

## **The IDC Monograph**

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# **Illinois Temporary Total Disability: Workers' Compensation Theory and Issues**

## **I. Introduction**

Workers' compensation legislation originated in Prussia in the 1880s. Following the Prussian workers' compensation legislation, workers' compensation statutes were thereafter enacted in 20 additional countries: Austria, Norway, Finland, Great Britain, Denmark, France, Italy, Spain, South Australia, New Zealand, Greece, Netherlands, Sweden, British Colombia, Luxembourg, Belgium, Russia, Queensland, Cape of Good Hope, and Hungary.<sup>1</sup> In 1911, ten statutes were enacted in the United States in the following jurisdictions: Washington, New Jersey, Wisconsin, Ohio, Kansas, California, Nevada, New Hampshire, Massachusetts, and Illinois.<sup>2</sup>

One of the basic concepts of most workers' compensation models in the United States is that of temporary total disability ("TTD"). Some jurisdictions have bright-line tests to resolve TTD issues. Other jurisdictions, like Illinois, do not.

## **II. Jurisdictional Survey of TTD Issues**

Four traditional classifications of disabilities have been identified: (1) temporary total; (2) temporary partial; (3) permanent partial; (4) permanent total.<sup>3</sup> Temporary total and temporary partial disability are ordinarily established by direct evidence of actual wage loss.<sup>4</sup>

In the usual industrial injury situation, there is usually a period of medical healing and complete wage loss during which TTD is payable.<sup>5</sup> Issues regarding TTD include those situations in which a claim for TTD does not completely coincide with actual loss of wages. For example, in *International Paper Co. v. McCoogan*,<sup>6</sup> the claimant suffered a thumb injury. During a portion of the healing time, the claimant was a full-time student and neither sought nor performed full-time employment. The employer appealed an award of TTD benefits to the employee for the duration of the thumb injury. The court held that the claimant was entitled to TTD payments for the entire healing time and rejected the employer's contention that benefits were intended only for actual wage loss.

Courts in many jurisdictions, including Illinois, have ruled that permanent benefits may not be awarded until the claimant has reached the maximum level of medical improvement (“MMI”) from work related injuries. For example, in the *City of Miami v. Wright*,<sup>7</sup> it was determined that MMI was not reached as long as there was a need for further psychiatric treatment. In another Florida decision it was held that permanent benefits may not be awarded before the claimant reaches a maximum level of medical improvement from both the psychiatric and orthopedic injuries the claimant suffered.<sup>8</sup>

Another issue is whether the possibility of future surgery precludes a finding of maximum medical impairment. In a Kansas case, the court held that the mere possibility of future surgery did not convert a permanent injury into a temporary disability.<sup>9</sup>

In *Gardner v. Beatrice Foods*,<sup>10</sup> the court considered whether a claimant is automatically entitled to TTD benefits if he is awarded rehabilitation benefits. The claimant sustained a low back injury. He was released to return back to work with a permanent disability rating of 12 percent of the body-as-a-whole, and medical testimony stated that the claimant could work at a medium-heavy work level.

The claimant had reached maximum medical recovery and had been released to return to work with the 12 percent permanent-disability rating, and nothing further was available by way of medical treatment. The claimant argued that since he was awarded rehabilitation benefits, he was also entitled to receive TTD benefits. The Nebraska Supreme Court rejected this argument, noting that while a claimant in Nebraska is ordinarily entitled to TTD and living and travel expenses during rehabilitation, the claimant had not undergone rehabilitation despite the rehabilitation award. The court noted that it was unable to determine if the claimant was entitled to further TTD benefits because he had not formulated a vocational plan and goals.

Other states focus directly on permanency rather than on MMI. For example, in *State ex rel. Bryant v. Pinkertons, Inc.*,<sup>11</sup> the claimant requested 200 weeks of TTD benefits before the institution of permanent disability benefits. The court noted that there must be a medical examination and if the medical examination shows that the disability has become permanent, then the change to permanent disability benefits should be made at that time.

Another issue is whether an individual is entitled to TTD benefits when there has been a return to work in a different capacity. In *Smith-Gruner v. Yandell*,<sup>12</sup> the claimant had held several jobs after becoming disabled, and his last position was eliminated due to lack of funding. The claimant testified that he was physically capable of continuing the work. The court held that an award of TTD was not supported, stating that when a person works in any capacity subsequent to an injury, there is a refutable presumption that he is not totally disabled and therefore not entitled to total disability benefits.

In *Covarubias v. Decatur Casting, Division of Hamilton Allied Corp.*,<sup>13</sup> the petitioner alleged that he was permanently and totally disabled because he was unable to return to work of the same kind and character as his pre-injury job. The court noted that TTD benefits were intended to compensate the petitioner for the treatment period immediately following the injury. Once the injury has reached a permanent and quiescent state, the treatment period ends, and the extent of permanent injury is assessed for compensation purposes. In Indiana, once the injury has stabilized to a permanent state, temporary disability ceases and the extent of disability is determined pursuant to the schedule as identified in the Indiana Workers’ Compensation statute.

In Texas, the approach has also been tied to MMI. In *Rodriguez v. Service Lloyds Ins. Co.*,<sup>14</sup> it was noted that the statute determines that the date of MMI is fixed when an examining doctor certifies that no further medical recovery or lasting improvement can reasonably be anticipated. Until an employee reaches MMI, he or she may receive temporary income benefits.

