



8200 Hampson Street, Suite 302
New Orleans, LA 70118

(504) 266-2024

frank@whiteley-law.com

Louisiana Workers Compensation

Chapter 9

DISABILITY BENEFITS

Regarding disability from a job injury, workers' compensation is a wage replacement system. It is designed to compensate an injured worker for wage loss during the period of disability. There is no provision for the award of estimated future wage loss¹. Wage replacement through workers compensation benefits is paid on a weekly or monthly basis as the wage loss is sustained.

There are four classifications of disability benefits under the workers compensation Act:

Temporary Total Disability Benefits (TTD)

Permanent Total Disability Benefits (PTD)

Supplemental Earnings Benefits (SEB)

Permanent Partial Disability Benefits (PPD)

¹ §1222. Probable duration of disability not basis for award

Supplemental earnings benefits shall not be awarded or payable for probable duration of loss of wages. However, this Section does not prohibit the parties from entering into a compromise or lump sum settlement, in accordance with the Workers' Compensation Law.

Temporary Total Disability²

Generally, an injured worker initially will be entitled to TTD following the accident, during the period of healing. The name of the benefits explains its purpose, temporary (during recovery) total disability (unable to work in any capacity). The injured worker is given medical care and, during this healing process, receives TTD benefits. The right to TTD ceases when the employee's condition resolves to such an extent that (1) a reasonably reliable determination of the employee's disability may be made; and (2) continued, regular treatment by a physician is not required.³ The amount of weekly benefits is two-thirds⁴ of the injured worker's average weekly wage (AWW). TTD benefits are subject to the maximum and minimum compensation rate.⁵

Permanent and total disability⁶

In the case of very serious or catastrophic injury, the employee may not ever be able to return to work in any capacity. In such a case, the employee would be entitled to permanent total disability benefits. These benefits are paid for the life of the injured worker. Like TTD, the amount of weekly PTD is two-thirds the amount of the injured workers average weekly wage AWW, subject to the maximum and minimum compensation rates.

Permanent and Total Disability is primarily, but not exclusively, determined by the employee's physical abilities. La. R.S. 23:1221(2)(b) provides that permanent and total disability benefits shall be awarded only if the employee proves by clear and convincing evidence that the employee is "physically unable to engage in any employment or self-employment, regardless of the nature of the employment or self-employment." Emphasizing that the employee's physical capabilities are the primary criteria, the statute specifically provides that the following are not to be considered in determining whether an employee is able to engage in employment: (1) Whether the employment is the same or similar occupation that the employee was customarily engaged in when injured [La. R.S. 23:1221(2)(a)]; (2) Whether, at the time of injury, the employee was particularly fitted for the employment "by reason of education, training, and experience" [La. R.S. 23:1221(2)(a)]; (3) the location or availability of the employment or self-employment [La. R.S. 23:1221(2)(c)]; or (4) whether the employment requires the employee to work in pain [La. R.S. 23:1221(2)(b)(c) and (d)]. Before adjudicating an employee to be permanently and totally disabled, however, a workers' compensation judge must

² La. R.S. 23:1221(1)

³ La. R.S. 23:1221(1)(d)

⁴ Sixty-Six and two-thirds percent. La. R.S. 23:1221(1)(a)

⁵ Under La. R.S. 23:1202, the OWC publishes annual maximum and minimum compensation rates based on the average weekly wage of all Louisiana employees, as determined by the administrator of the Louisiana Employment Security Law. The maximum compensation rate in any given year is 75% of the average weekly wage of all Louisiana employees for that year. The minimum compensation rate is 20% of the average weekly wage of all Louisiana employees for that year.

⁶ La. R.S. 23:1221(2)

determine whether there is a reasonable probability that, with appropriate training or education, the employee may be rehabilitated to the extent that the employee can achieve suitable gainful employment and whether it is in the employee's best interest to undertake such education or training or education. La. R.S. 23:1226(D).

The Louisiana Supreme Court relied on that last provision, La. R.S. 23:1226(D), to hold that, while lack of education alone is not sufficient to establish permanent and total disability, the lack of education combined with the lack of ability to be educated may be considered in determining whether an employee is permanently and totally disabled. Comeaux v. City of Crowley, 01-0032 (La. 7/3/01), 793 So.2d 1215, 1222. In Comeaux, the employee, a manual laborer, had severe physical limitations as the result of a work-related back injury. At best, the employee was capable of sedentary employment. The trial court concluded that, because the employee was physically able to perform sedentary employment, the employee was not permanently and totally disabled. The appellate court, however, considering "a totality of factors, including education, experience and age," found that the employee was permanently and totally disabled. The Louisiana Supreme Court found that both courts interpreted permanent and total disability incorrectly. The trial court interpreted permanent and total disability too strictly in relying exclusively on the employee's physical capabilities. On the other hand, the appellate court interpreted permanent and total disability too leniently in considering an expansive list of factors other than the employee's physical capabilities.⁷

