HOW TO CALCULATE THE VALUE OF A PERMANENT TOTAL DISABILITY CLAIM UNDER WISCONSIN WORKER'S COMPENSATION LAW

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Permanent total disability claims in Wisconsin are not infrequent. Attorneys on both sides of the case and claims adjusters are required to calculate the potential value or risk exposure whenever the facts justify such a claim. The process of placing a dollar value on the amount which the injured worker is likely to recover is often cumbersome, time consuming and fraught with error. While it is not difficult to state the formula, all of the factors that must be plugged into the formula are not definite. Predictions must be made about certain criteria. If the claim is adjudicated, only the accrued amounts can be known with certainty. Unaccrued future benefits must be predicted, and cannot be known for sure until the passage of time. The best estimate that can be accomplished is usually the calculation of a probability range within which the payout will fall. The purpose of this essay is to establish a framework for assessing the value of permanent total disability claims. The methodology should be equally useful for advocates on either side of the issue.

Permanent total disability indemnity benefits are payable at the same rate as temporary total disability benefits, two-thirds of the average weekly wage at the time of the injury, Wis. Stat. § 102.43(1), subject to the state's periodically adjusted maximum wage and benefit rates. See Maximum Wage and Rate Chart, form WKC-9572-P:

http://www.dwd.state.wi.us/dwd/publications/wc/WKC-9572-P.pdf

A permanent total disability award also entitles the injured worker to medical expenses related to the industrial injury. Permanent total disability indemnity benefits last "for the period that the employee may live." Wis. Stat. § 102.44(2). Because the employer's duty to pay medical expenses continues "as may be reasonably required to cure and relieve from the effects of the injury," Wis. Stat. § 102.42(1), medical expenses related to the injury must also be paid for life.

The calculation of worker's compensation benefits becomes more complicated if the worker is also entitled to or already receiving social security disability benefits. Federal law requires a social security offset when, prior to age 65, the combined social security disability benefits and worker's compensation benefits exceed 80% of the average current earnings. 42 U.S.C. § 424a(5). As the United States Supreme Court has explained, "by limiting total state and federal benefits to 80% of the employee's average earnings [as defined in 42 U.S.C. § 424a] prior to the disability, [§ 224 of the Act] reduce[s] the duplication inherent in the programs and at the same time allow[s] a supplement to workmen's compensation where the state payments [are] inadequate." Richardson v. Belcher, 404 U.S. 78, 83 (1971). See also SSR 97-3; SSA Publication No. 05-10018. The publication is available online here: http://www.ssa.gov/pubs/10018.pdf

When the state enacts a law to reduce its worker's compensation benefits upon the claimant's receipt of social security disability, the federal social security administration will discontinue the offset of social security benefits, allowing the state to employ its offset of worker's compensation benefits instead. The state's offset is referred to as a "reverse offset." 42 U.S.C. §424a(d); 20 C.F.R. § 404.408.

Wisconsin uses the reverse offset approach. Wis. Stat. § 102.44(5) provides that when social security disability benefits are paid contemporaneously with worker's compensation benefits, the worker's compensation benefits may be offset. Here is the language of the statute:

> For each dollar that the total monthly benefits payable under this chapter, excluding attorney fees and costs, plus the monthly benefits payable under the social security act for disability exceed 80% of the employee's average current earnings as determined by the social security administration, the benefits payable under this chapter shall be reduced by the same amount so that the total benefits payable shall not exceed 80% of the employee's average current earnings.

Emphasis supplied.

A key provision of the quoted statute is the phrase, "excluding attorney fees and costs." The significance of this phrase is the fact that the portion of worker's compensation benefits that is paid or payable to the applicant's attorney for attorney fees or costs is not included in the worker's compensation benefits that are subject to offset. Attorney fees and costs are payable by the employer and insurer in addition to the worker's compensation benefits that, when added to social security benefits, bring the combined benefits up to a total of no more than 80% of average current earnings, as adjusted. If the combination of attorney fees and offset PTD benefits, when added to the social security benefits exceeds 80% of the average current earnings, the PTD benefits will not be offset at all.

