



Credit Where Credit is Due: WCL 15(3)(w)

Tracey A. McLean

315.569.4602 | tmclean@vaughanmclean.com

Zachary H. Pratt

610.360.5881 | zpratt@vaughanmclean.com

NYSIA

**15(3)(w):
What is it?**

WCL 15(3)(w)

- WCL 15(3) Addresses payment of permanent partial disability awards, including SLUs, facial disfigurements, and caps.
- WCL 15(3)(w) specifically addresses the durational permanent disability caps associated with LWEC determinations.

15(3)(w): What We Know

- 2017 reform: 15(3)(w) was amended* to apply a **credit** for periods of temporary partial disability beyond 130 weeks from the date of accident up to the date of the implementation of the statutory LWEC caps against those capped permanent partial disability awards.

{ The same amendment removed the obligation for ppd claimants to look for work.}*



- Applies to all injuries with dates of accident or disability occurring on or after **4/10/2017**
- The **credit period** begins 130 weeks (2.5 years) **after** the date of loss and continues to the date of any permanency finding.
- As a general rule, the carrier is entitled to a **credit** against the LWEC Caps for any weeks of temporary partial disability benefits paid during the **credit period**.



Board issued Number 046-936 on 4/25/2017, in response to the amendment to 15(3)(w), in which it stated:

“The statutory changes create a **safety valve** that extends the period of temporary disability beyond 2.5 years (130 weeks) when the Board makes a determination that the claimant has **not yet reached maximum medical improvement on that date.**”

Note: TTD or TPD is not specifically mentioned.



Board issued Number 046-936 on 4/25/2017, in response to the amendment to 15(3)(w), in which it also stated:

“ Insurance carriers may receive a credit against the maximum benefits payable for permanent partial disability for any periods of temporary disability paid beyond the 2.5 years (130 weeks).”

Note: TTD or TPD is not specifically mentioned.

POP QUIZ:

Is it

- (a) 130 weeks from the date of accident **OR**
- (b) 130 weeks of paid benefits?



ANSWER: (b)

130 weeks from the date of accident.

The credit is based on the number of weeks paid **AFTER** the 130-week mark and the date of the permanency finding. 130 weeks of payments is not required.



Case: Donaldson Interior 2022 NY Wrk. Comp G1399547

- ❖ “WCL 15(3)(w)... also provides a "safety valve" for claimants. **If a claimant has not reached maximum medical improvement 130 weeks after the date of accident**, then periods of disability beyond 130 weeks from the date of accident will not be applied to the statutory caps for permanent partial disability awards.”
- ❖ “With regard to the carrier's credit, the proper credit period begins 130 weeks post-accident and continues through the date of classification.”
- ❖ **The 130 week start date applies regardless of how many weeks of benefits were paid during that 130-week period. Family Dollar Stores of NY 2022 NY Wrk Comp G2031302, citing Donaldson Interior.**

The Terms:

- Credit Period:** The time between week #130 and a finding of MMI
- Credit:** The number of weeks paid during the Credit Period to be applied as reduction in payment against the caps.
- Safety Valve:** wipes out the credit to that point upon a finding of no MMI.



Safety Valve Applies

= NO CREDIT for us

= good for claimant

If the WCLJ determines that the safety valve applies, then we do not get credit for the weeks paid between the 130-week mark and that determination.



Safety Valve Does NOT Apply

= CREDIT

= good for us.

If the WCLJ determines that the safety valve does not apply, then we get credit for the weeks paid between the 130-week mark and the classification.

Is the Credit for Weeks or Amount?

Ex: The Claimant is classified with a LWEC resulting in 300 weeks of benefits payable at \$400 PPD per week. Prior to permanency, we paid 10 weeks of benefits at \$500 TPD. What's our credit? 10 weeks or \$5000?

- The Statute expressly provides a credit for “weeks” as opposed to a dollar amount.
- Here, we paid 10 weeks of TPD benefits during the credit period.
- We get credit for those 10 weeks and the LWEC durational cap is reduced from 300 weeks to 290 weeks. The dollar figure is not considered.