In Missouri, it has been held that the purpose of TTD awards is to cover the employee’s healing period, so the award should only cover the time before the employee can return to work.<sup>15</sup> When further medical progress is not expected, then an additional TTD benefit award is not warranted. The test for temporary disability in Missouri is not whether an employee is able to do some work but whether the employee is able to compete in the open market considering his physical condition.<sup>16</sup> Many decisions in Missouri have found that TTD benefits are due until the claimant could find employment or the condition has reached the point of MMI.<sup>17</sup>

Courts in Alabama focus on the concept of maximum medical recovery.<sup>18</sup> Exactly when MMI is reached depends on the circumstances of the particular case.<sup>19</sup> The date of MMI indicates the date on which the claimant has reached a plateau that there is no further medical care or treatment that could reasonably be anticipated to lessen the claimant's disability.<sup>20</sup>

A North Carolina statute allows an employee to receive scheduled benefits for a specific physical impairment only once the healing period has ended.<sup>21</sup> This healing period ends at the point where the injury is stabilized, which is referred to as the point of "maximum medical improvement" or "maximum improvement" or "maximum recovery."<sup>22</sup> However, there has been a great deal of confusion with respect to whether or not an employee may receive TTD benefits after he has reached MMI.<sup>23</sup> North Carolina has therefore determined that MMI is a crucial point only within the context of a claim for scheduled benefits pursuant to its statute but that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive TTD benefits once the employee has established a loss of wage-earning capacity.<sup>24</sup>

In Arkansas, the statute expressly provides that for scheduled permanent injuries the injured employee is to receive compensation or temporary partial disability during the healing period or until the employee returns to work, whichever occurs first.<sup>25</sup> Thus, an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.<sup>26</sup>

In Kentucky, TTD means the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement that would permit a return to employment. In *Central Kentucky Steel v. Wise*,<sup>27</sup> the employer argued that a termination of TTD benefits was appropriate as soon as the worker was released to perform any kind of work. The court rejected this, determining that it would not be reasonable to terminate benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of the injury.<sup>28</sup>

In the state of Tennessee, the focus is on "the healing period during which the employee is totally prevented from working. When a worker reaches maximum recovery, at that point either permanent total or permanent partial disability commences."<sup>29</sup> Temporary total disability benefits are terminated either by the ability to return to work or by the attainment of maximum recovery.<sup>30</sup>

The Workers' Compensation Act and its regulations in South Carolina allow the employer to attach a medical certificate stating that the claimant has reached MMI in order to stop payment application. Workers' compensation awards in South Carolina have generally provided for TTD benefits up until the time that MMI occurs, at which point a claimant receives permanent partial disability, if warranted.<sup>31</sup>

In South Carolina, MMI is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. An argument was made that the renewal of prescriptions is inconsistent with the finding of MMI. This argument was rejected by the appellate court in South Carolina. It held that the hearing commissioner could easily conclude that the medication helped to temporarily alleviate remaining symptoms but still concluded that the medical condition overall would not further improve.<sup>32</sup>

The workers' compensation laws in Arizona provide that when an employee's condition becomes "stationary," no more partial temporary disability benefits may be paid. The courts have concluded that while there is no clear definition of "stationary available." In the opinion of the Arizona Supreme Court, a person's condition becomes stationary when his or her disability ceases to decrease and his or her physical condition ceases to improve.<sup>33</sup>

In Wyoming, the focus on TTD liability is on an event known as "ascertainable loss." This is commonly measured as the point of "maximum medical improvement."<sup>34</sup> The workers' compensation divisions define MMI as a condition or state that is well-stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however, further recovery or deterioration is not anticipated. The term, "maximum medical improvement," may be used interchangeably with the term "ascertainable loss" as defined in the statute.<sup>35</sup>

In California, it has been determined that temporary disability and indemnity is intended primarily to substitute for the worker's lost wages to maintain a steady income stream.<sup>36</sup> An employer's obligation to pay temporary disability indemnity ceases when replacement income is no longer needed. This occurs when the injured employee either returns to work or the injured employee's medical condition achieves permanent, stationary status.<sup>37</sup>

### III. Illinois TTD

The time when TTD benefits are properly terminated is often the source of dispute and extended litigation. Injured workers need predictable compensation for daily living, while employers often feel that claimants have no motivation to end temporary payments when they are not working. In recent years, the Illinois Workers' Compensation Commission and reviewing courts have increasingly focused the TTD analysis on whether the claimant's condition has reached MMI.<sup>38</sup> Moreover, this narrow rule has been repeated in a line of decisions where an employment relationship was terminated before the employee reached MMI.<sup>39</sup> In summary, the employers in these cases tried to mitigate TTD exposure by relying on the claimant's termination – whatever its reason. Without exception, the terminated employee was awarded TTD benefits. In practice, it is possible that these decisions and appellate court holdings could slowly lead to an oversimplification of the TTD analysis by focusing merely on whether the claimant is at MMI.

Consider the following scenario:

Wendy Waitress, an employee of Sam's Steakhouse, suffers an accidental injury arising out of and in the course of her employment. Wendy Waitress's physicians agree she can return to work in a light-duty capacity. Sam's Steakhouse offers Wendy Waitress bona fide light-duty work – tabulating tips – which is within her physical capabilities. However, Wendy Waitress either refuses the light-duty program, or she accepts the offer and subsequently refuses to tabulate the tips, essentially behaving in a manner that sabotages the accommodation program. She is not at MMI.

What should Sam's Steakhouse do with Wendy Waitress? Under both “refusal” scenarios, Sam's Steakhouse should not owe Wendy Waitress TTD benefits even though she has not reached MMI. The TTD inquiry should continue to account for other facts, especially the good faith participation in and mutual benefits of a return-to-work program.

Historically, the TTD entitlement analysis has encompassed more than simply the claimant's physical condition or MMI status. For purposes of workers' compensation, “an employee is totally disabled when he cannot perform any service except those for which no reasonably stable market exists.”<sup>40</sup> The “claimant must prove not only that he did not work [for the period TTD is claimed], but that he was unable to work.”<sup>41</sup> The Workers' Compensation Act (“Act”) is supposed to provide a compromise between the interests of employers, employees, and the general public.<sup>42</sup>

In the case of Wendy and Sam's, the physicians verified that Wendy was able to do light duty work at the time of her termination, and Sam's afforded her the opportunity for a reasonably stable job through its bona fide light-duty program. Moreover, Sam's light-duty program supports rehabilitation and return-to-work goals by accommodating Wendy's medical restrictions. Awarding Wendy TTD, when she is not at MMI, in spite of conduct detrimental to the employer's program, would disregard Sam's interests as well as the spirit of compromise envisioned under the Act. Wendy's claim to benefits under the Act should carry with it a “quid pro quo,” *i.e.*, her responsibility to conduct herself properly within her employer's bona fide and reasonable rehabilitation and return-to-work program.

The group of cases discussed above, in which terminated employees not at MMI were entitled to TTD, are each factually distinct from the fictional case of Wendy and Sam. In those TTD- entitlement cases, the employers either did not offer light duty, the light-duty offer did not accommodate the medical restrictions, or

termination was not due to the injured worker's "refusal-by-conduct" while participating in the light-duty program.

