

# Settlement considerations when the petitioner is receiving Social Security Disability Benefits – NJAJ Boardwalk Seminar 2017

Robert A. Petruzzelli

*The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act "almost unintelligible to the uninitiated."* *Schweiker v. Gray Panthers*, 453 U.S. 34, 49-50, 101 S.Ct. 2633, 2643, 69 L.Ed.2d 460 (1981) citing, *Friedman v. Berger*, 547 F.2d 724, 727, n. 7 (CA2 1976), cert. denied, 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977).

References to POMS refers to SSA's Program Operations Manual System

<https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView>

## **The Basics of the Workers' Comp/Social Security Offset**

### **DI 52150.001 Overview of Workers' Compensation/Public Disability Benefit (WC/PDB) Computations**

Workers injured on the job may qualify for Social Security disability insurance (DI) benefits in addition to benefits under Federal and State WC/PDB programs. When an injured worker qualifies for Federal or State WC/PDB and Social Security DI benefits, the combined benefits can result in the worker receiving more in disability payments than he or she earned before becoming disabled.

Therefore, the Social Security Act requires SSA to reduce Social Security DI benefits when the worker is also eligible for periodic or lump-sum WC/PDB benefits so that the combined amount of WC/PDB and Social Security DI benefits does not exceed 80 percent of the worker's average current earnings (ACE).

The DI benefits are not reduced if the State WC/PDB law or plan provides for a reverse offset (a reduction of the WC/PDB benefit to a worker also receiving Social Security DI benefits).

## **A. Definition – Offset**

Offset is the reduction in SSA benefits to a worker and/or entitled auxiliaries when the total of the benefits plus WC/PDB exceeds the limit provided in the Act. WC, PDB, or both can cause offset.

**NOTE:** Social Security DIB and WC/PDB do not have to be based on the same injury or illness for offset to apply.

(Also for multiple claims, all WC benefits are added together before applying offset: DI 52150.035 Determining the Workers' Compensation/Public Disability Benefit (WC/PDB) Amount Used to Compute Offset. See DI 52150.035 Sec. F. More than one WC/PDB benefit received for a given period.)

## **B. Offset provision**

Social Security DI benefits may be reduced or totally offset if the worker is also entitled to:

- Federal or State WC payments; and/or
- Federal, State, or local government PDB payments.

This does not apply if the worker is a disabled widow(er) or a disabled child.

Date of Entitlement/Initial Entitlement:

The date of entitlement is the first month that benefits are payable. The Date of Disability Onset is the first date a claimant meets the definition of “disabled” under the Social Security Act. There is a five full calendar month waiting period from the date of onset. A waiting period is not required where the claimant has had a prior period of disability that ended within 5 years of the current period of disability. An application for DIB has a maximum retroactive life of 12 months.

DI 10105.001 Period of Disability

DI 10105.015 Retroactivity of Disability Application

DI 10105.065 Disability Requirements

DI 10105.070 Waiting Period for Disability Insurance Benefits (DIB)

## **New Jersey Workers' Comp considerations**

### **DI 52120.165 New Jersey Workers' Compensation (WC)**

### **DI 52120.165 New Jersey Workers' Compensation (WC)**

**New Jersey is a reverse offset State for some types of WC. All reverse offset ends at age 62.**

#### **A. Types of WC payments**

New Jersey WC law is in Title 34, Chapter 15 of the New Jersey Revised Statutes (R.S. 34:15-1 to R.S. 34:15-142). All periodic WC in NJ is subject to State minimum and maximum amounts.

#### **1. Temporary Total (TT) [34:15-12a]**

TT WC is offsettable against SSA benefits. Reverse offset does not apply.

- Amount - TT payments are equal to 70 percent of the worker's average weekly wage. No COLAs are paid on TT.
- When Paid - TT is paid while the worker is under active medical care and while not able to return to work.
- Limits - TT cannot exceed 400 weeks. When TT ends, the worker may be entitled to receive benefits for permanent total or partial disability.

**NOTE:** Do not confuse TT WC with Temporary Disability Income (TDI) benefits, which are a State PDB benefit. For information on NJ TDI benefits, see DI 52135.165.

#### **2. Permanent Total (PT) [34:15-12b]**

PT WC is NOT offsettable against SSA benefits **before age 62. Reverse offset applies.**

PT is presumed when the worker has lost two major members or a combination of members of the body such as eyes, arms, hands, legs or feet. However, permanent total disability can also result from a combination of injuries that render the worker unemployable. It is initially awarded for a period of 450 weeks. PT can then continue beyond the initial 450 weeks if the worker is still unable to earn wages at his pre-injury level. Although those additional WC payments may be reduced to as little as \$5 per week by wages earned after the 450 week period, they are still considered permanent total WC and so are NOT offsettable.