So: Weeks.

15(3)(w): What's the Process?



- ✓ 130 weeks from date of accident/disability passes
- ✓ Carrier shows payments of TPD during the credit period
- ✓ Burden shifts to the claimant to prove she is entitled to “Safety Valve” protection.
 - ✓ Four requirements must be met. (more on that later)
- ✓ If the Safety Valve is found to apply, the Carrier will NOT receive credit against the caps.
- ✓ If the Safety Valve does not apply, the Carrier will be granted credit and the maximum LWEC cap liability will be reduced by the number of credit weeks.

The Credit

POP QUIZ:

If we don't raise the right to the credit at the first hearing following 130 weeks from the date of accident, is it waived?

ANSWER: No.

**The credit is a statutory entitlement and cannot be waived.
There is no timeframe identified in Section 15(3)(w).**

HOW do we raise our right to a Credit ?

- ❖ There is no established process, however, it is typically raised:
 - At the hearing to address permanency and LWEC.
 - RFA-2 after we hit the 130-week mark and have evidence of MMI.
 - RFA-2 after permanency is found.

WHEN do we raise our right to the Credit?

- ❖ The statute does not identify any timeline by which it has to be raised.
- ❖ Typically, after 130 weeks from the date of accident/disability has passed.
- ❖ Statutory entitlement, so by operation of law.

So, wait -- our right to a credit under 15(3)(w) can't be waived?

- ❖ Not yet. The statute can always be changed.

**Recent decisions suggest changes may be
coming...**



Hints: Pinnacle Industries 2024 NY Wrk. Comp G2028929

- ❖ “WCL 15(3)(w)... sets forth no provision for waiver of that right. In light of these precedents, **the Board Panel is constrained to find this carrier is entitled to credits** for awards at the temporary partial disability rate paid after June 23, 2020, the 130th week following the date of the accident to May 5, 2022, the date of the claimant's classification. ”
- ❖ “As found in Matter of NAES Corporation, the carrier's delay in pursuing its credit **has resulted in unnecessary procedures**, to wit the recalculation by the ATF. The Board Panel, noting the carrier's delay of more than a year warrants a **\$500.00 penalty under WCL 114-a(3)(i).**”



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POP QUIZ:

Is the credit based on

- (a) TTD payments
- (b) TPD payments, **OR**
- (c) **ALL** payments regardless of TTD or TPD?



ANSWER: (b)

Temporary partial disability payments only.

TTD payments do not apply to the credit.

(Maybe)



TPD Benefits Apply

- We are entitled to credit for weeks of temporary **partial** disability benefit payments during the credit period.
- WCL 15(3)(w) refers to WCL 15(5) – the section that addresses temporary partial benefits. (*next slide*)
- Payments of temporary **total** disability benefits do **NOT** count towards the credit.
 - NOTE: Currently applied inconsistently statewide



➤ WCL Section 15(3)(w) references Section 15(5):

- *“For a claimant with a date of accident or disablement after the effective date of the chapter of the laws of two thousand seventeen that amended this subdivision, where the carrier or employer has provided compensation **pursuant to subdivision five of this section** beyond one hundred thirty weeks from the date of accident or disablement, all subsequent weeks in which compensation was paid shall be considered to be benefit weeks for purposes of this section, with the carrier or employer receiving credit for all such subsequent weeks against the amount of maximum benefit weeks when permanent partial disability under this section is determined. In the event of payment for intermittent temporary partial disability paid after one hundred thirty weeks from the date of accident or disablement, such time shall be reduced to a number of weeks, for which the carrier will receive a credit against the maximum benefit weeks.”*



Case: Family Dollar Stores of NY 2022 NY Wrk. Comp G2031302

- ❖ “...periods of total disability benefits paid between the end of the 130-week period and the date of classification are not credited against PPD statutory cap weeks (see Matter of Brambles USA, 2021 NY Wrk Comp G1992037; Matter of Sanchez v. Jacobi Medical Ctr, 182 AD3d 121 (2020)).



How is the Credit Calculated?