TTD should be properly terminated for the non-MMI claimant where a workers' compensation claimant is released to work with temporary physical restrictions resulting from an occupational accident and the employer makes a bona fide light-duty job offer (or one is regularly available via an established light-duty program) and the injured employee either refuses the offer, or, while participating in the employer's program, behaves in a manner "tantamount to a refusal."<sup>43</sup> In the Wendy and Sam's hypothetical, the Commission and reviewing courts would serve the interests of claimants, employers, and the general public by denying Wendy's TTD claim even though she is not at MMI. Thus, the Commission and the courts must focus on more than MMI and consider the claimant's participation in light duty and other alternative employment arrangements. Keeping a broad TTD analysis would also likely encourage both employees and employers to invest in valid return-to-work programs, while emphasizing that TTD benefits remain "temporary." If the case law continues a trend towards "TTD until MMI" regardless of other facts and job offers, the "temporary" in TTD may be lost and the system stands to lose a basic element of fairness.

#### **IV. TTD and TPD Issues**

As noted above, the standard for determining when a claimant in a workers' compensation claim is entitled to disability benefits is well established. TTD benefits are awarded from the date on which the employee is incapacitated by injury to the date his condition stabilizes or he has recovered as far as the character of the injury will permit.<sup>44</sup> Additionally, to be entitled to TTD benefits, the claimant must prove not only that he did not work but that he was unable to work.<sup>45</sup>

In essence, a workers' compensation claimant is entitled to TTD benefits when he or she is still recovering from injuries sustained as a result of a work accident and is not capable of returning to work because of those injuries. While the courts have been consistent in setting forth the standard to be utilized when determining whether TTD benefits are appropriate, practitioners are still faced with several issues as to how the standard will be applied to different factual scenarios.

#### **Payment of TTD After Employee is Fired**

One issue which has yet to be directly addressed by the appellate court is whether a claimant who is working subject to medical restrictions, commonly referred to as "light duty," is entitled to TTD benefits after being fired for cause. Claimants argue they are entitled to TTD benefits because the employer is no longer accommodating their light-duty restrictions, and they have not reached maximum medical improvement. Employers argue a claimant is not entitled to TTD benefits, because light-duty work was available and, but for the claimant voluntarily removing himself from the workforce by engaging in conduct resulting in a termination from employment, he could still be working.

The Industrial Commission Division of the Illinois Appellate Court has denied claimants' requests for temporary total disability benefits when an employer was accommodating light-duty restrictions but the claimant refused to work subject to medically imposed restrictions.<sup>46</sup> In *Gallentine v. Indus. Comm'n*, the claimant suffered work-related injuries. Her doctor allowed him to return to work in a light-duty capacity. The claimant worked for a short period of time and claimed she could not continue because of the amount of pain she was experiencing. The claimant also testified at trial that she called her doctor who told her to stay off of work, but the medical records did not corroborate the claimant's testimony. The court held the claimant was not entitled to TTD benefits when light-duty work was available and was within the restrictions imposed by the treating doctor.

In *City of Granite City v. Indus. Comm'n*,<sup>47</sup> the claimant was a police officer. After returning to work subject to light-duty restrictions, the claimant advised the employer of his intent to take a disability retirement and stop working. The court held the duration of TTD benefits was controlled by the claimant's ability to work

and his continuation of the healing process. The court further held the claimant failed to prove he was not able to work. Based upon the claimant refusing to perform the light-duty work being provided by the employer, his claim for TTD benefits was denied.

The Workers' Compensation Commission addressed the issue of whether a claimant was entitled to TTD benefits after being terminated for cause in *Cordero v. Binzel*.<sup>48</sup> In that case, the Workers' Compensation Commission denied the claimant's request for temporary total disability benefits noting the claimant was terminated for cause and light-duty work was available but for his termination.

The Industrial Commission Division of the Appellate Court changed the landscape of how this issue was viewed by the Commission with its decision in *Freeman United Coal Mining Co. v. Industrial Commission*.<sup>49</sup> In *Freeman United Coal*, the employer disputed the payment of TTD benefits based upon an argument that the claimed injuries were not causally related to the work accident. The issue of whether TTD benefits should be awarded to the claimant after a voluntary refusal to perform light-duty work or an involuntary termination by the employer was not in dispute. However, in an effort to draw a distinction between temporary total disability benefits and permanent disability benefits, the court included a lengthy analysis in its decision. In doing so, the court stated that when a reviewing court determines the duration of TTD, the only questions that need to be asked and answered are whether the claimant has yet reached maximum medical improvement and, if so, when. Once an injured claimant has reached maximum medical improvement, the condition is no longer temporary, and entitlement to TTD benefits ceases even though the claimant may thereafter be entitled to receive permanent total or partial disability benefits.<sup>50</sup>

Following *Freeman United Coal*, the Commission has taken the court's isolated statement, which limited the TTD analysis to whether the claimant reached maximum medical improvement, and used it to support a holding that a claimant is entitled to TTD benefits after being terminated regardless of the basis for the termination.<sup>51</sup> For example, in *Sapp v. Wal-Mart*,<sup>52</sup> the claimant returned to work subject to light-duty restrictions, but she was subsequently terminated for absenteeism. The employer argued it should not have to pay TTD benefits after the claimant was terminated for a legitimate reason. The Commission held the employer's argument was irrelevant pursuant to the *Freeman United Coal* case. The Commission further explained the dispositive issue was whether the claimant's condition had stabilized. Because the claimant's condition had not reached maximum medical improvement, the claimant was entitled to TTD benefits.

The Commission did not make any attempt to distinguish the appellate court decisions in *Gallentine*,<sup>53</sup> *City of Granite City*,<sup>54</sup> or *Lukasik v. Industrial Comm'n*<sup>55</sup> when awarding TTD benefits. In each of the appellate court cases, TTD benefits were terminated despite the claimant's still receiving medical care (*i.e.*, not having reached maximum medical improvement). Similarly, in *Freeman United Coal*, when the appellate court was drawing a distinction between temporary total benefits and permanent benefits, it made no attempt to overrule or distinguish the previous cases which allowed for the termination of temporary total disability benefits in situations where the claimant was capable of working but had not yet reached maximum medical improvement.

