

**WORKERS' COMPENSATION BENEFITS
FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY,
PERMANENT PARTIAL DISABILITY, PERMANENT TOTAL DISABILITY,
COMBINED DISABILITIES, AND VOCATIONAL REHABILITATION**

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This is a summary of certain benefits under the Workers' Compensation Act. The information is not meant to be exhaustive or to serve as a substitute for thorough legal research on unique questions of law.

I. TEMPORARY TOTAL DISABILITY

The purpose of disability related compensation including temporary total disability is to replace the incapacitated worker's lost earnings.¹ The Workers' Compensation Act does not define "temporary total disability." However, the term is defined by case law as the healing period, or that period of time following an accidental injury when an employee is totally incapacitated for work due to illness resulting from injury.²

Commencing TTD

No compensation, other than medical benefits, is allowed for the first three (3) calendar days of disability.³ Thus, TTD benefits may be commenced beginning the fourth day of disability if the worker is unable to return to work for more than 3 calendar days. This may be done voluntarily, or pursuant to court order based on competent medical evidence.

Voluntary payments may be made by the employer or its insurer. If made by an insured employer in lieu of its insurer, TTD shall be paid for a period not exceeding four (4) weeks.⁴ The employer may seek reimbursement from its insurer.⁵ Advance payments of TTD benefits made under 85 O.S., §24.3 shall not constitute an admission by the employer or its insurer as to liability, compensation rate or any other material fact.

If TTD benefits are not started voluntarily and the worker has a claim pending before the Workers' Compensation Court, the worker may seek an order compelling payment of benefits by filing a Form 9 requesting a hearing on temporary compensation.⁶ TTD must be commenced within twenty (20)

¹ Farm Fresh, Inc. v. Bucek, 1995 OK 44, 895 P.2d 719, 722.

² Bodine v. L.A. King Corp., 1994 OK 22, 869 P.2d 320.

³ 85 O.S., §13; Workers' Compensation Court Rule 14, 85 O.S., Ch. 4, App.

⁴ 85 O.S., §24.3.

⁵ Id.

⁶ Workers' Compensation Court Rule 19, 85 O.S., Ch. 4, App.

days from the date the worker files the Form 9, unless the employer denies the claim.⁷ If the claim is denied, the employer has thirty (30) days from receipt of the worker's Form 9 within which to object to commencement of TTD by filing a Form 10 (Answer and Pretrial Stipulation).⁸ Failure to timely file the Form 10 constitutes an admission of liability for payment of temporary compensation warranting immediate payment of benefits.⁹ If the Form 10 is timely filed, the matter will be set for hearing on the temporary issue scheduling docket (TID), unless otherwise directed by the assigned trial judge.¹⁰ If set for trial, the worker has the burden of proof to establish the period of temporary disability.¹¹ There must be a showing of both (1) incapacity or loss of function in the physical or mental sense,¹² and (2) incapacity to perform remunerative employment.¹³ This first element must be established by medical evidence.¹⁴ The second element is normally demonstrated by nonmedical evidence touching upon claimant's employment situation.¹⁵ The worker is not required to prove that light duty was not available.¹⁶

Terminating TTD

Termination of temporary total disability, whether begun voluntarily or pursuant to court order, is governed by Workers' Compensation Court Rule 15, 85 O.S., Ch. 4, App.

Terminating TTD Without the Court's Involvement - Court Rule 15(A)

If the worker has no claim for compensation (i.e. no Form 3 or Form 3B) on file with the Workers' Compensation Court, the employer may terminate temporary compensation whenever it deems appropriate. However, if the worker has filed a Form 3 or Form 3B, the employer may terminate temporary total disability without the court's involvement only if one of the following events occur:¹⁷

1. the claimant returns to full-time employment; or

⁷ 85 O.S., §24.2(B); Workers' Compensation Court Rule 14, 85 O.S., Ch. 4, App.

⁸ Workers' Compensation Court Rule 19, 85 O.S., Ch. 4, App.

⁹ Workers' Compensation Court Rule 16, 85 O.S., Ch. 4, App.

¹⁰ Workers' Compensation Court Rule 19, 85 O.S., Ch. 4, App.

¹¹ American Management Systems, Inc. v. Burns, 1995 OK 58, 903 P.2d 288.

¹² AmeriResource Group v. Gibson, 2008 OK 33, ¶29, 183 P.3d 1006, 1012.

¹³ Gray v. Natkin Contracting, 2001 OK 73, 44 P.3d 547, 551.

¹⁴ AmeriResource Group v. Gibson, 2008 OK 33, ¶29, 183 P.3d 1006, 1012.

¹⁵ American Airlines v. Hervey, 2001 OK 74, ¶14, 33 P.2d 47, 51.

¹⁶ Gray v. Natkin Contracting, 2008 OK 33, 44 P.3d 547, 551.

¹⁷ Workers' Compensation Court Rule 15(A), 85 O.S., Ch. 4, App.