Attorney fees are capped by statute at no greater than 20% of the award, Wis. Stat. § 102.26. In the case of permanent disability, attorney fees are not be allowed on compensation awards due beyond 500 weeks. Wis. Adm. Code, ch. DWD § 80.43(3). The 500 week limitation on attorney fees begins running on the date of the healing plateau.

Because fees and costs are not considered when the offset is calculated, and because fees and costs stop after 500 weeks, additional steps in the calculation process are required before the total value of the claim can be determined.

When the possibility of a reverse offset exists, either the worker's representative or the employer's representative may write to the social security administration for the completion of a Social Security Information Request worksheet. See form WKC-6156, available here: http://www.dwd.state.wi.us/dwd/forms/2512/WKC-6156.pdf

The form shows the information below:

(a) The status of the disability claim;

(b) 80% of the monthly average current earnings;

(c) The disability monthly benefit amount at entitlement;

(d) The month and year of entitlement; and

(e) The month and year of last disability check if terminate.

Upon completion of the social security benefit worksheet, either side may request that the Department of Workforce Development, Worker's Compensation Division, complete a Reverse Offset Worksheet. See form WKC-6119, which is available online here: http://www.dwd.state.wi.us/dwd/forms/250e/WKC-6119.pdf

The form shows the information below:

(a) The initial 80% of average current earnings;

(b) The triennial redetermination index;

(c) The re-determined 80% of average current earnings;

(d) The weekly worker's compensation benefit before offset;

(e) A line for the higher of item (c) or (d);

(f) The initial monthly benefit amount times 12/52;

(g) The weekly balance to the employee, which is item (e) minus (f); and

(h) The entitlement date.

In order to arrive at an accurate total of accrued worker's compensation benefits, the social security reverse offset calculation must be made from the date of the onset of social security disability benefit payments, during each time period of the worker's receipt of worker's compensation benefits. A separate calculation must be made to compare and offset, if necessary, the two types of benefits during each time period when both are paid or payable.

As a protection against inflation, Congress enacted a provision that allowed, on a triennial basis, redetermination of the average current earnings for those workers that had a workers' compensation offset. 42 U.S.C. § 424a(f). Fortunately for workers, the triennial social security cost of living increases eventually raise the average current earnings rate against which the 80% cap is compared, so that eventually there is no reverse offset. However, in order to calculate accurately the unaccrued worker's compensation benefits that are due, the reverse offset comparison must be brought forward indefinitely, until the reverse offset no longer applies.   The Triennial Re-determination Ratio chart is here: http://policy.ssa.gov/POMS.NSF/lnx/0452001915

For each three-year time period into the past, a set redetermination ratio applies. The redetermination figure, or index figure is set forth in the table, and the social security figure is calculable. For time periods into the future, a guess must be made of the redetermination ratio, if future worker's compensation benefits are sought to be

calculated.

For persons seeking to calculate the exact amount of benefits due in the past or in the future, the calculation requires a consideration of various time periods between the date of injury and the date of the calculation. In the typical worker's compensation case, there are several different time periods to take into account:

TIME PERIOD I – PRIOR TO THE HEALING PLATEAU

For periods of time during which temporary total disability benefits are payable prior to the time when the worker reaches the healing plateau, the rate is two-thirds of the average weekly wage, unless there is a renewed period of disability commencing more than two years after the date of injury, and the employee had returned to work for at least ten days before the new period started, pursuant to Wis. Stat. § 102.43(7)(a).

TIME PERIOD II – PPD PRIOR TO PTD

For periods of time during which permanent partial disability benefits are payable or were paid after the date of the healing plateau, the lower permanent partial disability rate applies. There may have to be a credit against permanent total disability benefits due if permanent partial disability benefits were paid.