Despite the apparent change in landscape, the Commission has not been consistent in its application of the *Freeman United Coal* case. For example, in *Kirk v. City International Lease Dept.*,<sup>56</sup> the claimant was working in a light-duty capacity. However, the claimant was terminated after failing to show up for work for three consecutive days. The Commission noted that for a claimant to be entitled to temporary total disability benefits, he must prove not only that he did not work but that he was unable to work. The claimant failed to demonstrate he was unable to work or that there was no stable job market for him. Based upon those findings, the Commission denied the claimant's request for TTD benefits.<sup>57</sup>

When the Commission awards TTD benefits to a claimant after the claimant is terminated by the employer for a legitimate reason, the potential for an abuse of the workers' compensation system is evident. This type of ruling makes it possible for a claimant to not show up for work (or otherwise violate company policy), thereby resulting in a termination, but then be allowed to collect TTD benefits without having to perform any benefit for the employer despite being capable of doing so.

At least one circuit court judge has recognized the potential abuse of the system and made an attempt to stop it. In *Menard v. Workers' Compensation Comm'n*,<sup>58</sup> the Commission awarded the claimant TTD benefits noting a recommendation had been made for additional medical care. The Commission concluded that since the claimant had not reached maximum medical improvement, he was entitled to ongoing TTD benefits despite having been terminated by the employer. The Commission stated the termination was irrelevant. On administrative review, the circuit court reversed the Commission's decision. Relying on *City of Granite City v. Indus. Comm'n*<sup>59</sup> and *Gallentine v. Indus. Comm'n*,<sup>60</sup> the circuit court stated the claimant was not free to terminate his employment of his own volition for non-medical reasons, or for deliberate misconduct in the workplace, and thereby compel the payment of temporary total disability benefits because his injuries had not stabilized. The decision further stated the record did not support any contention that the claimant ceased working because his injuries had not stabilized, because he had not reached MMI, or because he was receiving or about to receive medical care which would preclude his employment. The record supports only one reasonable conclusion: the claimant ceased working because of his misconduct, resulting in his termination. The court found the termination relevant in determining whether the claimant was eligible to receive TTD benefits. Regarding the Commission's statement "that given Petitioner's restrictions and need for a pain management program, his termination from employment is irrelevant to the issue of his entitlement to temporary total disability compensation," the court found this to be an erroneous conclusion under the facts of the case.<sup>61</sup>

The case was appealed to the Industrial Commission Division of the Appellate Court, which issued a Rule 23 Order.<sup>62</sup> The appellate court determined the claimant had reached maximum medical improvement and terminated the TTD benefits as of that time. It did not expressly rule on whether a claimant is entitled to TTD benefits after being terminated by his employer for legitimate reasons despite not being at maximum medical improvement.

Recently, the Commission flip-flopped when deciding whether TTD benefits should be awarded to a claimant after being fired. In *Trevino v. Vesuvius*,<sup>63</sup> a three-member panel of the Commission issued a decision denying TTD benefits to a claimant who was terminated for violating a "no-call/no-show" policy of the employer. The claimant had not reached maximum medical improvement at the time of his termination.<sup>64</sup>

Less than six months later, two of the three commissioners who rendered the *Trevino* decision rendered an opposite conclusion in *Wleklinski v. Kelly Services*.<sup>65</sup> In that case, the Commission held a claimant was entitled to TTD benefits following her termination from employment. The Commission noted that by terminating the claimant's employment, the respondent's obligation to pay TTD benefits was not severed. Additionally, in reliance upon *Sapp v. Wal-Mart*,<sup>66</sup> the Commission imposed penalties upon the employer for its failure to pay TTD benefits.

In light of the inconsistent rulings by the Commission, the issue needs to be presented to the Workers' Compensation Commission Division of the Appellate Court. Notwithstanding the recent decision in *Wleklinski*,<sup>67</sup> there is sufficient precedent from the appellate court<sup>68</sup> and the Workers' Compensation Commission<sup>69</sup> to support a defense position that a claimant is not entitled to temporary total disability benefits if the employer is accommodating light-duty restrictions and the claimant removes himself from the workforce by failing to show up for work or by otherwise violating company policy resulting in a termination.

### **Benefits for Illegal Aliens**

The Act includes a definition of "employee".<sup>70</sup> The definition of "employee" expressly states that it means "including aliens." It is obvious from the plain language of the statute that the Illinois Legislature intended the Act to cover individuals not born in the United States. However, an emerging issue is whether those individuals who are in the United States "illegally" are entitled to benefits under the Act. This is especially sensitive in light of post-9/11 security concerns.

The Illinois Supreme Court and the appellate court have not issued any decisions expressly addressing this issue.

Prior to September 11, 2001, the Commission declined to hold, as a matter of law, whether or not a claimant who could not be legally employed in this country was precluded from wage differential benefits. In *Miezio v. Z-Wawel Constr.*,<sup>71</sup> the claimant sustained an undisputed accident. He was allowed to return to work subject to some restrictions, but the employer was unable to accommodate those restrictions. The employer provided vocational rehabilitation and paid the claimant TTD benefits. However, the employer terminated the vocational rehabilitation program and terminated the payment of TTD benefits when the employer discovered the claimant was not a United States citizen and had no valid green card, which would enable him to be legally employed in the United States.

The claimant argued he was entitled to wage differential benefits under Section 8(d)(1)<sup>72</sup> of the Act or an odd-lot permanent total disability award.<sup>73</sup> The employer contended the claimant was not entitled to either type of benefit because his lack of a green card prevented him from establishing the necessary *prima facie* case for either proposition. The employer further argued the claimant was limited to an award of permanency based upon a loss of a man as a whole under Section 8(d)(2) of the Act.<sup>74</sup>

Following a trial, the arbitrator concluded the lack of a valid green card, and the subsequent inability of the claimant to legally work in the United States, impacted the type of benefits available to the claimant. The arbitrator further held the claimant was prevented from receiving an award for either wage differential benefits or odd-lot permanent total disability benefits.<sup>75</sup>

The arbitrator expressly found the claimant was eligible for other benefits under the Act. He awarded permanent partial disability benefits under Section 8(d)(2) of the Act.