2. the claimant fails to:
 - a. object to the termination of temporary disability benefits as provided in 85 O.S., Section 14(A)(2) (*i.e. based upon a light duty release by the treating physician*), within fifteen (15) days after receipt, by the claimant's attorney of record or by the claimant if unrepresented, of written notice of the termination from the employer; or
 - b. object to the termination of temporary total disability benefits as provided in 85 O.S., Section 17(D)(10) (*i.e. based upon a full duty release by the treating physician*), within twenty (20) days after receipt by the claimant's attorney of record or by the claimant if unrepresented, of written notice of the termination from the employer;
3. The claimant is determined by a Court-appointed independent medical examine to be capable of returning to work and the claimant elects not to do; provided the Court-appointed independent medical examiner must provide a copy of the Form 5 Release to the assigned judge and all parties, when the examiner determines the claimant is capable of returning to work. Temporary total disability benefits shall cease when the claimant has reached maximum medical improvement on all body parts in dispute, is released from active medical care and can return to full or permanently restricted full duty, as indicated by the Court-appointed independent medical examiner on the Form 5 Release;
4. The claimant files a permanent disability rating report or a Form 9 requesting a hearing on permanent disability;
5. The parties voluntarily agree in writing to terminate temporary compensation;
6. The claimant dies; or
7. Any other event that causes temporary total disability benefits to be lawfully terminated under 85 O.S., Section 22 without Court order [*e.g. exhaustion of the 300-week maximum duration of temporary total disability benefits provided for in 85 O.S., §22(2)(c)*].

Terminating TTD By Court Order - Court Rule 15(B)

In all other instances, temporary compensation may be terminated only upon court order and pursuant to the procedures set forth in Court Rule 15(B). To terminate TTD under this provision, the employer must file a Form 13 (prehearing conference request) with the Court and mail a copy of the Form 13 to the opposing parties. The Form 13 mailed to the opposing parties must include a copy of all evidentiary exhibits relied upon by the respondent in support of terminating temporary compensation. The exhibits are not be to attached to the Form 13 filed with the Court.

Sanctions for Improper Termination of TTD - Court Rule 15(C)

Temporary total disability benefits must continue until further order of the Court. If the employer fails to continue benefits, the trial court shall at the time of trial, order the benefits to be reinstated to the date benefits were terminated, assess a 15% penalty on all unpaid benefits, and require the filing of a new Form 13 and full compliance with Rule 15 before a trial on the respondent’s request to terminate will be heard.¹⁸

Terminating TTD Based on Physician Release

Light Duty Release by Treating Physician - 85 O.S., §14(A)(2)

If the worker is capable of returning to modified light duty work, the attending physician shall promptly notify the worker and the employer or the employer’s insurer thereof in writing and shall also specify what restrictions, if any, must be followed by the employer in order to return the employee to work.¹⁹ If the worker refuses employment consistent with the treating physician’s restrictions, the worker shall not be entitled to temporary benefits during the period of refusal unless the treating physician determines the refusal was justified.²⁰

Before TTD may be terminated, the worker’s attorney of record or the worker, if unrepresented, must be served with notice of the consequences of refusing the light duty employment and that temporary benefits will end within fifteen (15) days after the date of the notice unless the worker objects to the termination.²¹ The benefits may not be terminated without a Court order, unless the worker fails to timely object to the termination.²² The worker may object by filing a Form 13 objecting to termination of temporary compensation based on “85 O.S., Section 14(A)(2).” The worker’s Form 13 will be expedited for hearing on the assigned trial judge’s pending prehearing conference docket.²³

An employer seeking to terminate TTD based on the treating physician’s light duty release has the burden of showing that light duty work was available to the worker and that the employer properly notified the worker of the availability of light duty work and of the consequences of rejecting the light duty offer.²⁴ If the worker rejects the offer of light duty work, the burden then shifts to the

¹⁸ Workers’ Compensation Court Rule 15(C), 85 O.S., Ch. 4, App.

¹⁹ 85 O.S., §14(A)(2).

²⁰ Id.

²¹ Id. See also, Workers’ Compensation Court Rule 15(A)(2)(a), 85 O.S., Ch. 4, App.

²² Workers’ Compensation Court Rule 15(A)(2)(a), 85 O.S., Ch. 4, App.

²³ Workers’ Compensation Court Rule 19, 85 O.S., Ch. 4, App.

²⁴ See, Hinton v. Labor Source, 1998 OK CIV APP 2, 953 P.2d 358.

worker to explain the rejection.²⁵ The judge may enter an order terminating the benefits, denying termination, or postponing termination pending further hearing.²⁶ To continue temporary total disability, the Court must find that probable cause exists to believe the work does not meet the conditions of the treating physician’s restrictions or that the restrictions are unreasonable.²⁷

Full Duty Release by Treating Physician - 85 O.S., §§ 14(A)(2) and 17(D)(10)

Title 85 O.S., §14(A)(2) requires the treating physician to notify the parties after maximum medical improvement is reached and the employee is released from active medical care. A release without the necessary finding of MMI does not meet the requirements of this section.²⁸ When an injured worker is released to full duty by the treating physician, the employer may terminate temporary total disability by notifying the worker’s attorney of record or the worker, if unrepresented, of the termination.²⁹ Title 85 O.S., §17(D)(10) provides for a one-time objection to the termination by the worker within twenty (20) days of receipt of the notice of termination from the employer. Court Rule 15(A)(2)(b) prohibits termination of temporary total disability benefits without a Court order, unless the claimant fails to timely object to the termination.

The worker may object to the termination by timely filing a Form 13 prehearing conference request which objects to the termination based on the “Treating Physician”. The Court shall appoint an independent medical examiner to determine if further medical treatment is needed.³⁰ The independent medical examiner is not allowed to treat the worker.³¹ The worker’s Form 13 will be set for hearing on the assigned trial judge’s prehearing conference docket.³²

The employer is responsible for the cost of the independent medical examination.³³ Either party may object to the independent medical examiner’s report within 10 days and request cross-examination of the independent medical examiner by deposition.³⁴ The party requesting the deposition is

²⁵ Cummings v. Armin Plastics, 2000 OK CIV APP 61, 5 P.3d 1099, 1102.