Scenario One: Benefits Paid (1-130)

- EX: 4/10/17 injury.
 - We paid from 4/10/17-12/10/19 or 138 weeks.
 - 8 weeks beyond the 130 week period
 - Classified on 12/10/19 with 50% LWEC
 - 50% LWEC = 300 weeks
 - So, we pay him 292 weeks.
 - 300 weeks for caps, less 8 weeks = 292 weeks balance



How is the Credit Calculated?

Scenario Two: Benefits Not Paid (1-130)

- EX: 4/10/17 injury.
 - We paid no benefits from 4/10/17-10/14/2019 (130 weeks).
 - We paid benefits from 12/16/2019 – 2/17/2020 (9 weeks)
- Classified on 8/13/2021 with 50% LWEC
 - 50% LWEC = 300 weeks
- So, we pay him 291 weeks. 300 weeks for caps, less 9 weeks =291 weeks.



How is the Credit Calculated

Scenario Three: Benefits Paid Intermittently

- EX: 4/10/17 injury.
 - We paid **25 weeks TTD** benefits from 4/10/17-10/14/2019 (130 weeks).
 - We paid **9 benefits TTD** of from 12/16/2019 – 2/17/2020 (post -130)
 - We paid **4 weeks of TPD** benefits from 2/17/2020 – 3/16/2020
- Classified on 8/13/2021 with 50% LWEC
 - 50% LWEC = 300 weeks
- So, we pay him 296 weeks. 300 weeks for caps, less 4 weeks =291 weeks.

The Safety Valve



How Does the Safety Valve Work?

- The safety valve is a device that is used to prevent a boiler or pressure vessel from exceeding a predetermined pressure limit. It is a mechanical device that is designed to automatically release the pressure from the system when the pressure reaches a set point.
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- J'ì y'ù' è'ù'ì ù'g'ì Ä'z'Ä'è'Ä'z'z'°'ì
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- Ä'è'v'y'Ä' Ä'è'ñ' y'ù' è'ä'È'Ä'Ä' ù'Ä' ù'Ä' z'Ä'v' è'c'Ä'v'ì Ä'è's'ù' è'ù'c'Ä' è'z'Ä'v'c'Ä'v'ì è'g'v'ì î Ä'G'G'È

When does the Safety Valve Apply? *Requirement One*

- ✓ $\int_0^t \dot{m} \dot{v} dt = \Delta p$
- ❖ $\Delta p > \Delta p_{crit}$
 - ❖ $\Delta p_{crit} = \frac{2 \sigma}{r}$
- ❖ $\Delta p_{crit} = \frac{2 \sigma}{r} = \frac{2 \sigma}{\frac{D}{2}} = \frac{4 \sigma}{D}$
 - ❖ $\sigma = \frac{p r}{t}$





When does the Safety Valve Apply? *Requirement Two*

- ✓ It is the claimant's burden to produce credible medical evidence that shows he or she has not reached MMI and to request a hearing to ensure that a formal finding of no MMI is made on the record, preferably on or around the 130-week post-accident date. *Matter of Department of Education, 2023 NY Wrk Comp G2056952*.

When does the Safety Valve Apply? *Requirement Three*

- ✓ The Safety Valve applies to any person who is a director, officer, or partner of a company that is a public company or a company that is a subsidiary of a public company.

The Safety Valve also applies to any person who is a director, officer, or partner of a company that is a public company or a company that is a subsidiary of a public company, if the person is also a director, officer, or partner of a company that is a public company or a company that is a subsidiary of a public company.



When does the Safety Valve Apply? *Requirement Four*

- ✓ *Not applicable unless the Board has made a formal finding of no maximum medical improvement*

The Board has repeatedly found that the safety valve provision does not apply, even if there is medical evidence that the claimant had not reached maximum medical improvement 130 weeks post-accident date, **unless the Board has made a formal finding of no maximum medical improvement** (see, e.g., Matter of Department of Education, 2023 NY Wrk Comp G2056952; Matter of County of Erie, 2023 NY Wrk Comp G2192175; Matter of Bread Alone Inc, 2023 NY Wrk Comp G1835069).