On review, the Industrial Commission affirmed the arbitrator's finding that the claimant failed to prove entitlement to wage differential benefits or permanent total disability benefits. However, the Commission stated it was unnecessary to determine whether, as a matter of law, the fact that a claimant cannot legally be employed in this country absolutely precludes an award for wage differential benefits. The Commission further noted the immigration status was a factor to be considered in the totality of the evidence which *in this case* included inconsistencies in the medical evidence and self-limiting behavior.<sup>76</sup>

In a post-9/11 case, the Commission affirmed an arbitrator's holding that when the claimant was unable to return to work in a light-duty capacity solely due to her illegal immigration status, no TTD benefits were owed by the employer in *Gomez v. Illinois Sportservice*.<sup>77</sup> In *Gomez*, the claimant sustained an undisputed accident, and the employer did not dispute payment for the claimant's medical bills. The employer did dispute the payment of TTD benefits after the claimant was terminated from her employment for falsifying her Social Security number. At trial, the claimant admitted she was not legally employed on the date of accident or at the time when she was allowed to return to work by her doctor.

The human resources manager for the employer testified light-duty work would have been available to the claimant had she not been terminated for falsifying her Social Security number in order to gain employment.

The arbitrator held that based upon the fact the claimant could not return to work for the employer in a light-duty capacity solely due to her illegal immigration status, no further TTD benefits were owed by the employer.

While it does not appear an employer has taken the position that a worker is not entitled to any benefits under the Act due to an illegal immigration status, the Commission has also not been willing to deny benefits, *sua sponte*, due to a claimant's illegal immigration status. However, the Commission will deny both temporary and permanent benefits which are based upon the claimant's inability to return to work solely because of an illegal immigration status.

This issue has not been litigated on very many occasions. One would suspect that a claimant who is not legally in the United States may be reluctant to testify before any type of tribunal for fear of his immigration status being discovered. However, in the post-9/11 era, employers that unknowingly hire a worker who is not legally in this country may be more willing to question whether an illegal alien is entitled to benefits under the Act. As it stands now, the Commission has given no indication it will deny all benefits under the Act to illegal aliens, but there is also no indication the matter has been brought before the Commission solely upon that issue.



### **Suspension of TTD Benefits for Failure to Attend IME**

The Act provides for an employer to schedule an independent medical exam, which is an exam to have a claimant examined by a doctor of the employer's choosing in order to assess the need for additional medical care or the nature and extent of the claimed injuries.<sup>78</sup> Section 12 of the Act imposes restrictions on the employer in that travel expenses must be paid to the claimant prior to the scheduled exam. Additionally, the exam must be scheduled at a time and place reasonably convenient for the employee.

Issues often arise as to whether a claimant is obligated to attend a medical exam scheduled pursuant to Section 12 of the Act. Claimants contend they are not obligated to attend an independent medical exam when the employer is not currently paying temporary total disability benefits. Claimants also fail to attend the scheduled exams for various reasons, including the employer's failure to comply with the requirements of the Act.

The Illinois Supreme Court has weighed in on these issues. In *R.D. Masonry, Inc. v. Indus. Comm'n*,<sup>79</sup> the employer was paying temporary total disability benefits pursuant to an award of the Commission. In an effort to determine whether the claimant was still temporarily totally disabled, the employer scheduled an independent medical exam pursuant to Section 12 of the Act. The claimant refused to attend the exam, and the employer suspended benefits as of the date of the scheduled exam.

The claimant argued Section 12 requires, "an employee entitled to receive disability payments shall be required" to attend an exam at the request of the employer. The claimant contended that because the employer was challenging the claimant's right to compensation, the claimant was not an "employee entitled to receive disability payments," and, therefore, the claimant did not need to comply with Section 12.

After discussing statutory construction, the supreme court held the legislature did not intend that an employer who denies liability and declines to make payments in a workers' compensation case be precluded from availing itself of the independent medical examination provision of Section 12.<sup>80</sup> The supreme court also pointed out that by filing an Application for Adjustment of Claim, the claimant asserted he was an employee entitled to compensation payments. The supreme court held the employer's suspension of benefits based upon the claimant's refusal to attend an IME was appropriate. It further held the claimant was required to submit himself for examination to avoid suspension of his benefits.

The courts have also made it clear that an employer's failure to pay a claimant's travel expenses prior to the scheduled exam and the employer's failure to schedule an exam at a convenient time and place preclude the employer from suspending benefits for a claimant's failure to attend the exam.<sup>81</sup>

Notwithstanding the frequency with which claimants fail to attend independent medical exams scheduled pursuant to Section 12 of the Act, the courts have been consistent in holding that if the employer complies with the requirements of Section 12 by paying appropriate travel expenses prior to the scheduled exam and by scheduling the exam at a reasonably convenient time and place, a claimant must attend the scheduled exam. The refusal to attend the exam allows the employer the right to suspend the payment of temporary total disability benefits until the claimant does attend an exam.

In many cases, the real issue is whether a claimant "refused" to attend an exam. The question of whether a claimant's car breaking down or a claimant's falling ill constitutes a refusal to attend an exam is generally limited to the facts of each case. However, if a reasonable argument can be made that a claimant simply refused to attend an IME, and assuming the employer has complied with the requirements of Section 12, the employer should suspend benefits until the time when the claimant attends a scheduled Section 12 exam.

### **Temporary Partial Disability Benefits**

The Act underwent significant changes as the result of amendments which went into effect February 1, 2006.<sup>82</sup> One of the additions to the Act is the creation of temporary partial disability benefits.<sup>83</sup>

The temporary partial disability benefit is available to employees who are working light duty on a part-time basis or full-time basis and earn less than he or she would be earning if employed in the full capacity of

the job or jobs. The rate to be paid to a claimant is equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of the accident and the net amount in which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working.<sup>84</sup>

Prior to the creation of temporary partial disability benefits, an employer was not entitled to receive a credit for an employee's earnings when the employee was working on a limited basis and had not yet reached maximum medical improvement. In *Mechanical Devices v. Indus. Comm'n*,<sup>85</sup> the claimant had two jobs at the time of his accident which occurred at Mechanical Devices. While still undergoing medical care for his injuries, the claimant returned to work at the YWCA as a shuttle bus driver, as the duties fell within the restrictions imposed by his doctor. The claimant enrolled in cosmetology school for which he did not have to perform any activities which exceeded his restrictions, and the claimant also turned down a couple of job offers which were extended to him. The employer contended that under these circumstances, the claimant was not entitled to TTD benefits.