²⁶ 85 O.S., §14(A)(2).

²⁷ Id.

²⁸ Ingram v. Nabors Industries, Inc., Case No. 105,001, WCC No. 2006-11689H (OK CIV APP, Div. 2, 10/23/08) (published).

²⁹ 85 O.S., §17(D)(10); Workers’ Compensation Court Rule 15(A)(2)(b), 85 O.S., Ch. 4, App.

³⁰ 85 O.S., §17(D)(10)(a).

³¹ Id.

³² Workers’ Compensation Court Rule 19, 85 O.S., Ch. 4, App.

³³ 85 O.S., §17(D)(10)(a).

³⁴ 85 O.S., §17(D)(10)(b).

responsible for its cost.³⁵ The matter shall be submitted to the Court for final determination following the deposition.³⁶

Release by Independent Medical Examiner - 85 O.S., §17(D)(7)

Temporary total disability benefits shall cease if the independent medical examiner determines that the employee is capable of returning to work and the claimant elects not to do so; provided the claimant has reached maximum medical improvement on all body parts in dispute, is released from active medical care and can return to full or permanently restricted full duty, as indicated by the IME on the Form 5 Release.³⁷ Title 85 O.S., Section 17(D)(7) provides for termination of temporary total disability benefits without a Court order under these circumstances, but no longer allows cessation of medical benefits upon the court-appointed independent medical examiner’s release.³⁸

The worker may object to the employer’s termination of temporary total disability benefits and request a hearing for reinstatement of temporary total disability.³⁹ The worker’s objection may be made by filing a Form 13 objecting to termination of temporary compensation based on “Court Appointed IME”. The worker’s Form 13 will be set for hearing on the assigned trial judge’s prehearing conference docket⁴⁰ for hearing within thirty (30) days of the filing of the Form 13 unless otherwise agreed to by the parties.⁴¹

Maximum TTD Benefit

For injuries occurring on or after January 1, 1996, temporary total disability benefits are computed at 70% of the employee’s average weekly wage,⁴² not to exceed the state’s average weekly wage.⁴³

For injuries occurring between November 4, 1994 and October 31, 1997, inclusive, total payments of compensation for TTD may not exceed a maximum of 300 weeks in the aggregate.⁴⁴ For injuries occurring on or after November 1, 1997, total payments of compensation for TTD may not exceed

³⁵ Id.

³⁶ Id.

³⁷ 85 O.S., §17(D)(7); Workers’ Compensation Court Rule 15(A)(3), 85 O.S., Ch. 4, App.

³⁸ Workers’ Compensation Court Rule 15(A)(3), 85 O.S., Ch. 4, App.

³⁹ 85 O.S., §17(D)(7).

⁴⁰ Workers’ Compensation Court Rule 19, 85 O.S., Ch. 4, App.

⁴¹ 85 O.S., §17(D)(7).

⁴² 85 O.S., §22(2).

⁴³ 85 O.S., §22(6).

⁴⁴ 85 O.S., §22(2)(b).

a maximum of 156 weeks in the aggregate, except for good cause shown, and for not more than 300 weeks in the aggregate, inclusive of consequential injuries.⁴⁵ Special rules govern the duration of TTD for soft tissue injuries.⁴⁶

II. TEMPORARY PARTIAL DISABILITY

An injured worker is authorized to recover compensation for temporary partial disability (TPD) under 85 O.S., §22(4). Benefits for TPD are intended to replace lost income for workers who, although able to return to work, are unable by reason of injury to earn the same wage as before the injury.⁴⁷ Two obvious examples are the worker who returns to work on a part-time basis and the worker who returns to work at a lower wage rate.

Compensation for TPD is calculated on the basis of 70% of the difference between the worker's average weekly wage before the injury and the worker's wage-earning capacity after the injury.⁴⁸ The benefits paid for TPD, when added to the worker's actual wage, shall not exceed 80% of the worker's average weekly wage before the injury, subject to the state's average weekly wage.⁴⁹

For injuries occurring between November 4, 1994 and October 31, 1997, inclusive, total payments of compensation for TPD may not exceed a maximum of 300 weeks in the aggregate.⁵⁰ For injuries on or after November 1, 1997, total payments of compensation for TPD may not exceed a maximum of 156 weeks in the aggregate, except for good cause shown, and for not more than 300 weeks in the aggregate, inclusive of consequential injuries.⁵¹

III. PERMANENT PARTIAL DISABILITY

Permanent partial disability is “permanent disability which is less than total and shall be equal to or the same as permanent impairment.”⁵² The term “permanent impairment” is defined by law as “any anatomical abnormality after maximum medical improvement has been achieved, which abnormality

⁴⁵ 85 O.S., §22(2)(c).

⁴⁶ 85 O.S., §22(3)(d).

⁴⁷ See, Orman v. Capitol Steel & Iron Co., 1955 OK 300, 289 P.2d 375; Farm Fresh, Inc. v. Bucek, 1995 OK 44, 895 P.2d 719, 722.

⁴⁸ 85 O.S., §22(4).

