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Workers' Compensation Alert

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A NEW LOOK AT WHAT CONSTITUTES "WORK"

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Temporary Total Compensation (TTC) is intended to replace a temporary loss of wages when an employee is unable to work due to an occupational injury or disease. TTC is not to be paid for any period in which the claimant actually worked. The question becomes what counts as "work."

Generally, the Ohio Supreme Court has held that work is considered to be labor exchanged for pay. For example, in *State ex rel Ford Motor Co. v. Industrial Commission of Ohio*, 2002-Ohio-7038, the Court held that a claimant's participation in a lawn care business did not constitute work because the claimant's participation was limited to signing paychecks, fueling lawnmowers and driving the mowers onto a truck. According to the Court, because the claimant did not mow the lawns himself, his activities were truly minimal and only indirectly related to generating income.

Recently, however, in *State ex rel. McBee v. Industrial Commission of Ohio*, 2012-Ohio-2678, the Court observed that "activities that are not minimal and that directly generate income for a separate entity may be considered work and may disqualify a claimant from receiving TTC even when the claimant is not paid." In *McBee*, the claimant was involved in his wife's auto auction and sales business; he drove cars to and from the auction for his wife, but was not paid for his activities. The court of appeals adopted the magistrate's conclusion that claimant's activities constituted work because they directly generated income for his wife's company and were consistent and on-going. While this determination was not before the Ohio Supreme Court, the Court's dicta indicates that non-paid activity can preclude or terminate TTC where that activity generates income for somebody, even if it is not the claimant.

In light of *McBee*, when considering questions of ongoing TTC, it is necessary to consider both the nature and the results of the activity and to keep in mind that activity that directly generates income for a separate entity may be considered work. If such activity constitutes "work," the claimant is ineligible for TTC.

Additionally, you may be interested to know that:

- An administrative rule has been proposed to reduce payment for services not previously authorized. Rule 4123-6-16.3 would reduce payment for services not previously authorized to 75%

of the fee schedule amount; however, the rule contains several escape clauses to allow for full payment. While the rule is currently not in effect, if passed, it could put a damper on abusive after the fact requests for authorization and full payment.

- On July 9, 2012, Paul Flowers, BWC Self-Insurance Director, sent a letter notifying self-insured employers that the BWC will begin reviewing PTD payment rates as part of the standard compliance audit for all self-insuring employers. The letter indicated that “This review will ensure that your injured workers are receiving the correct benefits and that PTD payment information is being accurately reported on the SI-40 Report of Paid Compensation and Reserves.” Remember, although the rate is two-thirds of the average weekly wage not to exceed a maximum of the state average weekly wage, there are several factors (e.g., social security disability, lump sum advancements) that may have an effect on the actual rate paid. Keep in mind that too low of a rate could create DWRF eligibility for a claimant and that, while PTD compensation has assessments in the upper 20% range, DWRF is essentially a 100% assessment. A voluntary audit of PTD files is a good idea in order to avoid both underpayments and overpayments. Note, if you are a self-insured employer with pre-SI State Fund PTD claims, you will pay the entire DWRF assessment if the claimant is found eligible. It could be worthwhile to be sure the BWC is paying the proper rate in old State Fund PTD claims.

If you have any questions about this or any other workers’ compensation or labor and employment law issue, please contact a member of Eastman & Smith Ltd’s Labor & Employment Practice Group at 419-241-6000 or visit our website at www.eastmansmith.com.

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