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THE BOARD'S CURRENT POSITION ON THE 130 WEEK CREDIT UNDER WCL § 15(3)(w)

The 2017-2018 executive budget (Part NN of Chapter 59, Laws of 2017), enacted April 10, 2017 made significant changes to WCL § 15(3)(w) to generate cost savings for employers and carriers. On April 25, 2017 the Worker's Compensation Board issued a bulletin regarding these reforms laying out the basic way that the reforms work. The basics of the changes are that WCL § 15(3)(w) now provides for a credit for periods of temporary disability that extend beyond 2.5 years (130 weeks) from the date of injury. Under the change the carrier may now receive a credit against the maximum weeks of benefits payable for PPD benefits for any periods of temporary disability paid beyond 130 weeks. The rule only applies to injuries with dates of accident or disability after 04/09/2017. The changes did provide for a "safety valve" that can extend the period of temporary disability beyond 130 weeks when the Board makes a determination that the claimant has not yet reached maximum medical improvement on that date.

The pertinent part of WCL § 15(3)(w) now which is related to the 130 week credit reads as follows:

“For a claimant with a date of accident or disablement after [04/09/2017], where the carrier or employer has provided compensation pursuant to subdivision five of this section beyond one hundred and thirty weeks from the date of accident or disablement, all subsequent weeks in which compensation was paid shall be considered to be benefit weeks for purposes of this section, with the carrier or employer receiving credit for all such subsequent weeks against the amount of the maximum benefit weeks when permanent partial disability under this section is determined. In the event of payment for intermittent temporary partial disability paid after one hundred thirty weeks from the date of accident or disablement, such time shall be reduced to a number of weeks, for which the carrier will receive a credit against the maximum benefit weeks.”

It goes on to state regarding the safety valve for the claimant that:

“For a claimant with a date of accident or disablement after [04/09/2017] when permanency is at issue, and the claimant has submitted medical evidence that he or she is not at maximum medical improvement, and the carrier has produced or has had a reasonable opportunity to produce an independent medical examination concerning maximum medical improvement, and the board has determined the claimant is not yet at maximum medical improvement, the carrier shall not receive a credit for the benefit weeks prior to a finding that the claimant has reach maximum medical improvement, at which time the carrier shall receive credit for any weeks of temporary benefits paid to the claimant after such finding against the maximum benefit weeks awarded.”

Breaking down the language in the statute into more simple terms, it is our position that the carrier is entitled to credit for all weeks of temporary benefits paid after 130 weeks unless the claimant makes a showing that they are not at maximum medical improvement. It is our position that the weeks of benefits at temporary total (TT) or tentative rate (TR) would be included in the calculation of the credit as the statute does not differentiate in the second clause and states that “all subsequent

weeks in which compensation was paid shall be considered to be benefit weeks for the purposes of this section, with the carrier or employer, receiving credit for all such subsequent weeks against the amount of the maximum benefit weeks when [PPD] under this section is determined."

It is our position that the first clause of the amendment which states "where the carrier or employer has provided compensation pursuant to subdivision five of this section beyond one hundred and thirty weeks from the date of accident or disablement" means that the claimant just needs to have had at least one week of compensation at a partial rate prior to the 130 week mark.

The Board has taken a different position finding that the 130 week credit is only for "payments made pursuant to subdivision five of this section". Subdivision five of WCL § 15 is the section for temporary partial benefits. This has led the Board to a very different interpretation of the credit where it only applies to temporary partial (TP) payments made after 130 weeks and not to TT or TR payments made after 130 weeks. While our office maintains this is an incorrect interpretation it is the one the Board is currently working with and the one they have asked Judge's to use.

In recent cases on calendar with the 130 week credit issue our office has been successful in obtaining the full 130 week credit we believe the carrier to be entitled to primarily in situations where:

1. The claimant is found to be at MMI by their own doctor prior to the 130 week mark; and
2. The payments made after the 130 week mark are made at a temporary partial (TP) rate.

On calendar some Judge's have been citing recent Board Panel Decisions regarding the applicability of the 130 week credit. The primary case that we have seen cited on calendar is Employer: SUNY at Buffalo, 2022 WL 3702418 (N.Y.Work.Comp.Bd), G2327483, August 17, 2022. In that case the parties entered a stipulation for a 31% LWEC and a SLU and the parties discussed at the hearing implementing the stipulation the applicability of

WCL § 15(3)(w). The Board panel ultimately highlighted it's position that "the WCL § 15(3)(w) credit is applicable to solely temporary partial disability awarded after the expiration of the 130 weeks from the date of accident." The Board made reference to its prior Board Panel Decision in Matter of West Seneca Central School District, 2022 NY Wrk Comp G1895795 which laid out the above rule.

In the decision in Employer SUNY at Buffalo, the Board went on to note that there was no evidence the safety valve was applicable in that matter as "the Board file does not contain a finding by the Board that the claimant had not reached MMI during the relevant period of temporary disability awards prior to the classification date. It has been our experience that the easiest time to assert this is when the claimant's own doctor finds MMI prior to the 130 week credit mark.

While it remains our position that the benefits at the TT or TR rates should also count against the cap, in current cases where the awards after the 130 week mark were all made at a TR rate we have been asking the judges to set litigation on the issue of degree of disability for the weeks subsequent to the 130 week mark in order to obtain a TP rate so that we can take the credit under the Board's current position.

While there are still many unanswered questions about the applicability of the 130 week credit and the so-called safety valve, the above lays out the board's current position on the issue which we have been attempting to work within currently.

As always Vecchione, Vecchione, Connors & Cano, L.L.P. is here for you to consult with in all stages of a permanency litigation regarding the 130 week credit, the safety valve, and any other issues. We are also available for in person or virtual presentations on this or any other topic.

If you have any questions on these issues, please feel free to contact us at info@vecchionelaw.com.

We welcome your feedback and look forward to providing information on topics that are of interest to you. If you have any questions about the information provided, or if you have a workers' compensation matter that you need assistance with, we are available to speak with you. Please contact us at vvccnews@vecchionelaw.com.

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