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Senator Michael Tipping, Chair
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Joint Standing Committee on Labor
100 State House Station
Augusta, ME 04333-0100

Re: Resolves 2023, c. 139, March 2025 Update

I. Introduction

Indemnity benefit payments compensate injured employees for wage loss resulting from work-related injuries. Indemnity benefits are payable under Maine's Workers' Compensation Act for total incapacity (§212), partial incapacity (§213), and death benefits (§215). Indemnity payments are categorized by insurers and self-insurers when they are made. As mentioned in the previous report, §205(2) requires insurers to maintain records of benefit payments.

Categorization is necessary because there are important differences between §212 and §213. Namely, benefits paid pursuant to §212 are paid for the duration of the employee's disability and may be entitled to a cost-of-living-adjustment ("COLA") while benefits paid pursuant to §213 are subject to a maximum duration and are not entitled to a COLA.

Categorization is also necessary because insurers in Maine, along with insurers in 35 other states, report benefit payments to the National Council on Compensation Insurance ("NCCI"), a nonprofit organization that collects workers' compensation claims data and provides services that relate to workers' compensation insurance premiums charged to employers. Benefit payments are reported to NCCI in the following categories:

- Death benefits;
- Permanent Total Disability (PTD) Benefits;
- Permanent Partial Disability (PPD) Benefits broken down further into:
    - Scheduled PPD (list of scheduled injuries with specific benefits for each body part listed) and
    - Non-Scheduled PPD (typically a function of whole body impairment));
- Temporary Total Disability (TTD) Benefits; and,
- Temporary Partial Disability (TPD) Benefits.

Self-insured employers also categorize payments by benefit type using the same or similar categories.

Categorization of death benefits is straightforward. The same is not true with respect to categorization of total and partial incapacity benefits in Maine. This is a function of how these terms are defined in Maine.

II. Total and partial incapacity

Section 212 offers injured workers two avenues of recovery for total disability.

> First, an employee who demonstrates a total physical incapacity, that is, the medically demonstrated lack of the physical ability to earn, can prove entitlement to "total" incapacity benefits pursuant to section 212 without a showing of any work search or other evidence that work is unavailable. *Morse [v. Fleet Fin.]*, 2001 ME 142, P8, 782 A.2d [769] at 772.
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> Second, in limited situations, an employee suffering only partial incapacity to earn may be entitled to "total" benefits pursuant to section 212 if the employee can establish both (1) the unavailability of work within the employee's local community, and (2) the physical inability to perform full-time work in the statewide labor market, regardless of availability. Id.; *Alexander [v. Portland Natural Gas]*, 2001 ME 129, P19, 778 A.2d [343] at 351.

Monaghan v. Jordan's Meats, 2007 ME 100 ¶¶ 11-12, 928 A.2d 786, 791.

Section 213 governs entitlement to partial incapacity benefits. Partial incapacity benefits are based on the difference "between the employee's average . . . weekly wages . . . before the injury and the average . . . weekly wages . . . that the employee is able to earn after the injury . . ." 39-A M.R.S.A. § 213(1)(C). In a nutshell, partially disabled claimants are awarded reduced (from 100%) partial benefits if they do not perform a convincing work search.

An employee who demonstrates work is unavailable because of their injury can receive 100% of their benefit entitlement under the partial incapacity section.

> [A] partially incapacitated employee may be entitled to "100% partial" incapacity benefits pursuant to section 213 based on the combination of a partially incapacitating work injury and the loss of employment opportunities that are attributable to that injury. *Morse*, 2001 ME 142, ¶ 6, 782 A.2d at 771. In order to obtain the 100% benefit, it must be established, pursuant to the "work search rule" that work is unavailable within the employee's local community as a result of the work injury.

Monaghan v. Jordan's Meats, 2007 ME 100 ¶ 13, 928 A.2d 786, 791.

As will be discussed below, because an employee can receive 100% of their benefit under § 212 or § 213, benefit payments may be miscategorized if the category is chosen based upon the amount of the payment instead of the section pursuant to which the benefit is being paid.

III. Need for clarification

The potential for mischaracterization means further clarity is needed. This need has become pronounced since the enactment of § 212(4) which requires a COLA after an employee has received 260 weeks of benefits pursuant to § 212. The COLA provision applies to injuries sustained on and after January 1, 2020.

For employees injured prior to January 1, 2020, it was not necessary to categorize each weekly payment. Whether payments were being made pursuant to § 212 or § 213 was not relevant until the benefit limitation in § 213 approached.[1] Benefits paid pursuant to § 213 could be terminated upon the occurrence of the benefit limitation. Benefits paid pursuant to § 212 could not because they must be paid for the duration of the employee's disability.

The COLA provision only applies after the employee has received 260 weeks of benefits pursuant to § 212. Since weekly payments made pursuant to § 213 do not count toward the 260-week threshold, it is necessary to separately categorize each weekly payment in order to determine if the threshold has been met.

The Board previously requested payment information broken down by statutory section (i.e., § 212 or § 213) as it considered the potential impact/application of the COLA. When it did, the Board assumed benefit payments were being tracked using categories the same as, or similar to, those used by NCCI. It was also assumed that these categories would correspond to the relevant sections of Maine's Workers' Compensation Act (the "Act"). In other words, payments made pursuant to § 212 would be categorized as either TTD or PTD and payments made pursuant to § 213 would be characterized as either TPD or PPD.

The Board learned that while these (or similar) categories are being used, they cannot be relied upon to identify whether a payment is made pursuant to § 212 or § 213.

As an example, payment for 100% partial might be categorized as TTD based on the amount of the payment (100%) instead of the underlying section of the Act (§ 213). Accordingly, trying to identify weeks of total incapacity (§ 212) benefits based on how many were categorized as TTD will lead to inaccurate results because benefits being paid for 100% partial incapacity (pursuant to § 213) will be included.

IV. Conclusion

Categorization of benefit type is important both in terms of understanding how current law is being applied and ensuring estimated cost impacts of legislative proposals are accurate. The most important aspect in Maine is whether payments are for total (§ 212) or partial (§ 213) incapacity. For example, payments made pursuant to § 212 could be categorized as either TTD or PTD while payments made pursuant to § 213 could be categorized as either TPD or PPD but

[1] The benefit limitation for employees injured on or after January 1, 2013 but before January 1, 2020 is 520 weeks. 39-A M.R.S.A. § 213(1)(B). The benefit limitation for employees injured on or after January 1, 2020 is 624 weeks. 39-A M.R.S.A. § 213(1)(C).

could not be categorized as TTD or PPD. Whether or not the temporary and permanent modifiers can or should play a role in Maine in less clear. As a result, the Board will be addressing this issue with guidance and/or enactment of a rule defining when to use different benefit categories. As it does so, the Board will be working with NCCI and representatives of insurers and self-insured employers as it moves forward.

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