⁴⁹ 85 O.S., §22(6). See, Eagle-Picher Mining & Smelting Co. v. Linthicum, 1936 OK 20, 53 P.2d 687, 175 Okla. 483.

⁵⁰ 85 O.S., §22(4)(b).

⁵¹ 85 O.S., §22(4)(c).

⁵² 85 O.S., §3(21).

or loss the physician considers to be capable of being evaluated at the time the rating is made.”⁵³ As amended effective July 1, 2005, the definition no longer includes “functional abnormality or loss.” A worker’s medical condition is considered to have reached maximum medical improvement when no further material improvement would reasonably be expected from medical treatment or the passage of time.⁵⁴

Rating Permanent Impairment

Evidentiary Burdens

Permanent disability for work-related injuries is determined by judges of the Workers’ Compensation Court based on medical opinions of permanent impairment stated within a reasonable degree of medical certainty.⁵⁵ All evaluations of permanent impairment must be supported by objective medical evidence,⁵⁶ and, in appropriate cases, may include credible medical evidence that the ability of the employee to earn wages at the same level as before the injury has been permanently impaired.⁵⁷ The “major cause” (i.e. the predominate cause) of a compensable injury must result from employment.⁵⁸ Medical opinions supporting employment as the major cause of occupational disease or age-related deterioration or degeneration, must be supported by objective medical evidence. That is, in these cases, permanent anatomical abnormality and causation of the impairment must be established by objective medical evidence.⁵⁹ “Objective medical evidence” means “evidence which meets the criteria of Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto.”⁶⁰ It includes “medical testimony that rests on reliable scientific, technical or specialized knowledge, and assists the Court to understand the evidence or to determine a fact in issue.”⁶¹

Evaluating Permanent Impairment - AMA Guides

In all cases except impairments to “scheduled members,” the medical evaluation of permanent impairment must be performed in compliance with the edition of the American Medical

⁵³ 85 O.S., §3(19).

⁵⁴ 85 O.S., §3(22).

⁵⁵ 85 O.S., §17(A).

⁵⁶ 85 O.S., §3(19).

⁵⁷ 85 O.S., §22(3)(d). The statute permits the Court to consider “credible medical evidence of permanent impairment to wage earning ability” in cases of soft tissue injury and in cases other than scheduled member injury cases (i.e. “other cases” class of disabilities).

⁵⁸ 85 O.S., §3(7)(13)(16)(18).

⁵⁹ 85 O.S., §3(13)(d)(18).

⁶⁰ 85 O.S., §3(17).

⁶¹ Workers’ Compensation Court Rule 20(C), 85 O.S., Ch. 4, App.

Association’s Guides to the Evaluation of Permanent Impairment in effect at the time of injury.⁶² Deviations from the AMA Guides are permitted only when the deviation is specifically provided for in the Guides⁶³ or is pursuant to a recommendation of the Physician Advisory Committee approved as provided for by law.⁶⁴ Physicians also are prohibited from following the Guides based on race or ethnic origin.⁶⁵

“Scheduled members” other than deafness, the eyes and hernia (i.e. the thumb; first, second, third and fourth fingers; great toe; other toes; hand; arm; foot; and leg) are specifically exempt from the requirement of evaluation under the AMA Guides.⁶⁶ Physicians may use any reasonable medical criteria, including the AMA Guides or subjective opinion, to evaluate permanent impairment of scheduled members.

Deafness, while listed as a scheduled member is to be evaluated using the AMA Guides if the last exposure occurred on or after June 1, 1987.⁶⁷ Where the last exposure occurred before June 1, 1987, former Court Rule 37 as set out in the Appendix “A” to the Court Rules is to be used to evaluate hearing loss. Permanent impairment to the eye is to be evaluated per Workers’ Compensation Court Rule 23, 85 O.S., Ch. 4, App. Although a hernia is considered a scheduled member, permanent impairment is applicable only in limited situations.⁶⁸

Under Oklahoma law, scheduled member injuries are rated as follows:

- To the hand, if the injury results in a functional impairment to the hand or that part of the arm below the elbow;⁶⁹
- To the arm, if the injury results in a functional impairment to the arm at or above the elbow to the shoulder joint;⁷⁰
- To the foot, if the injury results in a functional impairment to the foot or that part of the leg below the knee;⁷¹ and

⁶² 85 O.S., §§3 and 22; Workers’ Compensation Court Rule 21, 85 O.S., Ch. 4, App.

⁶³ 85 O.S., §3(19).

⁶⁴ 85 O.S., §§3, 22, and 201.1(B)(3).

⁶⁵ 85 O.S., §§3 and 22.

⁶⁶ 85 O.S., §3(19).

⁶⁷ Workers’ Compensation Court Rule 22, 85 O.S., Ch. 4, App.

⁶⁸ 85 O.S., §22(3).

⁶⁹ Wilkerson Chevrolet, Inc. v. Mackey, 1961 OK 267, 366 P.2d 422.

⁷⁰ See, 85 O.S., §22(3) (amputations).

⁷¹ Stoldt Builders, Inc. v. Thomas, 1964 OK 127, 393 P.2d 875, 876-77.

