



## State of New Jersey

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT  
PO BOX 381  
TRENTON, NEW JERSEY 08625-0381

CHRIS CHRISTIE  
*Governor*


KIM GUADAGNO  
*Lt. Governor*

HAROLD J WIRTHS  
*Acting Commissioner*

### MEMORANDUM

November 21, 2013

To: Judges and Case Parties

From: Peter J. Calderone, Director and Chief Judge 

Subject: Total Disability Calculations

In consultation with judges and attorneys including Second Injury Fund (Fund) counsel, the following procedures should be utilized in appropriate Total Disability cases. These are not common occurrences but uniform procedures have been requested for when the situations occur.

I. Partial Total Credit on Modification of Award for Total Disability

- A. Where the respondent is still paying a partial total award and on a reopener of the claim the petitioner is now found to be totally disabled, the respondent is entitled to a credit for the amount paid before the date of totality. Since the partial award ends on the date of totality, the credit is determined by dividing the dollar amount actually paid on the partial award by the total rate. The credit is in weeks that are subtracted from the respondent's share of the first 450 weeks of the total award.

Example 1: Total case is settled for 50-50 split with Second Injury Fund at max rate for a 2010 injury. Respondent has paid 150 weeks or \$55,650.00 in partial total benefits on a 35% partial total award prior to the date of totality. Respondent would pay 155 weeks of total benefits from date of totality (\$55,650.00 divided by \$794.00 total rate equals 70 weeks subtracted from respondent's 225 week total disability obligation). After 155 weeks of total benefits, Fund begins payments.

- B. Where the partial award has been fully paid before the date of totality, the respondent's credit is figured in the same way by dividing the full partial award by the total rate for the credit in weeks.

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- C. The election of Social Security offset, ordinary disability pension offset and Section 40 liens with respect to the total award are applied from the date of totality.

II. Partial Total Credit for Different Accident or Exposure

- A. Where a partial total award for a different accident or exposure with the same or a different respondent is being paid on the date of totality, the petitioner is entitled to begin receiving a total award from the date of totality for the last accident or exposure. The partial award continues to be paid and the respondent on the total award pays the difference between the partial total amount being paid and the total rate until the partial award is paid in full except as outlined in II C below for Social Security Disability recipients. When the partial award is paid in full, the respondent on the total award pays the full total rate subject to offset. There is no offset on the total award differential being paid while the partial award is still in effect. Any offsets with respect to the partial award would continue while the partial award is being paid.
- B. The respondent paying the total award will still owe the petitioner the dollar amount of the total award based on its share of the first 450 weeks even though the respondent pays at a reduced rate while the partial award is being paid. This means that the number of weeks for the total award payout can exceed the original number of weeks in the first 450 weeks owed by the respondent. For example, if on the date of totality, the petitioner is still owed 20 weeks of partial total, the total respondent will pay a differential rate during the 20 weeks. The partial award amount paid after the date of totality will be divided by the total rate for additional weeks to be paid by the respondent on the total award.

Example 2: Petitioner is still receiving payments from a 25% partial total award for a 2008 accident at \$225.72 a week. Using total disability information from Example 1, on date of totality there are 25 weeks left on the partial award. Total disability pays \$568.28 a week for the total differential (\$794 - \$225.72) for the 25 weeks. Respondent will pay total benefits for an additional 7 weeks ( $\$225.72 \times 25 = \$5,643.00 / \$794.00$ ) beyond the 225 weeks. After 232 weeks of total benefits, the Fund will begin paying total benefits.

- C. During the period that that petitioner is still receiving partial total benefits and where the petitioner is a Social Security Disability recipient, Social Security should be taking any applicable offset until the partial award is paid in full. Where the petitioner is receiving an amount equal to his or her 80% ACE with the partial award and Social Security, the respondent on the total award would not pay any additional moneys until the partial award is paid in full and the partial award Social Security offset ends. If the partial award and Social Security Disability do not equal the 80% ACE, the respondent on the total award pays an amount when added to partial award and Social Security equals the 80% ACE until the partial award is paid in full and the total award weeks are adjusted pursuant to II B above. After the partial award is paid in full, the respondent pays the total weekly amount and receives any applicable Social Security offset.

While the petitioner is receiving a partial award with either Social Security or ordinary disability pension offset, the total respondent cannot also take an offset. After the partial award is paid in full the respondent may make the election to take either a Social Security Disability offset or an ordinary disability pension offset whichever is more beneficial to the respondent.

With respect to a Section 40 lien on the total award which provides for a lump sum return of counsel fee on a third party recovery, there will be a gap period for total award payments. The counsel fee amount is divided by the total rate for weeks total benefits are not paid. During the gap period only the partial award would continue being paid after the date of totality until the partial award is paid in full. If the gap period ends and the partial award has not been fully paid, the rest of II B above applies.

- III. Where a Social Security Disability offset is elected with respect to a petitioner who is also receiving an ordinary disability pension, the respondent is entitled to the ordinary disability pension offset when the Social Security offset ends.
- IV. These procedures also apply when the Fund is scheduled to make total disability payments.
- X. If you have any questions, please review with Administrative Supervisory Judge Virginia Dietrich.