In finding that the employee was permanently and totally disabled, the Louisiana Supreme Court emphasized that the facts of Comeaux were unique. The employee was not just uneducated; he lacked the ability to be educated. As part of his vocational rehabilitation, the employee enrolled in a GED program, but he failed six times to pass preliminary GED tests. The court noted that La. R.S. 23:1226(D), which requires a determination of whether there was reasonable probability that an employee could be rehabilitated before awarding permanent and total disability benefits, would be meaningless if a court could not consider an employee's inability to be educated or retrained in determining whether the employee was permanently and totally disabled. Considering the employee's unsuccessful attempt at rehabilitation along with his physical incapacity, the Louisiana Supreme Court found that Comeaux was permanently and totally disabled.

Supplemental Earnings Benefits⁸

The typical injured worker at some point recovers from a job injury and reaches a point of maximum medical improvement. At this point, the worker usually is released to return to

⁷ The appellate court's "totality of factors" included access to employment, age, race, literacy and experience. 793 So.2d at 1221.

⁸ La. R.S. 23:1221(3)

employment with or without restrictions. If the injured worker is released to return to work without physical restrictions, weekly disability benefits typically end.⁹ If the injured worker has physical restrictions, and can prove a wage loss because of those restrictions, however, the worker is entitled to supplemental earnings benefits (SEB).

Again, the name of the benefit explains its purpose, to supplement an injured employee's income. SEB continues until the wage loss ends or after 520 weeks,¹⁰ whichever comes first. The total obligation to pay 520 weeks of SEB is subject to a credit for the number of weeks of TTD or other benefits paid.¹¹

The injured worker has the burden of proving a wage loss to be entitled to supplemental earning benefits. The injured worker must prove that, as result of a job injury, he is unable to earn 90% of pre-accident wage. Once the worker proves a wage loss, however, the employer has the burden of proving the worker's post-accident wage earning capacity.¹²

SEB is calculated on a monthly basis using the following formula:

(Average Monthly Wage – post-accident wage earning capacity) x 2/3 = monthly SEB

Average Monthly Wage is (Average Weekly Wage x 52) divided by 12.¹³

SEB is subject to the maximum compensation rate, but not the minimum compensation rate.¹⁴ The SEB rate is not increased if it reduces compensation below the minimum compensation rate.

In Pinkins v. Cardinal Wholesale Supply, Inc., 619 So.2d 52 (La. 1993), the Louisiana Supreme Court held that an employee's entitlement to SEB is based on the totality of factors related to a realistic appraisal of access to employment. Id. at 56. These factors include literacy, race and age. Id. Pinkins and Comeaux, discussed above, demonstrate the different standards under the Louisiana Workers' Compensation Act for supplemental earnings benefits, which are limited to 520 weeks of benefits, and permanent and total disability benefits, which are payable for life. The Act prescribes strict standards for permanent and total disability benefits. Those standards focus on the ability to engage in employment, regardless of whether that employment is available. For SEB, however, the focus is the availability of employment, and the availability of employment may be affected greatly by circumstances other than an employee's physical restrictions.

⁹ As discussed below, an employee may be entitled to permanent partial disability benefits despite having no wage loss.

¹⁰ La. R.S. 23:1221(3)(d)(ii)

¹¹ La. R.S. 23:1223(B)

¹² Proof of wage earning capacity is discussed more fully in Chapter 11 – Vocational Rehabilitation.

¹³ La. R.S. 23:1221(3)(a)

¹⁴ La. R.S. 23:1202(2)

Permanent Partial Disability¹⁵

Unlike other disability benefits, which compensate an employee for wage loss, Permanent Partial Disability benefits compensate an injured employee for loss of, or loss of use of a body part, or for disfigurement. La. R.S. 23:1221(4) contains a schedule of benefits that are due for total loss of specific body parts. If the employee does not have a total loss of use of the body part, the employee is entitled to compensation based on the percentage of impairment to the body part.¹⁶ For example, an employee with total loss of use of the hand is entitled to 150 weeks of compensation.¹⁷ If the employee has only a 50% impairment rating to the hand, the employee would be entitled to 75 weeks of benefits (50% x 150 weeks). The impairment rating is assigned by the treating physician based on the criteria set forth in the American Medical Association's "Guides to the Evaluation Permanent Partial Disability."¹⁸

Because PPD is based on impairment or disfigurement, rather than wage loss, PPD is paid even if the employee is capable of returning to work or, in fact, has returned to work. The payment is due once the employer has notice of an anatomic loss. The employer is entitled to a credit for TTD or SEB paid against any amount of PPD that may be due.¹⁹ Using the example above, if the employee is entitled to 75 weeks of benefits for a 50% impairment to the hand, but the employer has already paid 50 weeks of TTD, the employee only receives 25 weeks of PPD.