TIME PERIOD III – RETRAINING BENEFITS

For periods of time during which retraining benefits are payable, the rate is the same as the rate used during temporary total disability, unless retraining commences more than two years following the date of injury, in which case the rate is enhanced as if the date of injury were the date that retraining commences, pursuant to Wis. Stat. § 102.43(7)(b).

TIME PERIOD IV – PTD PRIOR TO SSD

For periods of time during which permanent total disability benefits are payable, prior to the effective date of any social security reverse offset, the full TTD/PPD rate applies.

TIME PERIOD V – PTD DURING FIRST SSD OFFSET PERIOD

For periods of time during which permanent total disability benefits are payable, after the effective date of a social security reverse offset, one must perform the calculations separately:

(a)   if no attorney fees or costs are applicable; or

(b)   if attorney fees or costs (to be excluded from worker's compensation benefits) are applicable.

TIME PERIODS VI AND FOLLOWING – PTD DURING SUBSEQUENT SSD REVERSE OFFSET PERIODS

For periods of time during which permanent total disability benefits are payable after each successive triennial redetermination ration change, one must perform the calculations separately:

(a)   if no attorney fees or costs are applicable; or

(b)   if attorney fees or costs (to be excluded from worker's compensation benefits) are applicable, but only for 500 weeks following the healing plateau.

LAST TIME PERIOD – PTD SUBSEQUENT TO LAST SSD REVERSE OFFSET PERIOD

For periods of permanent total disability subsequent to the last social security reverse offset period, permanent total disability benefits are payable at the full rate.

There is a significant amount of data entry required to make all the necessary calculations. For each of the potential time period shown above, data must be inserted for:

- the amount of the weekly worker's compensation payment;

- the number of weeks during which that rate applies;

- the annual discount rate to be employed (a constant rate for each time period);

- the corresponding weekly interest rate (annual rate divided by 52); and

- the present value of the benefit for each separate period.

The final complicating twist in the process is the calculation of the present value of future worker's compensation benefits, for each successive time period during which the amount of benefits is different from a prior period. The present value of an annuity, payable over time, cannot easily be calculated arithmetically, as can the present value of a future sum. Rather, the present value of a stream of payments must be calculated by dividing each payment by 1 plus the discount rate, raised to the power of the number of periods involved. The general form of the formula is:

$$PV_0 = [PMT/(1+r)^1] + [PMT/(1+r)^2] + ... + [PMT(1+r)^n]$$
$$= PMT[1/(1+r)^1 + 1/(1+r)^2 + ... + 1/(1+r)^n]$$

Simply put, $PV_0 = PMT/(1+r)^n$

The denominator $[(1+r)^n]$ is called the present value interest factor for the annuity. Because of the complexity of this calculation, it is generally done on a financial calculator or computer. If the discount rate and periods match, the calculation can be found in a present value table.

Because future permanent total disability benefit rates change potentially every three years when a social security offset applies, due to the triennial redetermination ratio changes, one cannot accurately calculate the present value of the benefits that do not start in year one by using the above present value formula. Instead, one must first calculate the future value of the income stream that begins at a future date, and then reduce that sum to present value.

The present value of a periodic payment of a certain sum beginning at a future date (say three years from now) and ending at a future date (say six years from now) is not representative of its value today. That present value is actually the value of the particular stream of payments at that particular moment in the future (three years from now). To determine what it is worth today, one must draw that present value back to now. This requires the analyst to recharacterize that present value figure as a "future value", and then calculate what is the net present value of that "future value" using the same discount rate (i.e., the actual present value, in today's terms, of the figure just determined to be the value of the future payment stream, as of three years from now).

The formula for future value is as follows:

$$FV_n \quad = \quad PV_0(1+r)^n$$

The formula for present value of a lump sum in the future is as follows:

$$PV_0 = FV_n/(1+r)^n$$

The calculations should be done a financial calculator or computer in Excel.

An Excel spreadsheet is supplied with this paper.