- To the leg, if the injury results in a functional impairment to the leg at or above the knee to the hip joint.⁷²

NEITHER THE SHOULDER NOR THE HIP ARE A SCHEDULED MEMBER. AN INJURY TO THE SHOULDER OR TO THE HIP IS RATED TO THE BODY AS A WHOLE.⁷³ It is important to note that under the AMA Guides, the shoulder is considered part of the upper extremity. At least one appellate decision requires the physician to rate the shoulder according to the AMA Guides by converting an upper extremity rating to the whole body.⁷⁴

Medical Evidence of Permanent Impairment Since SB1X (2005) Legislative Reforms

Previous to SB1X (2005), both the worker and the employer were allowed to submit medical evidence from their chosen physician on the extent, if any, of the worker's permanent impairment, and the Court had the power to find permanent disability within the range of competent medical evidence.⁷⁵ Under SB1X, the treating physician's opinion on permanent disability and other medical issues is favored by a rebuttable presumption, but if objected to, may be reviewed by a court-appointed independent medical examiner.⁷⁶ The argument that this provision eliminated the right of the parties to submit medical evidence from a physician of their own choosing was rejected in the Oklahoma Supreme Court case of Conaghan v. Riverfield Country Day School, 2007 OK 60, 163 P.3d 557. The Supreme Court upheld the rebuttable presumption in the SB1X amendments to 85 O.S., Section 17, but struck down as unconstitutional that portion of Section 17 that restricts the medical evidence on permanent impairment to only the opinions of the treating physician and IME.⁷⁷

The treating physician may, but is not required, to evaluate a worker's permanent impairment.⁷⁸ If permanent impairment is evaluated by the treating physician, the evaluation must be issued within fourteen (14) calendar days of the treating physician's release of the injured worker from active

⁷² Transcon Lines v. Brotherton, 1967 OK 248, 438 P.2d 935, 937.

⁷³ Leeway Motor Freight, Inc. v. Highfill, 1967 OK 139, 429 P.2d 745 (shoulder); Brown v. Oxy USA, Inc., 1993 OK CIV APP 63, 854 P.2d 378 (clavicle and shoulder are under "other cases"); Corbus Spring Service v. Cresswell, 1961 OK 18, 359 P.2d 219 (hip).

⁷⁴ Shebester-Bechtel, Inc. V. Higginbottom, 1995 OK CIV APP 120, 905 P.2d 1137.

⁷⁵ Green Country Rest. v. Carmen, 1978 OK 81, ¶15, 579 P.2d 1281, 1283; Goombi v. Trent, 1975 OK 16, 531 P.2d 1363.

⁷⁶ 85 O.S., §17(A)(2)(a).

⁷⁷ See also, Rush Truck Center/OKC v. Watson, 2007 OK CIV APP 37, 159 P.3d 1146, and Public Supply Co. v. Mucker, 2007 OK CIV APP 48, 162 P.3d 234.

⁷⁸ 85 O.S., §14(A)(1) requires the treating physician to "supply a full report of the **treatment** to the employer of the injured employee at the conclusion of treatment." (Emphasis added.) There is no obligation for the treating physician to **rate** at the conclusion of treatment.

medical treatment and then sent to the parties within seven (7) calendar days of issuance.⁷⁹ Unless the evaluation is issued and sent to the parties within these time frames, there shall be deemed to be no treating physician evaluation.⁸⁰ In the absence of a treating physician evaluation, the parties may petition the Court to appoint an independent medical examiner to give an opinion on the percentage of permanent impairment and whether the impairment is job-related and caused by the injury.⁸¹ The Court also may accept party-sponsored medical evidence addressing the nature and extent, if any, of permanent impairment.

If a treating physician's report is issued as required by Court Rule 20(E), it may be objected to by either party within ten (10) days of its receipt by written notice to the other parties and the Court.⁸² The objecting party may depose the treating physician⁸³ and/or request a court-appointed independent medical examiner to determine whether or not the treating physician's findings are based on objective medical evidence.⁸⁴ The party wanting to offer the treating physician's testimony on permanent partial disability must schedule the deposition within ten (10) days after filing the objection.⁸⁵ The party requesting the deposition of the treating physician is responsible for the physician's charges for the testimony and for the transcription expense.⁸⁶

If an IME is sought, the objection to the treating physician's report will be set for hearing within fifteen (15) days on the issue of appointing an independent medical examiner from the Court's IME list.⁸⁷ The parties may agree upon an IME or the Court shall randomly select one,⁸⁸ giving preference to Board certification whenever possible.⁸⁹

⁷⁹ Workers' Compensation Court Rule 20(E), 85 O.S., Ch. 4, App.

⁸⁰ Id.

⁸¹ 85 O.S., §17(A)(1).

⁸² 85 O.S., §17(A)(2); Workers' Compensation Court Rule 20(F)(1), 85 O.S., Ch.4, App.

⁸³ Workers' Compensation Court Rule 20(F)(1)(a), 85 O.S., Ch. 4, App.

⁸⁴ Workers' Compensation Court Rule 20(F)(1)(b), 85 O.S., Ch.4, App.

⁸⁵ Workers' Compensation Court Rule 20(G), 85 O.S., Ch.4, App.

⁸⁶ 85 O.S., §17(A)(3); Workers' Compensation Court Rule 20(G), 85 O.S., Ch. 4, App.

⁸⁷ 85 O.S., §17(D)(3).

⁸⁸ 85 O.S., §17(A)(2).

⁸⁹ 85 O.S., §17(D)(3).