Catastrophic Injury – One Time Lump Sum Payment²⁰

For certain catastrophic injuries, the injured worker is entitled to a lump sum payment of \$50,000.00.²¹ The following injuries qualify for the payment:

- (1) Paraplegia or quadriplegia or the total anatomical loss of both hands, or both arms, or both feet, or both legs, or both eyes, or one hand and one foot, or any two thereof;²² and
- (2) Third degree burns of forty percent or more of the total body surface.²³

¹⁵ La. R.S. 23:1221(4)

¹⁶ La. R.S. 23:1221(4)(o)

¹⁷ La. R.S. 23:1221(4)(e)

¹⁸ La. R.S. 23:1221(4)(q).

¹⁹ La. R.S. 23:1223(A)

²⁰ La. R.S. 23:1221(4)(s)

²¹ La. R.S. 23:1221(4)(s)(i).

²² La. R.S. 23:1221(4)(s)(iii)(aa). For the purpose of this payment, functional loss or loss of use shall not constitute anatomical loss.

²³ La. R.S. 23:1221(4)(s)(iii)(bb)

This payment is not subject to any credit or reduction due to other workers compensation benefits paid to the injured worker, and the employee's attorney is not allowed to take a fee out of the lump sum payment.²⁴ This payment is due within one year of the accident.

*Death Benefits*²⁵

If a job accident results in a worker's death, persons actually dependent on the deceased worker at the time of the accident and death are entitled to worker's compensation death benefits. The deceased worker's spouse living with the worker at the time of the accident and death is conclusively presumed to be wholly and actually dependent on the deceased employee.²⁶ The deceased workers' children are conclusively presumed to be wholly and actually dependent on the deceased employee if they are:

- (1) under age 18, a full-time student under age 24, or physically or mentally incapacitated from earning; and
- (2) either living with the deceased employee or the beneficiary of a valid child support order against the deceased worker, regardless of whether child support was actually being paid.²⁷

All other dependents must prove actual dependency and the extent of dependency to recover death benefits.

The total amount of death benefits to be paid varies depending on the number of the dependents and extent of each dependent's dependency.²⁸ The total payment to all dependents may not exceed 65% of average weekly wage or the maximum compensation rate, whichever is lower. Wholly dependent persons are paid in preference to partially dependent persons.²⁹ Competing dependents are paid in the following priority: (1) spouse and dependent children, (2) parents; (3) siblings; and (4) other dependents.³⁰

²⁴ La. R.S. 23:1221(4)(s)(i). The court, however, may award an attorney's fee in addition to the \$50,000.00 payment for services provided by an attorney to collect the payment.

²⁵ La. R.S. 23:1231 *et seq.*

²⁶ La. R.S. 1251(1).

²⁷ La. R.S. 1251(2) and (3).

²⁸ The percentage of average weekly to be paid in death benefits under different circumstances is listed in La. R.S. 23:1232. If a dependent was only partially dependent on the deceased employee, weekly compensation is paid in proportion to the dependency. La. R.S. 1231(B)(1). For example, if the weekly death benefit for someone wholly dependent on the deceased employee is \$200.00, a person 50% dependent on the deceased employee would receive a weekly benefit of \$100.00.

²⁹ La. R.S. 23:1252.

³⁰ La. R.S. 23:1232.

A dependent must be member of the deceased's family,³¹ but Louisiana courts interpret "family member" to include non-relatives that resided with the deceased employee.³² Effective August 1, 2012, however, neither a "concubine" nor the children of a "concubine" are entitled to death benefits, even if they resided with and were dependent on the deceased worker.³³ The legislation that prohibits payments to concubines did not alter any other language in the statute. Consequently, a person not related to the deceased, but who lived with and was dependent on the deceased at the time of death, still may recover benefits as an "other dependent," as long as that person is not the deceased's concubine or the child of the deceased's concubine. The legislation also did not define "concubine," and that omission makes the scope of the prohibition unclear.³⁴

If the deceased worker had no dependents, but is survived by biological or adopted children, the children are entitled to a single payment of \$75,000.00. The \$75,000.00 payment is to be divided between the children equally.³⁵ If the deceased worker had no dependents and no biological or adopted children, each surviving parent is entitled to a payment of \$75,000.00.³⁶

³¹ La. R.S. 1253

³² Archibald v. Employers' Liability Assur. Corp., 202 La. 89, 11 So.2d 492 (1942).

³³ La. R.S. 23:1253

³⁴ At least one workers' compensation judge has held that the provision excluding concubines and their children from workers' compensation benefits is unconstitutional. See, fn. 2, in Heathcote v. D&D Drilling & Exploration, Inc., 16-167 (La. App. 3d Cir. 9/28/16), 200 So.3d 371, 372. To date, no Louisiana appellate court has ruled on the issue.

³⁵ La. R.S. 23:1231(B)(2)

³⁶ *Id.*