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QUESTIONS CONCERNING COVID-19 IMPACT ON MODIFIED DUTY AND PAYMENT OF TTD

Illinois:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TD?

Yes. In Illinois, the standard for payment for payment of temporary total disability will be based upon the restrictions that prevent Petitioner from working his or her usual job duties and whether the medical condition has reached maximum medical improvement. Where a Petitioner is working modified job duty, is not at maximum medical improvement and the job ends (even related to Petitioner's voluntary actions), the Court has found entitlement to payment of TTD. The idea is that unlike other employees being released into the job market, Petitioner has restrictions which prevent her from obtaining other employment. Payment of benefits should end immediately if Petitioner is found at maximum medical improvement or if the restrictions are lifted.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TD?

We do not recommend voluntary payment of TTD in this situation. The current situation is impacting almost the entire workforce. As noted above, the Court has ignored a Petitioner's volitional acts in favor of the principle that Petitioner needs to be at maximum medical improvement.

However, in recent years the Court has been deciding the claims on a more fact specific basis. We have an argument that there was a labor market for Petitioner created by the accommodation of light duty and the sole reason for the demand for benefits is Petitioner's refusal to work. Certainly, an employee may have a reasonable fear of coming to work based upon their personal health.

3. How do we handle lack of TD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

Flexibility is needed on this issue. The burden is on Petitioner to show that he is on restrictions and not yet at maximum medical improvement. Terminating benefits should be fact specific. If an off-work note had been requested on a few occasions before this emergency, it would be more reasonable to terminate benefits. It is likely that most Arbitrators would not agree to a denial of benefits if the current situation resulted in a cancelled medical appointment. Most Arbitrators would likely award benefits where the last medical notes show that it was unlikely Petitioner would have been released from treatment at the next appointment.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

Petitioners can likely get a note to continue restrictions or recommendations for treatment. Although most doctors are not seeing patients in person, most are not closed completely. Therefore, phone calls can be made. Some doctors are participating in telemedicine right now as well, and during these times, the Illinois Workers Compensation Commission is likely to consider this type of treatment acceptable for the purpose of getting updated work ability notes or treatment recommendations. If the doctor's offices are closed, employer's likely have to honor the last work note.

5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

If the doctor is willing to see the patient or the physical therapy facility is open, we would recommend suspending benefits if the claimant does not treat accordingly. We would argue that treatment is essential to the recovery from the injury and these facilities are being allowed to stay opened for this very purpose.

Indiana:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TD?

No. The person would be unavailable for reasons other than the work injury. Presumably, the injured worker would be in the same situation as other, non-injured employees.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TD?

Same answer as #1 above. Someone cannot choose to collect TTD. If the employer has work available within restrictions for the work-related injury, no TTD is owed.

3. How do we handle lack of TD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

This is a tougher one. No hard and fast rule; however, our Board Members (Judges) are likely to give claimants a pass on getting updated work restrictions in the current climate. Flexibility is recommended.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

We would anticipate that if an updated work status is not available due to providers declining to see patients due to pandemic concerns, the Indiana Worker's Compensation Board's position will be that the most recent work status received from the authorized physician. Should an appointment with the physician be impossible at this point, the doctor may be willing to provide updated restrictions without an appointment if additional information since the last appointment is available, such as physical therapy records or a telephone call with the employee or the employer about the claimant's performance on light duty. An employer, claims professional or nurse case manager may attempt to contact the authorized physician to address work status, so long as they do not attempt to suggest what treatment or work restrictions are appropriate.

5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

IC 22-3-3-6 and 22-3-3-7 allow for the employer to terminate TTD if the employee refuses or obstructs reasonable medical treatment, and no compensation is owed during the period of the employee's refusal "unless in the opinion of the worker's compensation board the circumstances justified the refusal or obstruction." Any suspension or termination of benefits based upon the employee's refusal to submit to treatment must be preceded with a notice setting for the consequences of the refusal. I believe the worker's compensation board would take a number of factors into consideration when determining whether refusing treatment is justified, such as the number of confirmed cases of COVID-19 in the county of treatment, any preexisting conditions of the claimant or their family members, the provider's ability to provide separation from other patients and medical personnel, the availability of personal protective equipment for the employee while at the treatment facility, and whether the treatment facility had any patients testing or actively treating for the virus. If any of the directives of "social distancing", "stay at home", or "shelter in place" apply, I think our Board would more than likely determine that any refusal to submit to treatment would be justified under the circumstances. However, the employer would still be more than in good faith to suspend/terminate benefits based on a refusal to submit to treatment and make the claimant convince the Board that their actions were justified. As restrictions are (hopefully) lightened as this crisis continues, I would be more inclined to challenge a claimant's refusal to accept treatment than in the present climate.