The treating physician is to send the worker’s medical records to the IME⁹⁰ within seven (7) calendar days of notice by the respondent that an IME was appointed.⁹¹ The parties must send pertinent information, including any party-sponsored medical reports, to the IME within seven (7) calendar days of receiving the IME order.⁹² A party-sponsored medical report also must be sent simultaneously to the opposing parties.⁹³ Nothing prevents the parties from sending the treating physician’s records to the IME.⁹⁴

The IME shall be allowed to examine the worker, consider any party-sponsored medical reports submitted by the parties, and review all medical records of the worker, to determine whether or not the treating physician’s opinion is based on objective medical evidence.⁹⁵

If the IME finds the opinion is **based on objective medical evidence**, the IME must report that to the Court⁹⁶ and to the parties.⁹⁷ Within 10 days of receipt of the report, any party may object to the introduction of the IME report into evidence by giving notice to the Court and the parties⁹⁸ and request cross-examination of the IME by deposition.⁹⁹ The party requesting the deposition is responsible for the IME’s charges for the testimony and for the transcription expenses.¹⁰⁰ Reimbursement for the IME’s medical testimony is governed by Court Rule 44(A)(3).

If the IME finds the opinion is **not based on objective medical evidence**, the IME must render an opinion on the issues¹⁰¹ and report the same to the Court¹⁰² and the parties.¹⁰³ Either party may object to the IME’s report and request the IME’s deposition in the same manner and subject to the same

⁹⁰ 85 O.S., §17(D)(5); Workers’ Compensation Court Rule 20(E), 85 O.S., Ch. 4, App.

⁹¹ Workers’ Compensation Court Rule 20(E), 85 O.S., Ch. 4, App.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ 85 O.S., §17(A)(2)(b).

⁹⁶ Id.

⁹⁷ 85 O.S., §17(D)(6).

⁹⁸ 85 O.S., §17(B).

⁹⁹ 85 O.S., §17(A)(3).

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² 85 O.S., §17(A)(2)(b).

¹⁰³ 85 O.S., §17(D)(6).

expenses as provided when the objection and deposition request concern an IME report finding objective medical evidence. The Court may follow the opinion of the treating physician or IME, or establish its own opinion within the range of the two opinions.¹⁰⁴ Any deviation from the treating physician’s opinion must be explained.¹⁰⁵

Maximum PPD Benefit

The maximum weekly benefit payable for permanent partial disability is 70% of the employee’s average weekly wage,¹⁰⁶ not to exceed 50% of the state’s average weekly wage.¹⁰⁷

Limitations Affecting PPD Awards

The sum of all permanent partial disability awards, excluding awards against the Multiple Injury Trust Fund (formerly the Special Indemnity Fund) and awards for amputations, and surgeries, shall not exceed 100% permanent partial disability for any individual.¹⁰⁸ Being 100% permanently partially disabled does not necessarily constitute being permanently totally disabled since permanent partial disability is assessed based on physical impairment whereas permanent total disability is determined based on inability to earn wages.¹⁰⁹ An individual may not receive more than 520 weeks’ compensation for permanent partial disability, but may receive other benefits as provided in the Workers’ Compensation Act.¹¹⁰

IV. PERMANENT TOTAL DISABILITY

“Permanent total disability” is defined in 85 O.S., §3(20) as:
 “incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may become physically suited and reasonably fitted by education, training or experience, including vocational rehabilitation; loss of both hands, or both feet, or both legs, or both eyes, or any two thereof”

This definition describes two separate conditions which constitute permanent total disability. The first condition is “economic disability.” Permanent total disability from an economic standpoint is not synonymous with total incapacity or total dependence, but means a lack of ability to follow

¹⁰⁴ 85 O.S., §17(A)(2)(b).

¹⁰⁵ Id.

¹⁰⁶ 85 O.S., §22(3).

¹⁰⁷ 85 O.S., §22(6).

¹⁰⁸ 85 O.S., §22(7).

¹⁰⁹ Thomas v. Special Indemnity Fund, 1998 OK CIV APP 41, 958 P.2d 168.

¹¹⁰ 85 O.S., §22(7).

continuously some substantially gainful occupation without serious discomfort or pain and without material injury to health or danger to life.¹¹¹

The second condition is what is referred to as “statutory permanent total disability.” The loss of both hands, both feet, both legs, both eyes, or any two thereof creates a presumption of permanent total disability regardless of the earning capacity of the employee.¹¹² Since most cases do not concern statutory PTD, the discussion and references in this paper are to economic PTD, unless otherwise noted.

Determination of Economic PTD

As stated previously, economic permanent total disability requires a showing of lack of ability to continuously perform substantially gainful employment without injury to health or serious discomfort.¹¹³ The determination is based not only on the worker’s physical condition, but on age, education, employment history, rehabilitative potential, and availability of work that the claimant can do. Rehabilitative potential (i.e. the education and training necessary to learn a new job which the worker presently is unable to perform) is a significant factor in the determination of the existence of economic permanent total disability.¹¹⁴

Unlike vocational rehabilitation evaluation, transferrable skills testing is not a prerequisite for an award of economic PTD.¹¹⁵ Transferrable skills testing measures the worker’s present capabilities to perform another job based upon a counselor’s assessment of current educational level, job skills, physical abilities and past experience. A determination of permanent total disability by the Social Security Administration may not be considered to show the existence or the extent of an employee’s permanent disability for purposes of workers’ compensation.¹¹⁶

Vocational Rehabilitation and PTD

Based on the 1993 legislative changes to 85 O.S., Sections 3 and 16, an injured worker is considered permanently and totally disabled only if the worker cannot be restored to gainful employment following a period of rehabilitation. As stated in Mangrum v. Fensco, Inc., 1999 OK 78, 898 P.2d 461:

¹¹¹ Special Indemnity Fund v. Washburn, 1986 OK 46, 722 P.2d 1204.