#### **3. Permanent Partial (PP) [34:15-12c]**

PP WC is offsettable against SSA benefits. Reverse offset does not apply.

PP is paid when the worker is permanently injured but able to return to work. These WC payments are also referred to as Scheduled Awards because the WC awarded is based on a percentage of certain "scheduled" or "non-scheduled" losses, as defined by NJ law (scheduled

losses are for certain body parts, such as an arm or leg). While there is no specific statute for disfigurement benefits, awards can be made for permanent disability based upon the extent of disfigurement.

- Amount - PP is based on 70 percent of the worker's average weekly wage and paid in accordance with the statutory schedule. The minimum amount is \$35 per week. No COLAs are paid on PP.
- When Paid - PP is paid in addition to TT benefits and is due after TT ends. It is NOT reduced because of receipt of TT benefits.
- Limits - The maximum period for an unscheduled injury is 600 weeks. Other injuries are paid as determined by the statutory schedule.

#### **4. Second Injury Fund [34:15-95]**

Second injury fund (SIF) payments are NOT offsettable against SSA benefits **before age 62**. **Reverse offset applies.**

The Division of Workers' Compensation administers the SIF. It only makes payments when the worker is totally and permanently disabled as a result of their last work-related injury in combination with a pre-existing disability.

- When SIF payments start - Payments from the Fund commence at the conclusion of payments by the employer/carrier. The commencement date of Fund benefits is found on the last page of the Decision of Eligibility form.
- How long SIF payments are paid - Payments can continue until the worker's death, as long as he remains totally and permanently disabled.
- SIF amounts - Fund benefits are in the same amount as the WC received from the employer/carrier.

#### **5. Order Approving Settlement with Dismissal [34:15-20]**

These lump sum settlements are offsettable against SSA benefits. Reverse offset does **not** apply.

This type of lump sum payment is a compromise settlement made to resolve disputed claims. No further WC will be paid for that injury.

#### **6. Commuted Awards [34:15-25]**

Periodic WC may be commuted, but only with the approval of the WC bureau.

The WC paid by a commuted award may or may not be offsettable, depending on the type of WC that was commuted.

## **B. Reverse offset considerations**

### **1. Mid-month adjustments**

When an injured worker receives PT or Second Injury Fund WC, the PT or SIF award will specify the date the worker's permanent total disability began. Offset does not apply effective with that date because reverse jurisdiction (RJ) applies. If that is not the first day of the month, you must compute the amount of offsettable WC for that month and code it in ICF as a monthly rate. Do not include the non-offsettable amount of WC in the monthly rate for the month of change. Code WC/PDB ICF to show reverse jurisdiction beginning the following month, as only **full** months of RJ should be **coded** as RJ.

### **2. Age 62**

RJ WC ends at age 62, and in that month NJ pays reduced (RJ) WC prior to the age 62 attainment date and full WC from the day of age 62 attainment on. The correct amount of WC to use for offset for the age 62 month is the total amount of WC paid for the FULL month, which includes the RJ WC due that month.

- a. As offset is applicable for all types of WC from the worker's attainment of age 62 until age 65, take the following steps:
  - o Diary these cases for 4 months prior to age 62 since the system will not produce an age 62 alert, and
  - o Develop for WC verification, proof of age (if necessary), and a possible RIB election.

**NOTE:** Effective December 19, 2015 or later, WC offset termination extends from age 65 to full retirement age (FRA). See 2015 amendment in DI 52101.005.

- b. When imposing offset at age 62, remember that for periods of continuous WC, the computation of the ACE and TFB (and any protected increases) should be based on the **first** month that offset was imposed or considered.
  - o If offset was imposed and then removed because of RJ, and then imposed again at age 62, the offset effective date is not changed at age 62. The original ACE and TFB (based on the current family configuration) are used.
  - o If RJ applied for **all** months of disability entitlement prior to age 62, the month of attainment of age 62 is that first month of considering WC offset. The TFB is then based on the age 62 month, and there are no protected increases at age 62.

## **C. Cost-of-living Adjustments (COLA)**

**NOTE:** Also referred to as Supplemental Benefits.

1980 amendments to the WC law made provisions for annual cost of living increases for some workers. Prior to these amendments, all WC payments remained fixed at the weekly benefit rate

awarded. COLAs do not generally affect SSA payments because in order to receive a COLA, the worker:

- Must be receiving PT or Second Injury Fund WC (which is RJ until age 62), AND
- Must have a date of injury prior to 01/01/1980 (unless SSA has a different date of disability onset, our offset ends at age 62 for these cases).