Iowa and Nebraska:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TD?

Nebraska: Nebraska appellate case law states that you have to either put the claimant back to work or pay TD until they reach MMI. Therefore, it is likely that if an employer is shutting down claimant would be entitled to TD during the duration of the shut down even if claimant would not have been paid by the employer during the shutdown. This does, however, not preclude you from suspending benefits during the shutdown to claimant if claimant reaches MMI during the shutdown.

Iowa: Iowa's statutes are worded a little differently but the outcome is the same compared to Nebraska. You must pay TD until it is medically indicated that a claimant is capable of returning to suitable employment. TD must be paid even if intervening facts or circumstances (based on case

law, pregnancy or incarceration) make it impossible for claimant to present for light duty. Therefore, a claimant would be entitled to payment of TD even if the employer is shutting down and claimant would not be paid by the employer during the shut down anyway. If a claimant is entitled to TD while incarcerated it is difficult to see why they would not be entitled to TD if the employer shut down.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TD?

Nebraska: An employer may withhold TD from a claimant if they unreasonably refuse to attend light duty accommodation. Whether or not claimant's refusal to attend light duty because of fear of COVID-19 exposure would depend on the reasonableness of the claimant's fear of being exposed. If a known exposure occurred at work, prior to claimant's refusal to attend would likely be sufficient to be considered reasonable where we would still owe benefits despite the refusal. Another example I can think of offhand, a claimant in a high risk of exposure category for some reason or another due to age or pre-existing respiratory condition or the like. The only fact scenario that I could see being unreasonable might be if a claimant is below 40 years of age, not in a higher risk of exposure category, no known exposure at work prior to refusal and working in conditions with exposure of less than 10 individuals at a time.

Iowa: The answer is the same as Nebraska because Iowa also follows the unreasonable refusal to attend standard.

3. How do we handle lack of TD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

Nebraska: Again the standard in Nebraska is to put the claimant back to work or pay TD. There is no statute in Nebraska that permits you to cut off benefits for claimant's refusal to treat for a workers' compensation injury. Moreover, there is really nothing the claimant can do about treatment if the doctor is refusing to treat them. You will need to continue TD until you get either MMI or light duty restrictions that can be accommodated. I know this will be pretty frustrating but if the claimant virtually cannot be seen by a doctor than the last restrictions report will be considered valid until they are able to be seen by the treating physician and the physician authors new restrictions.

Iowa: The answer in Iowa is the same as Nebraska with one important caveat. The employer controls medical in Iowa so if the current treating doctor is refusing to accept patients there is nothing that precludes you from trying to find a similarly situated doctor based on specialty and location that would agree to treat claimant on an ongoing basis. In many cases, the claimant may prefer that you do this anyway so there is no gap in treatment.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

In Nebraska, the Courts would look to the most recent work status to determine claimant's ongoing disability. Even if you are unable to get claimant back in for treatment because of canceled appointment, the employer and carrier will have to honor the most recent work status note until they are able to get claimant back to a doctor to provide an updated work status regardless of how long that may take.

In Iowa, the Courts would look to the most recent work status to determine claimant's ongoing disability. You will need to get claimant in front of a doctor to provide an updated work status before the last issued work status will not be considered current. The employer, however, does control medical in Iowa so it is possible for the employer to direct the employee to a different doctor who is accepting patients to get an updated work status or provide treatment in general. Changing doctors in order to obtain an updated work status should only be considered a last resort if the delay in getting claimant in for treatment starts to become an extended problem. In some cases it

could have a negative impact on ongoing treatment recommendations if treatment is transferred to a less conservative doctor.

