8.6 SECTION 8(e): TEMPORARY PARTIAL DISABILITY

8.6.1 Generally

Section 8(e) of the LHWCA provides:

> **Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.**

33 U.S.C. § 8(e).

One who is temporarily and partially disabled is entitled to the usual measure of benefits but for the **limited period of five years**. Wages and time lost after the five-year period may not be considered in determining the amount of lost wage-earning capacity. St. Regis Paper Co. v. McManigal, 67 F. Supp. 146 (**N.D.N.Y.** 1946). In Admiralty Coatings Corp. v. Emery, 228 F.3d 513 (**4th Cir.** 2000) the employer unsuccessfully challenged the ALJ's authority to award temporary partial benefits beyond the date of the evidentiary hearing. The employer had argued that the ALJ's holding violated the APA's mandate that all findings and conclusions be supported by the evidence of record.

Despite sustaining a scheduled injury, if an employee is still receiving treatment for the condition (which has not yet reached maximum medical improvement) and he is employed but has sustained a loss of wage-earning capacity, he is entitled to temporary partial disability benefits based on such loss. Cox v. Newport News Shipbuilding & Dry Dock Co., 9 BRBS 791 (1978), aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP, 594 F.2d 986 (**4th Cir.** 1979). This case was decided before Potomac Electric Power Co. v. Director, OWCP, 449 **U.S.** 268, 14 BRBS 363 (1980) (hereinafter, "PEPCO"). Since the PEPCO **Court** dealt only with permanent partial disability, Cox is not in conflict.

A claimant may be entitled to temporary partial disability compensation for lost overtime. Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110 (1989). A claimant, who earned overtime prior to her injury and is moved to a different job (where no overtime is available) post-injury, need not show that overtime was available in her pre-injury welding job after her injury. The focus should be on the loss of previously available overtime because of her injury. Although a claimant must establish that absent her injury she would have worked available overtime, this burden may be met through her creditable testimony and previous work record.

In considering vocational evidence in a temporary partial disability case, the Board did not give a vocational expert's testimony retroactive effect, contrary to the treatment it was giving to permanent partial disability claims at the time. Cf. Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155 (1989). Where the worker's condition was temporary, it was probably evolving, and one could not, the Board reasoned, conclude that the condition remained constant during the period leading up to the time that the specifically-identified suitable alternate employment was first shown to be available. The preceding period was found to be one of temporary total disability. Hogan v. Schiavone Terminal, 23 BRBS 290 (1990).

This stance is consistent with the treatment given to permanent partial disability cases by several circuit courts and ultimately accepted by the Board. Palombo v. Director, OWCP, 937 F.2d 70, 25 BRBS 1 (CRT) (**2d Cir.** 1991); Director, OWCP v. Berkstresser, 921 F.2d 306 (**D.C. Cir.** 1990); Stevens v. Director, OWCP, 909 F.2d 1256 (**9th Cir.** 1990), cert. denied, 498 **U.S.** 1073 (1991); Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991).

8.6.2 Treatment of Container Royalty Payments Affects Disability Status

"Container royalty payments" (when considered wages) affect the character of a claimant's disability. They, like wage guarantee payments, are part of a claimant's income to be included in average weekly wage calculations. Container royalty payments are made directly to the employee on the basis of seniority and career hours worked. See generally Lopez v. Southern Stevedores, 23 BRBS 295, 300-01 (1990); McMennamy v. Young & Co., 21 BRBS 351 (1988); Denton v Northrop Corp., 21 BRBS 37 (1988). Container royalties **do not count as wages when** they are received **based on the time disabled** rather than the time worked. Branch v. Ceres Corp, 29 BRBS 53 (1995), aff'd mem. Ceres Corp. v. Branch, 96 F.3d 1438 (1995), 30 BRBS 74, 78(CRT) (**4th Cir.** 1996). In Branch, during periods of disability the claimant received 20 hours/week credit towards the total hours needed to receive the container royalties. Thus the royalties came to the claimant as a result of disability and not hours actually worked. Id.

The situation in Branch is distinguished from that in Aiken v. Stevens Shipping & Terminal, 32 BRBS 1 (ALJ) (1997). In Stevens, the claimant suffered a crush injury to his hand while helping to unload a container. Unlike in Branch, where the claimant became eligible for a royalty payment after the inclusion of the disability credit hours, the claimant in Stevens had worked a sufficient number of hours prior to his injury to establish his eligibility to receive a container royalty payment. **The key is whether the claimant satisfies the container royalty hour requirement with actually worked hours or a combination of worked and disability credit hours.** Where the royalty is pay for purely worked hours the royalty is another form of compensation for work performed and falls into the category of wages. As a result it should be taken into account when calculating the claimant's average weekly wage.

In accordance with the holding in Branch, "if the payments from the Funds post-injury are 'wages,' then the claimant has a 'wage-earning capacity' and the claimant's 'disability' is less than

'total in character'" 30 BRBS 74, 78 (CRT). Thus, section 8(e) applies, and the employer is entitled to a credit.