

# Worker's Compensation & Duty Disability – Maximizing Benefits for Clients in Protective Occupations



*Matthew Robles is an associate attorney with Hawks Quindel in Madison. His practice focuses on duty disability, worker's compensation, and Social Security Disability.*

Many attorneys know that duty disability is a benefit similar to workers' compensation and specific to law enforcement, firefighters, and other "protective occupation participants." Though this is accurate, to fully serve clients who work in protective occupations, it is important for attorneys to understand how duty disability and worker's compensation claims interact. A few key points about duty disability can help attorneys properly advise their clients, protect their interests, and know when they should seek further legal counsel.

Too often, potential duty disability clients apply for duty disability and then seek legal advice. Unfortunately, at that point, they have lost any additional monetary compensation they might have received from their worker's compensation claim. Any worker's compensation payments made after a duty disability application will be offset. For personal injury practitioners representing a protective occupation participant in a work-related car accident, it is important to know that it may be in your client's best interest to quickly resolve their worker's compensation claim and then apply for duty disability. This article will first provide a brief overview of duty disability with some comparisons to worker's compensation, and then discuss how to spot cases where worker's compensation can result in additional compensation for protective occupation participants intending to apply for duty disability.

## What is Duty Disability?

Duty disability is an income-replacement benefit available to state and municipal "protective occupation participants," which includes law enforcement, firefighters, correctional officers, DNR wardens, and some emergency medical service providers.<sup>1</sup> Duty disability bears some resemblance to worker's compensation. It provides benefits for work-related injuries and conditions and uses identical legal standards in most claims for determining if a condition is work related. The duty disability benefit is established by Wis. Stat. § 40.65, and

administered by the Department of Employee Trust Funds (ETF).

### Criteria to Qualify for Duty Disability

To qualify for disability, employees must meet four criteria:

1. They worked in a protective occupation when they became disabled.
2. Their disability is work-related.
3. Their disability is permanent.
4. Their disability has caused at least of the following:
  - permanent reduction of base pay or position;
  - permanent assignment to light duty;
  - retirement; or
  - adversely affected their promotion opportunities.<sup>2</sup>

In some circumstances, a firefighter's disability caused by heart conditions, lung conditions, and certain cancers will be presumed work related.<sup>3</sup> A similar presumption applies to disabilities caused by infectious diseases contracted by firefighters, law enforcement, correctional officers, and EMS providers.<sup>4</sup> These presumptions apply only to duty disability and not worker's compensation. Thus, in these "presumption" cases, duty disability may be the employee's only option.

## Comparing the Duty Disability and Worker's Compensation Benefits

Like worker's compensation, duty disability is a tax-free benefit. In general, the duty disability benefit rate for state employees is 80% of their monthly salary (as of the date they first met the criteria to qualify for duty disability), and the benefit rate for most municipal employees is 75% of their monthly salary, unless they are permanently and totally disabled, in which case it is 80%.<sup>5</sup> In almost all cases, the duty disability benefit is going to be greater than the 66.6% benefit rate under worker's compensation. Additionally, duty disability benefits are adjusted annually, while worker's compensation is a static

benefit based on the wage at the time of injury. Thus, in almost every respect, duty disability is the preferable benefit. It pays more, rises over time, and has a lower threshold than worker's compensation to qualify for ongoing benefit payments.

Unlike worker's compensation, duty disability does not cover medical expenses for work-related conditions. Duty disability is a wage-replacement benefit only. However, applying for duty disability will provide certain protections for continued group health insurance coverage (though the employee must still pay premiums), and for those determined to be permanently and totally disabled under duty disability, their life insurance premiums can be waived.

### Duty Disability Application Process

It is not possible to receive a duty disability back benefit preceding the date of application. A claim for benefits starts accruing as of the "effective date," which is the later of either: (1) the date the duty disability application is received by ETF; or (2) the "qualifying date," or the first date the employee met the criteria for duty disability (i.e. she reached an end-of-healing and was assigned permanent light duty restrictions).<sup>6</sup>

The process of applying for duty disability starts with filing an application with ETF. Once ETF receives the application, they will send the employer an employer certification form. The form asks the employer whether they believe the employee meets each of the qualifying criteria for duty disability. If the employer disputes that the employee meets the criteria for duty disability, ETF will deny the claim, and it will have to proceed to a hearing before an ALJ to be approved. Though employers are instructed to state the basis for disputing a claim, there is no penalty for failing to do so (or not having a reasonable basis for disputing the claim).<sup>7</sup> There is also no deadline for the employer to complete the employer certification form, and they will sometimes simply ignore the employer certification, which delays the claim. Eventually, if no employer certification is filed, ETF will issue a letter acknowledging they employee filed all necessary documents and give them the opportunity to take their claim to a hearing.

Applicants will also need to submit two Duty Disability Medical Reports completed by their doctors. These can be submitted at the time of application, but they can also be submitted later. One of the medical reports must be a specialist in an area of disability, but the other report may be from a general practitioner. There is no statute of limitations for a duty disability claim,

but an application will be dismissed if the two medical reports are not submitted within a year of the date ETF received the duty disability application.<sup>8</sup> Additionally, ETF requires that the doctors complete the medical reports within six months of the doctor's last appointment with the applicant.