#### **D. Attorney fees**

Counsel fees are limited to 20 percent of the WC received and are set by the judge assigned to the case. Workers are generally represented by an attorney but they may file a claim petition on their own ('pro se').

**NOTE:** When the attorney fee is deducted from periodic WC and paid directly to the attorney, generally we credit the excludable expense to the period of WC adjusted or withheld to recover the fee. If the fee is recovered from retroactive WC due, we credit it 'up front' (similar to a lump sum Method A credit). However, if the last weeks of the WC awarded are withheld to recover the fee, we credit it to the end of the awarded WC (similar to a lump sum Method C credit). This is an area where the technician must rely on their judgment to make a reasonable determination.

#### **E. Retirement insurance benefit (RIB) considerations**

NJ does not offset their WC for RIB.

#### **F. Time limitations for filing claims**

There is a **2 year** statute of limitations that applies to workers' compensation cases. A **formal** claim petition must be filed within 2 years of the date of injury or the date of last payment of WC, whichever is later. In cases of occupational illness, such as asbestosis or hearing loss, the claim petition must be filed within 2 years from the date the worker first became aware of the condition and its relationship to employment.

#### **G. Opt-Out statute**

New Jersey's WC system is technically elective. Employers are not **required** to provide WC insurance for their employees. However, few employers actually exercise their right to opt-out of the State WC system. The few companies that opt-out create their own plans to provide benefits to injured employees. Payments from those private plans are NOT WC, and we do not offset for them. The New York Regional Office (RO) maintains a list of the companies with these plans; check with the RO before determining payments are private plan payments and not WC. Email requests for this information to the NY Region Center for Disability at ||NY CD.

#### **H. Verifying WC**

Always ascertain the type of NJ WC being paid in order to determine whether reverse offset applies. PT WC and Second Injury Fund WC are NOT offsettable before age 62. All other NJ

WC is offsettable. Verification of the type of WC being paid is REQUIRED before you can determine that offset does not apply.

### **1. Obtaining proof from the carrier**

NJ maintains a list of insurance carrier contacts on their website. See DI 52120.165L below. The carriers are the best source of WC payment information.

### **2. Obtaining proof from the State**

Form SSA-1709 is usually the best vehicle for obtaining WC information from the State, rather than asking for copies of documents. NJ WC document copies do not photocopy or fax well, therefore, if copies are needed DOL will mail the documentation to SSA. Faxes will no longer be used by DOL to forward information to the requestor at SSA.

### **I. Disputed WC claims**

In NJ, TT WC is often followed by the carrier's voluntary offer of some permanent disability benefits. In cases of dispute between a worker and the employer/carrier over WC, the worker may file either an Application for an Informal Hearing or a formal Claim Petition with the Division of Workers' Compensation. The case will then be assigned to a judge to resolve the disputed claim. The suggestions made by the judge at an informal hearing are not binding on either party, but **formal hearing decisions are binding**. If the WC case is settled in court, it is usually for a higher dollar amount than the voluntary offer.

Orders approving WC will indicate the dollar amount to be paid over a specified number of weeks, less any voluntary payments made after the TT. Generally the worker will be issued a 'catch-up' payment starting from the end of the TT, and then regular WC payments will be made at the normal dollar amount as noted on the Order. However, see DI 52120.165A.5. above regarding 34:15-20 Orders (Orders Approving Settlement with Dismissal).

### **J. WC forms**

Because NJ offsets their PT and Second Injury Fund payments for SSA disability benefits, we must provide information about SSA benefits to the State. The State form WC-124 (Request for Social Security Information) is sent to SSA for this purpose. We complete Part 2. For an exhibit of WC-124, see the first bullet in DI 52120.165K — Exhibits below. For WC forms and letters that contain payment information, see the second to last bullets in DI 52120.165K — Exhibits below.

### **K. Exhibits**

- Request for Social Security Information (WC-124) [Part 2 is completed by SSA]
- New Jersey Benefit Status Letter – Indemnity
- Notice of Motion for Temporary and/or Medical Benefits (WC-101)
- Workers Compensation - Subsequent Report (IA-2)

- Respondent's Answer to Claim Petition (WC(F)-367)
- Respondent's Answer to Application for Review & Modification of Formal Award (WC-369)
- Answering Statement for Motion for Medical and/or Temporary Benefits (WC-170)
- Pre-Trial Memorandum (WC-31)
- Decision of Eligibility - Second Injury Fund (SCF-6)
- Order for Total Disability, WC-374i\_pdf (02-08-07)
- Order for Total Disability w/ Second Injury Fund (WC-376i\_pdf (02/08/07)

## **L. References**

- DI 52101.005 Social Security Amendments with Workers' Compensation/Public Disability Benefits (WC/PDB) Offset Provisions
- NJ WC website
- NJ's Carrier Contact List
- NJ Chart of Minimum and Maximum WC Rates
- NJ WC Law
- NJ WC Rules
- Precedent Information: PR 02505.033, PR 01-033 (Impact of a Third Party Settlement Payment on the WC Offset Provision of the Social Security Act)
- SSA Ruling 82-5 (Treatment of Certain Lump-Sum Settlements Made under New Jersey Law)

### **State TDB is not offsettable by SSA**

#### **DI 52135.165 New Jersey Public Disability Benefits (PDB)**

New Jersey established a Temporary Disability Income (TDI) program in 1948. State law permits employers to provide coverage for temporary disability through an approved Private Plan or the State Plan.