The Commission found the claimant had not reached maximum medical improvement, and therefore awarded TTD benefits; but it also awarded the employer credit for the wages the claimant earned at the YWCA.

The Appellate Court held the claimant's earning of occasional wages did not necessarily preclude a finding of temporary total disability benefits.<sup>86</sup> The court also held the Commission erred when it effectively awarded a temporary partial disability benefit by reducing the claimant's TTD award by the wages he earned at the YWCA.<sup>87</sup>

In a concurring opinion, Justice McCullough commented upon some inconsistencies in the Commission's decision concerning the credit to be provided to the employer. He did not dissent from the appellate court's decision, but he urged the Commission and his peers on the appellate court to be wary of completely eroding the word "total" in "temporary total disability." He also indicated "it would be worthwhile for the legislature to provide for credit" in cases similar to the factual scenario presented in that case.<sup>88</sup>

Justice McCullough recognized the unfairness of a claimant's receiving the full amount of temporary total disability benefits despite not being totally disabled. He also recognized the unfairness of an employer having to pay the full amount of TTD benefits when an employee was earning wages while working for a different employer.

The creation of temporary partial disability benefits allows for an employee to return to work in some capacity without suffering a wage loss. The employer is obligated to pay TTD benefits on only the difference between the amount the employee could be earning and the amount he is actually earning.

Similar benefits were already available under the Act, but they applied to a permanent wage loss as opposed to a temporary wage loss.<sup>89</sup> The benefits for a permanent wage loss were calculated by taking two-thirds of the difference between the amount the employee could be earning in the full performance of his duties and the amount he is now earning or could be earning in some suitable employment.<sup>90</sup> The difference between the temporary partial disability benefits and the permanent wage differential benefits is that the temporary benefits allow the employee to utilize the *net* amount he is currently earning, whereas, the permanent wage differential calculation requires the employee to utilize the *gross* amount of his current earnings.

The creation of temporary partial disability benefits was a substantive change in the Act, and as such, it only applies to cases involving accidents which occurred on or after February 1, 2006. As of this time, approximately two and one-half years have passed, and the appellate court has not yet issued any decisions concerning disputes relating to temporary partial disability benefits. However, disputes most likely will arise from two issues. One will be whether or not a claimant is entitled to temporary partial disability benefits, and the other will be how to calculate the benefits to which a claimant is entitled.

In each potential dispute, the individual facts of a case will be dispositive. For example, a claimant may argue he is not capable of performing certain job duties which an employer has made available. Consequently, the employee will contend he is entitled to TTD benefits, and the employer will argue the claimant is only entitled to temporary partial disability benefits. Another possible scenario will be when doctors render

conflicting or contrasting opinions as to a claimant's capabilities. An employer may be able to accommodate one set of restrictions but not another. Once again, this leads to a dispute as to whether temporary total disability benefits or temporary partial disability benefits would be appropriate.

With respect to the calculations of temporary partial disability benefits, disputes may be raised as to what will constitute "net earnings." Employers will take the position that the net earnings of an employee should be determined in a manner similar to the credit an employer receives pursuant to Section 8(j) of the Act.<sup>91</sup> This method of calculation includes as net earnings any deductions made by the employer other than taxes and Social Security withholdings, including but not limited to premiums for health insurance, premiums for other disability policies, union dues, or child support withholdings.<sup>92</sup> Any claims made by an employee contending the net amount of the current earnings is limited to the amount on the paycheck should be rejected. Additionally, any claims by employees as to the amount they could now be earning in the full performance of their duties which would require speculation or conjecture should also be rejected.<sup>93</sup> As time goes on, the Commission and the appellate court will have opportunities to issue decisions concerning the interpretation and application of the temporary partial disability provision. As decisions are issued, defense counsel will need to modify and adjust the strategy and evidence utilized at trial.

## V. Conclusion

Illinois' theory and treatment of TTD liability follows that of numerous other jurisdictions in the United States. Liability is tied to the medical status of a claimant. When an employee reaches a maximum level of medical improvement, TTD benefits should cease.

However, Illinois does not in practice establish a bright-line test for the suspension of TTD benefits in all situations. In many situations, the suspension of TTD benefits has been withheld when an injured employee has not yet reached a maximum level of medical improvement. In these situations, the Workers' Compensation Commission and reviewing courts have applied a commonsense analysis for TTD. Such an approach is recommended because it includes acceptance of the realities of the modern employment relationship and current issues facing employers.

### (Endnotes)

<sup>1</sup> 4 ARTHUR LARSON AND LEX LARSON, WORKERS' COMPENSATION LAW, Sec. 80.05 (2001).

<sup>2</sup> LARSON, note 1, *supra*, Sec. 80.05 (2001).

<sup>3</sup> *Id.* Sec. 57.10.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 255 Ark. 1025, 504 S.W.2d 739 (1974).

<sup>7</sup> 380 So.2d 555 (Fla. App. 1980).

<sup>8</sup> *Copeland Steel v. Miles*, 536 So.2d 1179 (Fla. App. 1989).

<sup>9</sup> *Rose v. Thornton and Florence Elec. Co.*, 4 Kan. App. 2d 669, 609 P.2d 1180 (1980).

