



Our first Coronavirus memo covered compensability of Coronavirus claims. Our second memo involved Coronavirus' effect on temporary disability (TTD and TPD) claims. This memo provides guidance for employers, third party administrators, and insurers regarding Coronavirus' impact on permanent disability benefits.

Coronavirus' disruption of the economy will affect employees' eligibility for certain permanent disability benefits and the amount of those benefits. Reduced pay or hours, furloughs, layoffs, buyouts, and other related situations can have differing impacts on permanent disability benefits. The potential impacts are discussed below. Basic and complex issues are discussed. Contact us with questions regarding this guidance and to discuss your factual situation.

### **REQUIRED DISCLAIMER**

This guidance is for general, educational purposes and not intended to be legal advice. Seek separate legal advice on your specific cases and facts. The legal analysis of your specific question or claim depends on facts which might alter, or completely change, what you will read below. The below analysis covers only Tennessee's workers' compensation claims.

### **BASICS OF PERMANENT DISABILITY BENEFITS**

There are two types of permanent disability benefits: permanent partial disability (PPD) benefits and permanent total disability (PTD) benefits. An employee is eligible for permanent disability benefits if the injury results in a permanent impairment, which is typically expressed as a percentage of anatomic impairment pursuant to the *AMA Guides*. Eligibility for permanent disability benefits begins once the employee attains maximum medical improvement (MMI). The actual amount of permanent disability benefits depends on the facts of each case.

#### ***What are permanent partial disability (PPD) benefits?***

An employee gets PPD benefits if the injury results in a permanent impairment and the employee is not totally disabled to work. There are two basic types of PPD benefits: 1) the initial compensation (Original Award); and 2) increased benefits (Resulting Award).

**Initial Compensation:** The initial compensation is equal to the employee's anatomic impairment rating times 450 weeks. All employees receiving an impairment rating are entitled to the initial compensation, regardless of work status. Thus, the economic downturn will not impact these benefits.

**Increased Benefits:** Coronavirus' impact on the labor market will affect increased benefits because eligibility for and the amount of these benefits is dependent upon work status and labor market statistics. An employee may be entitled to increased benefits if, at the end of the initial compensation period, the employee has not returned to work with any employer or has returned to work and is receiving wages or a salary that is less than 100% of the wages or salary the employee received from the pre-injury employer on the date of injury. The initial compensation period begins



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at MMI and continues for the same number of weeks as the initial compensation (i.e., impairment rating times 450 weeks).

An employee may not be eligible for increased benefits if the loss of employment is due to the employee's voluntary retirement or resignation if unrelated to the injury. Also, an employee may not be eligible for increased benefits if the employee remains employed and the reduction in wages or hours affects at least 50% of the hourly employees at the same location. An employee's misconduct may also be a disqualifying event.

If eligible for increased benefits, the employee is automatically entitled to a PPD award equal to 1.35 times the impairment rating. Other factors may apply. A 1.45 factor applies if the employee lacks and high school degree or GED, and a 1.2 factor applies if the employee is more than 40 years old when the initial compensation period ends. The economy will not impact these factors.

The economy will impact the unemployment factor. A 1.3 factor applies if the unemployment rate in the county in which the employee worked for the pre-injury employer was at least 2 percentage points higher than the yearly average unemployment rate in Tennessee for the year immediately prior to the expiration of the initial period of compensation. Since the enactment of the new law in 2014, the 1.3 factor rarely applied. Considering the historically low unemployment rates in 2019 and anticipated spike in unemployment rates, the 1.3 factor will likely apply in more cases. That will result in higher PPD awards.

### ***What are permanent total disability (PTD) benefits?***

An employee may receive PTD benefits if the employee is totally incapacitated from working. This does not mean the employee must be 100% medically disabled. Instead, whether an employee is totally disabled depends on the employee's skills, education, age, training, job opportunities in the immediate and surrounding communities, and the availability of suitable work. There is no set formula. Considering current labor market conditions, there may be an increase in permanent total disability awards. Permanent total disability benefits are paid from the MMI date until the employee is eligible by age for full benefits in the Old Age Insurance Benefits Program under the Social Security Act.

### **SITUATIONS IMPACTING ELIGIBILITY FOR INCREASED BENEFITS**

#### ***Is an employee entitled to increased benefits if the injured employee's reduction in hours or wages are part of a company-wide reduction?***

Probably not. If the employee remains employed but received a reduction in wages, salary, or hours that is concurrent with a similar reduction that affects at least 50% of all hourly employees working at the same location, the employee is not eligible for increased benefits.



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***Is a furloughed employee eligible for increased benefits?***

Maybe. Whether a furloughed employee is eligible for increased benefits is heavily dependent upon the employee's status during the furlough. As discussed, if the employee remains employed and the furlough affects at least 50% of all hourly employees working at the same location, the employee may not be eligible for increased benefits. This will depend on whether the courts find that the 50% rule does not apply if the hours or wages are reduced to zero.

If the 50% rule does not apply, the employer may argue that the employee is not eligible for increased benefits if the employment relationship remains intact (i.e., the employee has not been separated) and there is an expectation that the employee will be recalled within a reasonable period. Other factors impacting eligibility in this scenario include whether the employee continues to receive benefits while furloughed, whether the employee struggled to work due to the injuries prior to the furlough, and whether the employer eventually eliminates the employee's position.

***Is an employee entitled to increased benefits if not working due to a Stay at Home order?***

Whether an employee is eligible for increased benefits if not working due to a Stay at Home order depends on the circumstances and will likely be decided on a case-by-case basis. The discussion in response to the preceding questions covers this issue. The effect a Stay at Home order has on an employer's workforce decisions does not matter.

***What if the employer offers alternate work that the employee declines or cannot perform?***

There may be instances when the employer offers alternate work arrangements, such as working at home or in a different position, that the employee either declines or is unable to perform. In such cases, a reasonableness test applies: the reasonableness of the employer in attempting to provide alternate work versus the reasonableness of the employee's failure to accept the work. The reasonableness of each is determined on a case-by-case basis. Generally, if the employee is unable to perform the alternate work due to the injury, the employee will be entitled to increased benefits. If the employee declines the work for personal reasons or other reasons unrelated to the work injury, the employee likely is not entitled to increased benefits.

***Is an employee who accepts a buyout package entitled to increased benefits?***

Maybe. The eligibility for increased benefits depends on whether the employee accepted the buyout package for reasons unrelated to the injury. An employee who resigns or retires for reasons unrelated to the work injury is not entitled to increased benefits. So, if the employee accepts a buyout package for reasons unrelated to the work injury, the employee is not entitled to increased benefits. Alternatively, if the employee is struggling to work due to an injury and for that reason accepts a buyout package, the employee may be eligible for increased benefits.



## QUESTIONS?

Please contact Manier & Herod with questions, comments, and concerns. We are happy to consult on all potential claims to determine the best course of action based on your particular facts.