¹¹² Eslinger v. Cole Grain Co., 1982 OK CIV APP 24, 655 P.2d 164; Superior Smokeless Coal & Mining Co. v. Bishop, 1922 OK 91, 205 P. 497, 85 Okla. 204; Harry Tidd Construction Co. v. Mead, 1933 OK 64, 20 P.2d 909, 163 Okla. 64.

¹¹³ Special Indemnity Fund v. Washburn, 1986 OK 46, 722 P.2d 1204.

¹¹⁴ 85 O.S., §§3 and 16.

¹¹⁵ Charles Komar & Sons v. Hicks, 1993 OK CIV APP 52, 852 P.2d 807; Advanced Medical Instruments v. Keo, 1993 OK CIV APP 47, 851 P.2d 551.

¹¹⁶ Johnson v. Special Indemnity Fund, 1999 OK CIV APP 106, 990 P.2d 323.

“This necessitates an initial determination that vocational rehabilitation is practicable and that the worker is at that time permanently and totally disabled. After the rehabilitation period, the worker’s status is reevaluated to determine whether the worker has become physically suited and reasonably fitted to return to the workplace. Only if the injured worker cannot return to gainful employment does permanent total disability status continue. [Title 85 O.S.,] Section 16(D) requires that during the rehabilitation period the worker must receive income benefits at the temporary total disability rate.”

Under this view, an award of PTD is essentially “temporary,” in that it is subject to review following vocational rehabilitation.¹¹⁷ TTD-equivalent benefits allowed by Section 16(D) are to be paid only when “an employee is actively and in good faith being evaluated or participating in a retraining or job placement program for the purposes of evaluating permanent total disability status[.]” When an award of permanent partial disability (PPD) is entered, the injured worker is not entitled to Section 16(D) income benefits at the temporary total disability rate.¹¹⁸

If an employee claiming PTD status unreasonably refuses to be evaluated or to accept vocational rehabilitation services or training, PTD benefits shall not be awarded during the period of such refusal and the employee is limited to permanent partial disability (PPD) benefits only.¹¹⁹

Maximum PTD Benefit

The maximum weekly benefit payable for permanent total disability is 70% of the employee’s average weekly wage, not to exceed the state’s average weekly wage.¹²⁰ Permanent total disability awards are payable by the employer for the remainder of the lifetime of the claimant, unless there is a change of condition for the better.¹²¹ Title 85 O.S., Section 28 prohibits amounts paid on the PTD award from being deducted from a subsequent PPD award:

“In a change in condition for the better changing a permanent total disability to a permanent partial disability, the weeks paid on the permanent total disability award shall not be deducted from a subsequent permanent partial disability award; however, permanent partial disability awards together with temporary compensation shall not exceed five hundred (500) weeks.”

¹¹⁷ City of Norman v. Steves, 1998 OK CIV APP 68, 962 P.2d 655.

¹¹⁸ Koch v. CRI Feeders, 1998 OK CIV APP 114, 964 P.2d 948.

¹¹⁹ 85 O.S., §16(A).

¹²⁰ 85 O.S., §22(1)(6).

¹²¹ 85 O.S., §28.

V. COMBINED DISABILITIES AGAINST THE MULTIPLE INJURY TRUST FUND OR THE LAST EMPLOYER

Historical Background

In 1943, the Special Indemnity Fund, now known as the Multiple Injury Trust Fund (“Fund”), was created to encourage employers to hire workers who suffered previous impairments.¹²² Employers were insulated from liability for the combination of old and new disabilities. An employer was responsible only for the permanent disability resulting from the subsequent injury as if there were no previous impairment. Any material increase in disability caused by the combination of the previous impairment and the subsequent injury was the responsibility of the Fund.¹²³

In 1999, the legislature began dissolving the Fund’s liability for combined disabilities by amending 85 O.S., Section 172(A).¹²⁴ The Fund’s liability was limited to combined disabilities resulting in permanent total disability (PTD). The employer’s liability remained unchanged – limited to permanent disability resulting from the subsequent injury as if there were no previous impairment.

In 2000, the Fund’s liability for combined disabilities was further dissolved when the legislature discontinued benefits from the Fund for a material increase in combined disability resulting in PTD when the subsequent injury occurred on or after June 1, 2000.¹²⁵ Additionally, the 2000 amendment made the subsequent employer liable for “any material increase resulting from the combination of such injuries.”

In 2005, liability for combined disabilities constituting permanent total disability was shifted from the last employer to the Fund for injuries occurring on or after November 1, 2005.

Following is a chart summarizing the allocation of liability for combined disabilities between the Fund and the last employer.

¹²² See, Special Indem. Fund v. Archer, 1993 OK 14, 847 P.2d 791, 794.

¹²³ 85 O.S. Supp. 1995, Section 172(A).

¹²⁴ Section 8 of Enrolled Senate Bill No. 680 of the 1st Session of the 47th Oklahoma Legislature; 1999 Okla. Sess. Laws ch. 420, §8, emerg. eff. November 1, 1999.

¹²⁵ Section 12 of Enrolled Senate Bill No. 1414 of the 2nd Session of the 47th Oklahoma Legislature; 2000 Okla. Sess. Laws ch. 248, § 12, emerg. eff. May 26, 2000.