- <sup>10</sup> 231 Neb. 464, 436 N.W.2d 542 (1989).
- <sup>11</sup> 24 Ohio St.3d 79,493 N.E.2d 544 (1986).
- <sup>12</sup> 768 P.2d 388, (Okla. App. 1989).
- <sup>13</sup> 171 Ind. App. 533, 358 N.E.2d 174 (1976).
- <sup>14</sup> 997 S.W.2d 248 (Tex. 1998).
- <sup>15</sup> *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418 (Mo. App. 2000).
- <sup>16</sup> *Cooper v. Medical Center of Independence*, 955 S.W.2d 570 (Mo. App. 1997).
- <sup>17</sup> *Id.*
- <sup>18</sup> *Ex Parte Moncrief*, 627 So. 2d 385, 387 (Ala. 1993).
- <sup>19</sup> *Hillary v. MacMillan Bloedel, Inc.*, 717 So. 2d 824 (Ala. Civ. App. 1998).
- <sup>20</sup> *Gub.MK Constructors v. Traffanstedt*, 726 So. 2d 704 (Ala. Civ. App. 1998).
- <sup>21</sup> N.C. Gen. Stat., sec. 97-31.
- <sup>22</sup> *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288, 229 S.E.2d 325 (1976).
- <sup>23</sup> *Russos v. Wheaton Industries*, 145 N.C. App. 164, 167-68, 551 S.E.2d 456, 459 (2001).
- <sup>24</sup> *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (N.C. App. 2002).
- <sup>25</sup> Arkansas Code Annotated sec. 11-9-521(a).
- <sup>26</sup> *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (Ark. App. 2001).
- <sup>27</sup> *Central Kentucky Steel v. Wise*, 19 S.W.3d 657 (Ky. 2000).
- <sup>28</sup> *Id.*
- <sup>29</sup> *Roberson v. Loretto Casket Co.*, 722 S.W.2d 380 (Tenn. 1986).
- <sup>30</sup> *Simpson v. Satterfield*, 564 S.W.2d 953, 955 (Tenn. 1978).
- <sup>31</sup> *Williams v. South Carolina Department of Mental Retardation*, 308 S.C. 438, 418 S.E.2d 555 (Ct. App. 1992).
- <sup>32</sup> *O'Banner v. Westinghouse Electric Corp.*, 319 S.C. 24, 459 S.E.2d 324 (1995).
- <sup>33</sup> *Employers Mutual Liability Ins. Co. of Wisconsin v. Contreras*, 109 Ariz. 383, 509 P.2d 1030 (Ariz. 1973).

<sup>34</sup> *State Ex. Rel. Wyoming Workers' Compensation Div. v. Gerdes*, 951 P.2d 1170, 1174 (Wyo. 1997).

<sup>35</sup> *Three Weil's Code of Wyoming Rules, Department of Employment, Workers' Compensation Comm'n, Workers' Compensation Rules, Regulations and Fee Schedules*, ch. 1, Sec. 4(t), 025 220 001-4 (2004).

<sup>36</sup> *J. T. Thorpe v. Workers' Comp. Appeals Board*, 153 Cal. App. 3d 327, 333 (1984).

<sup>37</sup> *Department of Rehabilitation v. Workers' Compensation Appeals Board*, 30 Cal. 4th 1281, 70 P.3d 1076, 135 Cal. Rptr. 2d 665 (Cal. 2003).

<sup>38</sup> *Mech Devices v. Indus. Comm'n*, 344 Ill. App. 3d 752, 759, 800 N.E.2d 819, 825-26 (4th Dist. 2003), citing *Freeman Coal Co. v. Indus. Comm'n*, 318 Ill. App. 3d 170, 175-76, 741 N.E.2d 1144, 1148-49 (4th Dist. 2003).

<sup>39</sup> *Maggio v. Material Services Corp.*, 07 I.W.C.C. 1633 (December 13, 2007) (employee absent due to pneumonia during light-duty work); *Adams v. Dobbs Tire & Auto*, 07 I.W.C.C. 410 (April 19, 2007) (employee unable to physically perform required light-duty assignments); *Walker v. L&N Indus.*, 07 I.W.C.C. 322 (May 2, 2007) (employee unable to physically perform required light-duty assignments); *Poole v. Roadway Express, Inc.*, 06 I.W.C.C. 820 (September 25, 2006) (Discovery of claimant's falsified job application while on light duty); *Alicea v. Sysco Food Services*, 06 I.W.C.C. 596 (2006) (Employer did not offer light-duty job); *Sapp v. Wal-Mart*, 06 I.W.C.C. 459 (2006) (Employee terminated for absenteeism, and employer's light-duty job did not accommodate physical restrictions); *Palmer v. Indus. Comm'n*, 200 Ill. App. 3d 558, 558 N.E.2d 285 (1st Dist. 1990) (Employee unable to return to light-duty work offered by employer).

<sup>40</sup> *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623, 627 (1990); *City of Granite City v. Indus. Comm'n*, 279 Ill. App. 3d 1087, 1090, 666 N.E.2d 827, 829 (5th Dist. 1996); *Palmer v. Indus. Comm'n*, 200 Ill. App. 3d 558, 558 N.E.2d 285 (1st Dist. 1990). *Cf.*, *Sisto v. City of Chicago*, 7 I.W.C.C. 591 (May 15, 2007) (Retired claimant not entitled to TTD during post-operative period).

<sup>41</sup> *City of Granite City v. Indus. Comm'n*, *supra* note 40, 279 Ill. App. 3d at 1090.

<sup>42</sup> *Peoria County Bellwood Nursing Home v. Indus. Comm'n*, 138 Ill. App. 3d 880, 487 N.E.2d 356 359-60 (3rd Dist. 1985).

<sup>43</sup> *Poole v. Roadway Express, Inc.*, *supra* note 39.

<sup>44</sup> *Freeman United Coal Mining Company v. Indus. Comm'n*, *supra* note 38, 318 Ill. App. 3d 170.

<sup>45</sup> *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>46</sup> See, *Gallentine v. Indus. Comm'n*, 201 Ill. App. 3d 880, 559 N.E.2d 526 (2d Dist. 1990); and *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>47</sup> *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>48</sup> *Cordero v. Binzel*, 94 WC 44770, 96 IIC 0893 (1996).

<sup>49</sup> 318 Ill. App. 3d 170, 741 N.E.2d 1144 (5th Dist. 2000).

<sup>50</sup> *Freeman United Coal*, *supra* note 44, 318 Ill. App.3d at 178.

<sup>51</sup> See, *Tolly v. Aramark*, 99 WC 49081, 01 IIC 0553 (2001) (Commission awarded TTD benefits noting the claimant's condition had not reached maximum medical improvement when he was terminated by the employer); *Radulescu v. LSG Sky Chefs*, 01 WC 15679, 03 IIC 0884 (2003) (Commission awarded TTD benefits noting the claimant was entitled to said benefits regardless of the reason for his termination from light-duty employment); *Sapp v. Wal-Mart*, *supra* note 39 (despite being terminated for absenteeism, the Commission awarded TTD benefits finding the employer's argument that it terminated the claimant's employment for legitimate reasons was irrelevant pursuant to the *Freeman United Coal* case).