5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

In Nebraska, there is no statute or case law that gives the employer/carrier the right to suspend TD benefits for the employee's refusal to attend medical appointments. The only way that benefits can be suspended during a period of refusal is when an employee unreasonably refuses to attend an Independent Medical Evaluation scheduled by the employer/carrier. In a case where employee is refusing treatment, and the employer or carrier is considering an Independent Medical Evaluation anyway, it may be a good idea to schedule on at this time. You will be able to get the answers you want from an independent doctor if claimant attends the appointment. If employee does not attend the appointment then you will be able to suspend benefits with impunity under Nebraska law. In all cases where an IME is not warranted you will unfortunately have to continue to pay TD to claimant until you can get claimant back in front of doctors or PT. If benefits are suspended then exposure for penalties would attach for any payment that is more than 30 days past due.

In Iowa, there is no statute or case law that give the employer/carrier the right to suspend TD benefits for an employee's refusal to attend medical appointments. You must, unfortunately, continue to pay benefits until employee agrees to continue PT or medical treatment. Suspension of benefits solely for failure to attend PT or medical appointments could result in exposure for penalties and interest.

Kansas:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TTD?

K.S.A. 510c(b)(2) states: (2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

If the employer's ability to offer accommodated work changes, the inquiry would shift back to whether the claimant is otherwise still temporarily incapable of engaging in any type of substantial and gainful employment. If it isn't reasonable to believe any other employer would hire and retain the claimant due to the temporary restrictions, TTD would have to be paid.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TTD?

A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employer is ineligible to receive TTD benefits.

3. How do we handle lack of TTD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

TTD status is a medical determination made by the authorized treating physician. Delays in work status determinations for reasons outside of the control of the claimant would not justify an interruption in benefits and would be viewed as unfairly penalizing the claimant. As reported by others, at a minimum, it would likely just retroactive entitlement of TTD.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

In Kansas, if a valid off-work slip cannot be obtained at this time due to the providers inability to provide it, then the courts will likely defer to the last work status or off-work slip to determine an employee's ability to return to work. Delays are likely to be inevitable during this crisis. In the absence of medical evidence to the contrary, the last available medical report will continue to control until updated.

5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

In Kansas, all benefits shall be suspended to an employee who refuses to submit to medical examination or examinations until such time as the employee complies with the employer's request. The suspension of benefits shall occur even if the employer is under preliminary order to provide such benefits.

Missouri:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TTD?

Temporary total disability exists when employee has been rendered completely and temporarily incapable of engaging in substantial and gainful employment. The ability to perform some work is not the test for temporary total disability. Rather, the test is whether the employee is able to compete in the open labor market given the employee's present physical condition. If the employer's ability to offer accommodated work changes, the inquiry would shift back to whether the claimant is otherwise still temporarily incapable of engaging in any type of substantial and gainful employment. If it isn't reasonable to believe any other employer would hire and retain the claimant due to the temporary restrictions, TTD would have to be paid.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TTD?

In this instance, claimant would be viewed as voluntarily removing themselves from the workforce for reasons unrelated to the injury and would not be entitled to TTD where a bona fide modified duty job was available.

3. How do we handle lack of TTD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

TTD status is a medical determination made by the authorized treating physician. Delays in work status determinations for reasons outside of the control of the claimant would not justify an interruption in benefits and would be viewed as unfairly penalizing the claimant. As reported by others, at a minimum, it would likely just retroactive entitlement of TTD.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

In Missouri, if a valid off-work slip cannot be obtained at this time due to the providers inability to provide it, then the courts will likely defer to the last work status or off-work slip to determine an employee's ability to return to work. Of course this can cut both ways. An employee could be off-work currently, but nearing or at a position to return, but a valid release has not been provided. Alternatively, an employee could be working, but have deteriorating symptoms which cause the employee to no longer be able to work, but without a valid off-work slip the employer could potentially require them to still work unless the employer felt it jeopardized the safety of the injured employee or other workers. Regardless, an effort should be made to obtain a current work status if possible.

5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

In Missouri, the employer directs and controls treatment. Therefore, if a Claimant refuses to attend a doctor's appointment or comply with medical treatment, and the doctor or medical provider remains open and available to offer that treatment, then the employer would have a right to terminate benefits on that basis. Normally, an injured employee who refuses to participate in medical treatment would have TTD benefits terminated. In this COVID-19 era, so long as the medical providers treating the employee are recommending additional treatment and the facilities or providers who offer that treatment are open and able to provide it, then an argument can be made the medical treatment should proceed. If it is refused out of fears of the virus, then an argument can be made this is a refusal of medical treatment, and TTD should be terminated. With that said, there are risks that if the employee caught the COVID -19, then may more likely be able to make a case it was compensable, if they can show the virus was contracted from participating in the medical treatment. As such, the risks would need to be weighed against how the ongoing TTD might have to be paid, and the amount that would be incurred against the risk for a new claim based on the virus.