Liability For Combined Disabilities - 85 O.S., Section 172

	Liability for last injury	Liability for combined disabilities constituting LESS THAN PTD	Liability for combined disabilities constituting PTD
MITF	No	Yes, if the subsequent injury (last combinable compensable injury) was before 11/1/99. See, <i>Autry v. MITF</i> , 2001 OK 79, 38 P.3d 213, and <i>Loftis v. MITF</i> , 2003 OK CIV APP 30, 67 P.3d 924, released for publication by the OK Supreme Court.	Yes, if the subsequent injury (last combinable compensable injury) was before 6/1/00 or on or after 11/1/05.
Last Employer	Yes	No	Yes, if the subsequent injury (last combinable compensable injury) was on or after 6/1/00 but before 11/1/05.
Claimant	No	Yes, if the subsequent injury (last combinable compensable injury) was on or after 11/1/99. See, <i>St. John Medical Center v. Bilby</i> , 2007 OK 37, 160 P.3d 978.	No

Combined Disabilities Against the Multiple Injury Trust Fund (Form 3F Claims)

To get compensation from the Multiple Injury Trust Fund, the worker must have:

1. a compensable workers' compensation injury occurring before June 1, 2000 or after October 31, 2005, and a previous disability which, when added together, constitute permanent total disability; or
2. a compensable workers' compensation injury occurring before November 1, 1999, and a previous disability which, when added together, constitute permanent partial disability.

The Multiple Injury Trust Fund is not liable for any combined disabilities constituting permanent partial disability if the subsequent injury occurred on or after November 1, 1999.

If a worker is found to be permanently and totally disabled (PTD) from the combination of prior disabilities and the last injury, the worker is entitled to weekly benefits at the maximum rate the worker would get for a permanent partial disability (PPD).¹²⁶ If the subsequent injury occurred before June 1, 2000, PTD awards against the MITF are payable for a period of five (5) years or until the worker reaches age 65, whichever period is the longer.¹²⁷ If the subsequent injury occurred on or after November 1, 2005, PTD awards against the MITF are payable for a period of fifteen (15) years or until the worker reaches age 65, whichever period is longer.¹²⁸ However, if the worker dies, from any cause, before the award is paid in full, the award abates.¹²⁹

¹²⁶ 85 O.S., §172(B)(1)(3).

¹²⁷ 85 O.S., §172(B)(1).

¹²⁸ 85 O.S., §172(B)(3).

¹²⁹ 85 O.S., §172(D).

A claim against the MITF shall be commenced by filing a Form 3F, Employee's Claim for Benefits from the Multiple Injury Trust Fund.¹³⁰ The Form 3F must be filed in the claim in which benefits are sought and shall use the same Court claim number.¹³¹

Combined Disabilities Against the Last Employer (Form 3E Claims)

If the worker has a compensable workers' compensation injury which occurs on or after June 1, 2000 but before November 1, 2005, the last employer, rather than the Multiple Injury Trust Fund, is liable for the combined disabilities.

The compensation rate for PTD awards resulting from a combination of injuries shall be the compensation rate for PPD paid by the employer in the last combinable compensable injury.¹³² PTD awards resulting from a material increase in disability resulting from a combination of injuries shall be payable for a period of fifteen (15) years or until the worker reaches age 65, whichever period is longer.¹³³ However, if the worker dies, from any cause, before the award is paid in full, the award abates.¹³⁴

A claim against the last employer for combined disabilities shall be commenced by the filing of a Form 3E, Employee's Claim for Benefits for Combined Disabilities Against the Last Employer.¹³⁵ The Form 3E must be filed in the claim in which benefits are sought and shall use the same Court claim number.¹³⁶ No Form 9 may be filed to request a trial on a Form 3E claim against the employer for combined disabilities until the claimant's claim for compensation for the last compensable injury against the employer has been adjudicated or otherwise resolved.¹³⁷

VI. VOCATIONAL REHABILITATION

The Workers' Compensation Act contemplates the worker is to receive all benefits for an injury, including vocational rehabilitation services (vocational rehabilitation, retraining and job placement) designed to restore the injured worker to gainful employment.¹³⁸ A worker is entitled to vocational

¹³⁰ Workers' Compensation Court Rule 11, 85 O.S., Ch. 4, App

¹³¹ Id.

¹³² 85 O.S., §172(B)(2).

¹³³ Id.

¹³⁴ 85 O.S., §172(D).

¹³⁵ Workers' Compensation Court Rule 12, 85 O.S., Ch. 4, App.

¹³⁶ Id.

¹³⁷ Workers' Compensation Court Rule 19(A), 85 O.S., Ch. 4, App.

¹³⁸ See, Warren v. Oberlin Color Press, 1998 OK CIV APP 113, 959 P.2d 609.

rehabilitation services if, as a result of the work-related injury, the worker is unable to perform the same occupational duties the worker was performing before the injury.¹³⁹

Vocational rehabilitation must be requested within 60 days after a permanent partial disability (PPD) award.¹⁴⁰ For information about entitlement to vocational rehabilitation in relation to a claimed permanent total disability status, see the “Vocational Rehabilitation” portion of the “Permanent Total Disability” section of this paper. Vocational rehabilitation services or training shall not extend for a period of more than 52 weeks, but may be extended for an additional 52-week period upon order of the court.

¹³⁹ 85 O.S., §16(A).

¹⁴⁰ 85 O.S., §16(B).