<sup>52</sup> *Sapp v. Wal-Mart*, *supra* note 39.

<sup>53</sup> *Gallentine v. Indus. Comm'n*, *supra* note 46.

<sup>54</sup> *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>55</sup> *Lukasik v. Indus. Comm'n*, 124 Ill. App. 3d 609, 465 N.E.2d 528 (1st Dist. 1984).

<sup>56</sup> 03 WC 55382, 06 I.W.C.C.IWCC 0382 (2006).

<sup>57</sup> *Id.*

<sup>58</sup> *Menard, Inc. v. Workers' Compensation Comm'n of Illinois*, Coles County Circuit Court, No. 06 MR 22.

<sup>59</sup> *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>60</sup> *Gallentine v. Indus. Comm'n*, *supra* note 46.

<sup>61</sup> *Menard, Inc. v. Workers' Compensation Comm'n of Illinois*, *supra* note 58.

<sup>62</sup> *Id.*

<sup>63</sup> *Trevino v. Vesuvius*, 03 WC 25021, 07 IWCC 1215 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> *Wleklinski v. Kelly Services*, 06 WC 54649, 08 I.W.C.C.IWCC 0254 (2008).

<sup>66</sup> *Sapp v. Wal-Mart*, *supra* note 39.

<sup>67</sup> *Wleklinski v. Kelly Services*, *supra* note 65.

<sup>68</sup> *Lukasik v. Indus. Comm'n*, *supra* note 55; *Gallentine v. Indus. Comm'n*, *supra* note 46; and *City of Granite City v. Indus. Comm'n*, *supra* note 40.

<sup>69</sup> *Cookson v. Lowe's of Peoria*, 01 WC 41185, 03 IIC 0495 (2003);

*Kirk v. City International Lease Dept.*, 03 WC 55382, 06 IWCC 0382 (2006); *Trevino v. Vesuvius*, *supra* note 63.

<sup>70</sup> 820 ILCS 305/1(b)(2) (2006) (The statute defines “employee” as:

Every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract or hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made, and *including aliens*, and minors who, for the purpose of this Act are considered the same and have the same power to contract, receive payments and give quittances therefor, as adult employees. (Emphasis added).

<sup>71</sup> 98 WC 16088, 00 IIC 0341 (2000).

<sup>72</sup> 820 ILCS 305/8(d)(1) (2006) (Provides for benefits based upon a claimant’s inability to return to his previous employment resulting in a loss of earning capacity.)

<sup>73</sup> Odd-lot permanent total disability benefits are awarded when the claimant is unable to return to work due to a lack of a reasonably stable labor market for a person with his experience, education, and physical limitations incurred as a result of a work accident.

<sup>74</sup> 820 ILCS 305/8(d)(2) (2006) (Provides for permanent benefits as a result of injuries not covered in Section 8(e) including the upper and lower extremities, vision loss or hearing loss and includes the loss of occupation if the claimant is not able to return to his previous employment as a result of his injuries but does not suffer a wage loss by returning to alternative employment. Benefits under this Section most often involve injuries to the neck or back).

<sup>75</sup> *Miezio v. Z-Wawel Constr.*, 98 WC 16088, 00 IIC 0341 (2000).

<sup>76</sup> *Id.*

<sup>77</sup> 03 WC 19746, 07 IWCC 0798 (2007).

<sup>78</sup> 820 ILCS 305/12 (2006). The Act provides: An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee,... for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this act. ... [A]n employer requesting such an examination, of an employee residing within the State of Illinois, shall deliver to the employee with the notice of the time and place of examination sufficient money to defray the necessary expense of travel by the most convenient means to and from the place of examination, and the cost of meals necessary during the trip, and if the examination or travel to and from the place of examination causes any loss of working time on the part of the employee, the employer shall reimburse him for such loss of wages upon the basis of his average daily wage. ...if the employee refuses so to submit himself to examination or unnecessarily obstructs the same, his right to compensation payments shall be temporarily suspended until such examination shall have taken place, and no compensation shall be payable under this Act for such period.

<sup>79</sup> *R.D. Masonry, Inc. v. Indus. Comm’n*, 215 Ill. 2d 397, 830 N.E.2d 584 (2005).

<sup>80</sup> *Id.* at 404.

<sup>81</sup> *Navistar International Transp. Corp. v. Indus. Comm’n*, 331 Ill. App. 3d 405, 771 N.E.2d 35 (1st Dist. 2002).

<sup>82</sup> 820 ILCS 305 (2006).

<sup>83</sup> 820 ILCS 305/8(a) (“When the employee is working light duty on a part-time basis or full-time basis and earns less than he or she would be earning if employed in the full capacity of the job or jobs, then the employee shall be entitled to temporary partial disability benefits. Temporary partial disability benefits shall be equal to two-thirds of the difference between the average amount that the employee would be able to earn in the full performance of his or her duties in the occupation in which he or she was engaged at the time of the accident and the net amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working.”).

<sup>84</sup> See 820 ILCS 305/8(a).

<sup>85</sup> 344 Ill. App. 3d 752, 800 N.E.2d 819 (4th Dist. 2003).

<sup>86</sup> *Id.* at 760.

<sup>87</sup> *Id.* at 762.

<sup>88</sup> *Id.* at 765-766.

<sup>89</sup> 820 ILCS 305/8(d)(1).

<sup>90</sup> *Id.*

<sup>91</sup> 820 ILCS 305/8(j) (2006) (“In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to Wholely or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan shall be consistent with, and limited to, the provisions of paragraph two hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act.”)

<sup>92</sup> *Navistar International Transp. Corp. v. Indus. Comm’n*, 315 Ill. App. 3d 1197, 734 N.E.2d 900 (1st Dist. 200); *Hutchinson v. Sedco, Ltd.*, 97 WC 47076, 01 IIC 0328 (2001).

<sup>93</sup> *Forrest City Erectors v. Indus. Comm’n*, 264 Ill. App. 436, 636 N.E.2d 969 (1st Dist. 1994); *Taylor v. Indus. Comm’n*, 372 Ill. App. 327, 867 N.E.2d 1147 (4th Dist. 2007).

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