced payouts by addressing this issue of causation.

### **TTD and TPD**

TTD is payable where an employee's compensable disability is total in character, but temporary in quality; TPD is payable when the disability is partial and temporary. In claims of TTD the employee bears the burden of proving an inability to work and earn gainful employment is a legal result of his compensable injury. In claims of TPD, the employee must demonstrate that he has been medically released to return to work and that his compensable work restrictions prevent him from earning at least 80 percent of his pre-injury wages, subject to the maximum compensation rate.

In either instance, the employee must demonstrate his compensable injury, its occupational cause, as well as any resulting manifestations or disability, to a reasonable degree of medical certainty, based upon objective relevant medical findings. The compensable injury also must be the major contributing (more than 50 percent) cause of any resulting injuries. Accordingly, lay testimony alone is insufficient upon which to support an award of temporary indemnity benefits.

### **Legal Issues and Strategies**

The judge of compensation claims (JCC), in determining whether to award temporary disability benefits, will consider the facts of a claim within the totality of circumstances in determining whether the employee met his burden of showing that his compensable injury is the cause of his wage loss. Under this test, courts have awarded temporary indemnity benefits despite employer assertions of the employee's voluntarily limiting his post-accident income, such as by refusing suitable employment, leaving employment or being terminated from employment for misconduct. Employer/carriers also face obstacles in claims management with employees who lack transportation to work, have become incarcerated, or prove to be illegal aliens.

Employers and carriers accordingly should undertake all efforts to overcome these challenges so as to properly manage claims for temporary indemnity benefits. Such efforts include improved communication between the employer, carrier, health care provider, and the employee and his attorney, if represented.

While the employee might present evidence of an unsuccessful job search, that alone will not support an award for temporary indemnity benefits. The employee also may present admissible medical opinion testimony as to the employee's work restrictions and their relationship to the claimed accidental injury. In preparation of its defense, the employer/carrier regularly should request production of documentation of an employee's job search to review whether the employee is looking for work within the assigned restrictions and, if so, whether the job search is conducted in "good faith."

### **Critical Records**

Likewise, DWC-19s (Employee Earnings Reports) should be sent to the employee monthly to inquire into post-accident employment and wages. An employee who fails to return timely the completed form (within 21 days of receipt) may have indemnity benefits suspended, pending their submission. The information from these reports can be a valuable source of post-accident discovery, leading to additional post-accident employer information. Where the employee alleges that he was terminated from post-accident employment because of his injuries, such documentation can prove important in rebutting the employee's allegations.

Properly conducted background investigations of the employee can reveal pre-existing conditions that could lead to issues of compensability and major contributing cause, or issues of mitigation such as apportionment, or possible claims for contribution, exoneration, or indemnification against preceding employers/carriers. The investigation also could determine whether an employee is receiving unemployment or Social Security disability benefits or proceeds from an employer-provided disability or pension plan that might allow for an offset against or otherwise affect the provision of workers' compensation payments.

The employer/carrier must prove its affirmative defenses with the presentation of supporting evidence, including its own medical evidence. Evidence of an employee's work restrictions and disability status is obtainable from the employee's authorized health care providers and the employer/carrier's independent medical examiners, as Florida's workers' compensation statute's announced policy, with respect to its administration, provides for "reasonable access to medical information by all parties." Medical evidence also should demonstrate that the work available for the employee has been approved by the authorized doctors and is within the assigned compensable work restrictions. The employer/carrier also should be prepared to demonstrate that the employee knew of his disability status and need to obtain suitable employment; otherwise, benefits will be awarded merely because the employee was unaware of his need to look for work.

As the employee bears the burden of proof for each biweekly period for which temporary benefits are claimed, the failure of an employee to secure an award of temporary indemnity benefits for one biweekly period does not bar him from successfully obtaining benefits for subsequent weeks. Thus, even where an

employee stops working for “an extraneous reason,” such as leaving suitable employment without “just cause,” a subsequent unsuccessful job search still can provide the basis for an award of temporary indemnity benefits. Even where an employee is terminated for “misconduct,” temporary indemnity benefits could still be awarded if the employee can demonstrate that his lost earnings are a result of his compensable injury.

### **Employment Issues**

Employers must document well and be prepared to testify to the circumstances surrounding an employee’s termination from employment and the “suitability” of the work the employee left behind, as well as the wages the employee abandoned, as such will become important facts for the JCC to consider. This evidence can be found in records of post-accident earnings, and supervisor testimony. Such could establish the employee’s capability of earning his pre-accident wages despite his compensable injuries.

Records used in unemployment proceedings should be preserved, as they are persuasive in the workers’ compensation analysis. These records could provide significant information in addressing whether the employee properly was terminated from post-accident employment or whether he left employment with “just cause.”

An employee’s involuntary confinement in a jail, prison, or other institution could terminate entitlement to indemnity benefits, but only if the employee does not have statutorily defined dependants. If the employee can demonstrate the requisite legal causation between his compensable injury and his lost wages, and if he has statutorily defined dependants, indemnity benefits would need to continue.

Occasionally an employee asserts that he cannot return to work because he no longer has transportation available to take him to and from work. The inability of an employee to secure transportation should not serve as a basis upon which indemnity benefits are awarded, unless perhaps there is sufficient evidence that the employee’s post-accident restrictions preclude the employee from driving. Otherwise, the employee’s inability to secure transportation likely is not causally related to his disability. Of course, inquiry should be made into whether the employer provided pre-accident transportation to the employee and, if so, whether such affects the legal issue of causation.

### **Alien Eligibility**

Illegal aliens are eligible to receive workers’ compensation benefits under Florida law. However, where the employee’s inability to work is not a result of his compensable disability, but instead is due to his legal residency status, indemnity benefits are not payable as the employee is incapable of establishing the legal relationship between his compensable work restrictions and his lack or declined earning capacity.

An illegal alien must present sufficient evidence that it is his disability rather than his immigration status that precludes him from working. In such instances, such as where the illegal alien is on a no-work status, indemnity benefits still may be payable. Even still, an employer might be estopped, or legally precluded,

from denying benefits on the basis of the claimant's illegal work status if the employer knew or should have known the claimant was illegally employed.

While employers currently do not bear a burden of verifying the legality of an employee's work status, an employer will not be allowed to knowingly employ illegal aliens so as to avoid exposure in workers' compensation claims.

### **Conclusion**

Employers and carriers face many challenges in properly managing payments of temporary benefits, despite the October 2003 amendments to Florida's workers' compensation statute. With courts applying a "totality of circumstances" analysis in deciding whether to award temporary indemnity benefits, employers and carriers must ensure effective communication remains among all key actors in the workers' compensation system.

The efficient securing of relevant information will ensure employees receive benefits to which they are eligible and provide for the establishment of defenses to guard against awards of employee benefits to which they otherwise are not eligible.