Wisconsin:

1. If somebody was on modified duty and due to the virus the employer is shutting down are we responsible to pick up TD?

In Wisconsin, temporary total disability is owed during the healing period unless "suitable employment that is within the physical and mental limitations of the employee is furnished to the employee by the employer or some other employer." Wis. Stat. 102.43(9)(a)(a). If no suitable employment is furnished, TTD is owed. Given that, we expect it would be difficult to prevail on the theory that it is the plant closure and not the injury that causes the absence. That said, this argument remains available when there is a widespread layoff or plant closure due to the virus.

2. If somebody was working modified duty but they elect not to go into the office due to the virus do we owe TD?

The duty to pay TTD comes to an end if the employer makes a bona fide offer of suitable employment that the employee unreasonably refuses to accept. Wis. Stat. §102.43(9)(a)(a). There is little guidance as to what unreasonably refuse to accept means in the context of an epidemic. Certainly, if the employee was in one of the high-risk categories, he or she would have a better case than if the employee was in a low risk category. You have a reasonable basis upon which to suspend TTD/TPD liability under these circumstances, but we expect the courts/ALJ would ultimately side

with the employee. The act is liberally construed in favor of the employee's interests, and so a court—even if this defense is not invoked out of a genuine fear of the virus but instead to evade an accommodation—is likely to award benefits during this timeframe.

3. How do we handle lack of TD reporting from providers as many are not taking patients right now, so injured workers may not have valid off work slips.

In Wisconsin, that response will depend on the form of the off-work slip takes and a good deal of common sense. If the off-work slip states “until next appointment,” TTD will be owed unless you have a different medical opinion to the contrary. If the work excuse has an endpoint, it would probably be a matter of common sense. If the excuse had an endpoint but disability would be expected to continue, e.g. someone is two weeks out from a spinal fusion, you probably should continue to pay. If however, the person could be expected to be at and end of healing and their work excuse runs out, then you can probably refuse additional TTD until the worker's doctor clarifies the situation. Finally, as a practical matter, the employee may have no choice about this issue because clinics are closing.

4. How do we handle lack of disability/work status reporting from providers, as many are cancelling appointments, not taking patients right now, or other issues that prevent the injured workers from getting valid off work slips.

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5. How do we handle a situation where an injured worker that is currently on TD does not want to engage in PT or see their treating doctor due to virus fears? What is your opinion on if the Courts would state we must continue to pay TD?

In Wisconsin, “no compensation shall be payable for the . . . disability of an employee, if the . . . disability may be aggravated, caused, or continued by an unreasonable refusal [of] reasonable medical . . . dental treatment.” Wis. Stat. §102.42(6). The question becomes what is unreasonable. The Department has in the past taken the position that a refusal to submit to surgery, which involves a risk to life or limb, is not unreasonable. Under its position, back surgery and probably all surgery requiring general anesthesia is per se not unreasonable to decline. Again, there is no guidance of what is reasonable in time of pestilence. The guidelines with regard to general anesthesia are older when mortality was higher. That said, a quick internet search shows that there is 1 in 100,000 risk of death for general anesthesia or .001%. As of this writing, March 20, 2020, COVID-19 has a 1% to 2% mortality rate, 1,000 times higher. If it is not unreasonable to refuse general anesthesia, it would probably not be unreasonable to refuse to engage in activity which increases the chance of contracting COVID-19. Of course, this is just a guess because there is very limited information. But the higher the risk category the employee finds him or herself, the more reasonable it becomes to not seek treatment. Finally, as a practical matter, the employee may have no choice about this issue because clinics are closing.

PLEASE NOTE: While above we outline legal arguments and general guidelines about how to handle the above scenarios, the reality is we are operating in an environment in which most courts and Judges will seriously consider the impact of the COVID-19 pandemic on employees, and this will most likely result in great deference to employees to both protect them, and avoid employees not receiving any benefits until

receipt of such benefits would produce a blatant violation of the law. Each case will need to be evaluated based on the facts to discern the best course of action. We recommend you contact us with any cases which require attention regarding these matters before making a decision, so that we can carefully analyze an appropriate response specific to those facts.

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