RECAP -- When does the Safety Valve Apply?

- ❖ When the vessel is at normal operating conditions
- ❖ When the vessel is at normal operating conditions and the pressure is above the set point
- ❖ When the vessel is at normal operating conditions and the pressure is below the set point
- ❖ When the vessel is at normal operating conditions and the pressure is above the set point



THE PITFALLS:

- ❖ Nř i Āvėyĭ Ā ězĀgi ĩ ůĀězřsřbĀĉv ůĀř ĩ sĀěuf Ā sĭ ġăũbĀ y.ėyĭi zĀvĀy.ŵi ° ġi Ā Es ĩ ůġi Ā ĶĀ Ģ ĚŵvĀ Ģ Ģ Ě
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- ❖ ĢĬ ĬĈĀġi Āġe° äv° zĀĚ ř ĩ ůĀězřsřbĀĬv.° yĀĚ ĢĀv yĀeũĀ Ģ Ģ ĚĀy.sřsřũ9



CLAIMANT WORK-AROUNDS:

- ❖ Rather, the claimant is "entitled to seek a finding from the Board that he has not reached maximum medical improvement in order to show the fourth element that is required to invoke the **safety valve** provision of WCL 15(3)(w)" (Matter of Weitsman Recycling LLC, 2024 NY Wrk Comp G2381274), and such request may be made "on or around the 130-week post-accident date" (Matter of Department of Education, 2023 NY Wrk Comp G2056952). If the claimant makes such a request, the Board will address the request and make an affirmative finding of no MMI if supported by the evidence in the record. However, if the issue is not raised until permanency is ripe, the Board will look back and analyze the evidence in the record at the 130 week timeframe. The Board will consider whether a C-4.3 report was received at that time, and will review the report to make a finding regarding whether the claimant was or was not at MMI at that time.⁹

**15(3)(w):
What We Still Don't Know**

What Happens When Safety Valve Applies? Do we get a Second Crack at It?

Example:

- 146 weeks post-accident we raise permanency.
- There is a finding of no MMI.
- We lose those 16 weeks as a credit.

- We take another crack at it at 160 weeks.
- There is a finding of MMI,

- **Do we get credit for any? How much? All 30 weeks? 14? None?**



What Happens When Safety Valve Applies? Do we get a Second Crack at It?

- ❖ No case law on it. We say “yes.” We lose the first batch, but not the second.
- ❖ The "safety valve" provision states when permanency is at issue, and a claimant satisfies all four prongs, "the carrier shall not receive a credit for benefit weeks **prior to a finding that the claimant has reached maximum medical improvement, at which time the carrier shall receive credit** for any weeks of temporary disability paid to claimant **after such finding** against the maximum benefit weeks awarded under this subdivision."

**15(3)(w):
So What's Our Plan?**



Strategies - IMEs

- ✓ In those instances where you are outside the 130 weeks, if you don't believe claimant is at MMI –don't rush an IME on permanency.
- ✓ Be cautious when asking your IME to comment on MMI
- ✓ An IME confirming no MMI may trigger claimant's entitlement to protection.
- ✓ Where claimant tries to avoid it by way of evidence of no MMI, make sure to reserve your right to allow for an IME.
 - ✓ If your IME provides MMI (and you are confident with the opinion), litigate MMI versus no MMI.



Strategies

- Be aware! Note the 130-week post accident date in your file at the outset of the claim and be sure to track any subsequent weeks of TPD payments for potential credit
- Remember the general rule is that you are entitled to credit.
- Be thoughtful and deliberate in pursuit of MMI on LWEC claims
 - Weigh your interest in promptly closing a claim against your potential credit interests when deciding to schedule an IME on MMI.



Strategies

- Be prepared to fight back against efforts to invoke the Safety Valve
- It's the Claimant's burden to prove all 4 elements of the safety valve.
 - Silence on the issue of MMI is not enough. To invoke the Safety Valve, there **MUST** be a formal finding the Claimant has not yet reached MMI

QUESTIONS?



Thank You!