### When to Consider Settling Worker's Compensation Before Applying for Duty Disability

If a protective occupation participant suffers a work-related injury, which causes permanent work restrictions limiting their ability to perform their job, it is very likely they will have both a worker's compensation and duty disability claim. People in protective occupations are often advised to immediately apply for duty disability because their claim cannot start accruing until an application is filed. As discussed below, this is not always in their best interest.

§ 40.65(5) provides that any worker's compensation benefits "payable" will be offset against duty disability benefits, but does not address worker's compensation benefits previously paid. Because of this, any worker's compensation received before a duty disability application is filed cannot be offset (but worker's compensation payments made after an application will).<sup>9</sup> What this means is that in certain circumstances, a protective occupation participant can receive additional money if they are paid worker's compensation benefits in a lump-sum before they apply for duty disability.

Assessing whether someone should immediately apply for duty disability, or should first wait to resolve their worker's compensation claim, requires a case-by-case determination. Because duty disability benefits are paid at a higher rate, the main question an attorney needs to answer is whether the workers' compensation payment to your client will be worth more than the duty disability payments they forgo while the worker's compensation claim is resolved. The main considerations for the attorney will be the duty disability benefit amount, how much their client will likely receive from the worker's compensation claim, and how long it will take to resolve the claim.

Though there is not hard-and-fast rule, any protective occupation employee with a significant worker's compensation claim should consider consulting with an attorney before applying for duty disability. Cases where an attorney may be able to add significant value on top of duty disability include injuries with potential loss of earning capacity or permanent total disability

claims (head, neck, back, and torso injuries), or cases with significant permanent partial disability.

Having both the worker's compensation and duty disability claims open can also give an employee additional leverage and options when negotiating with the employer as their employment ends. Even if the employee intends to only pursue duty disability, it may make sense for them to consult with an attorney, especially if their worker's compensation claim has been denied and it is unclear if the employer will certify the duty disability claim.

There are a few additional considerations attorneys should keep in mind regarding duty disability and worker's compensation. First, the Department of Workforce Development limits the ability for parties to settle conceded worker's compensation claims. All settlement agreements in worker's compensation cases will need to be reviewed and approved by an administrative law judge, and a prerequisite for compromising a claim is that there is a "genuine and significant basis for a dispute between the parties."<sup>10</sup> If there is no dispute, you will have a difficult time getting a worker's compensation settlement approved.

Second, there are circumstances where it may still make sense to pursue a worker's compensation claim after a duty disability application has been filed. For example, your client may simply value having more money up front, or they may need future medical treatment, which worker's compensation can cover but duty disability cannot.

Finally, many protective occupation participants have other benefits available to them through ETF, which may include income continuation, long term disability, or disability retirement. It is important that they are educated about all the benefits available to them.

### Recently Proposed Legislation Regarding PTSD

This summer, 2017 Assembly Bill 434 was introduced by a bipartisan group of state lawmakers. The bill would create a rebuttable presumption that a diagnosis of post traumatic stress disorder for certain protective occupation participants is work related. If the employer or worker's compensation insurance carrier alleged the PTSD diagnosis was not work related, they would carry the burden of proving this. As drafted, the bill would apply only to worker's compensation and not duty disability claims.

Worker's compensation and duty disability claims based on mental health conditions not caused by a physical injury ("mental-mental" claims) are subject to the "extraordinary stress" standard.<sup>11</sup> This standard has created an incredibly high bar for all workers, but has made it close to impossible for those in protective occupations to be compensated for work-related mental health conditions. This is because "extraordinary stress" is defined in terms of the situations and stress expected of those working in the same occupation as the applicant.<sup>12</sup> Given that the stated job duties of protective occupations are to regularly respond to crises and extreme situations, it has been a rare case that has met the extraordinary stress standard.

Given the current political climate surrounding worker's compensation, it is not clear if this bill will make progress anytime soon, but it would be a welcome change for those in protective occupations. 

### ENDNOTES

1. Wis. Stat. § 40.02(48).
2. Wis. Stat. § 40.65(4).
3. Wis. Stat. §§ 891.45, 891.455.
4. Wis. Stat. § 891.453.
5. Wis. Admin. Code § ETF 52.14(1); Wis. Stat. § 40.65(5).
6. Wis. Admin. Code § ETF 52.10.
7. See Wis. Admin. Code § ETF 52.06(7)
8. Wis. Admin. Code § ETF 52.06(5)-(6).
9. *Coutts v. Wis. Ret. Bd.*, 209 Wis. 2d 655, 562 N.W.2d 917 (1997).
10. Wis. Admin. Code § DWD 80.03(3).
11. *School Dist. No. 1, Village of Brown Deer v. Department of Industry, Labor and Human Relations*, 62 Wis. 2d 370, 215 N.W.2d 373 (1974) (establishing extraordinary stress standard); see also *Village of Random Lake v. Labor & Industry Review Com'n*, 141 Wis. 2d 559, 415 N.W.2d 577 (Ct. App. 1987) (holding that extraordinary test applies to duty disability claims).
12. See *Spink v. Farm Credit Services*, WC Claim No. 87-32662 (LIRC December 11, 1989).