Work-related injuries or illnesses are not compensable under the Temporary Disability Benefits Law. A worker may be eligible for TDI benefits while workers' compensation issues are being resolved. State law provides up to 26 weeks TDI benefits unless the worker is paid SSA DIB.

#### **A. Imposing offset**

This TDI benefit is a reverse offset plan and will not cause offset of DIB. Code reverse offset per DI 52105.001E.3.

#### **DI 52150.005 Total Family Benefits (TFB)**

The TFB is the total of all disability insurance benefits (DIB) monthly amounts for the number holder (NH) and any auxiliaries entitled on the NH's SSN in the first-considered date of offset. For the definition of first-considered date of offset, see DI 52150.020.

**DI 52150.010 Average Current Earnings (ACE)**

Use the number holder’s (NH) average current earnings (ACE) to determine whether disability insurance benefits (DIB) payable to the NH and any entitled auxiliaries will be reduced (i.e., offset) due to the NH’s receipt of worker’s compensation (WC) and/or public disability benefits (PDB).

The highest of three computation methods is the ACE:

- High-1 ACE,
- High-5 ACE, or
- Average Monthly Wage (AMW).

**A. Beginning with benefits payable 01/73, the ACE is the highest of three methods:**

<b>“High-1” ACE</b>	<b>“High-5” ACE</b>	<b>Average Monthly Wage (AMW)</b>
Based on the one calendar year in which the worker's unindexed covered earnings were highest	Based on the five consecutive years after 1950 with the highest unindexed covered earnings	Based on the unindexed covered earnings used to determine the DIB PIA.
Selected from the period consisting of the year of current DIB onset and the five years immediately preceding the year of onset (regardless of whether or not any of these years is within a prior period of DIB)	Computed without regard to the statutory maximum. (i.e., we can use years of over-maximum earnings in the ACE computation. See RS 01401.015 and RS 01404.300 for over-maximum earnings).	
Computed without regard to the statutory maximum. (i.e., we can use years of over-maximum earnings in the ACE computation. See RS 01401.015 and RS 01404.300 for over-maximum earnings).		
<b>NOTE:</b> The ACE, as used in computing WC/PDB offset, cannot be indexed nor can it be based on indexed earnings.		

For a definition of over-maximum earnings, see RS 01401.015 and the chart of maximum earnings in RS 01404.300. See RS 00605.018 regarding indexed earnings.

## C. Compute the ACE

In most cases, the High-1 method is the highest ACE. If the NH's highest year of earnings is in the year of onset or one of the five years immediately preceding the year of onset, the High-1 ACE is the highest of the three methods. Therefore, in this case, it is not necessary to manually compute the High-5 or the AMW ACE.

### 1. Computing the ACE

Use the following chart to compute each ACE method. MCS EC and the interactive computation facility (ICF) automatically compute all three methods and select the highest ACE when computing WC/PDB offset.

**NOTE:** If the MCS EC ACE or ICF ACE must be refigured due to over-maximum earnings, see DI 52150.010D.

<b>“High-1”</b>	<b>“High-5”</b>	<b>AMW</b>
Select the highest yearly earnings from the year of current onset and the 5 previous years and	Take the sum of the 5 consecutive years after 1950 with the highest unindexed earnings and	Divide the total unindexed earnings for the computation years (dividend) by number of months in the computation years (divisor)
Divide the yearly total by 12 months	Divide by 60 months	
Round to the next-lower dollar amount	Round to the next-lower dollar amount	Round to the next-lower dollar amount

### 2. Example of ACE computation

- Date of onset: 08/05/07
- Entitlement date: 02/08
- 12/2007 PIA: \$543.80
- 300 divisor months
- Total of the highest earnings for 25 years: \$203,416.33

Highest actual earnings amounts (unindexed and after maximum earnings amounts):

2002 \$16,782.16

2003 \$16,703.38

2004 \$18,915.10

2005 \$21,762.44

2006 \$29,876.05

2007 \$ 8,789.77

"High-1"	"High-5"	AMW
High year is 2006: \$29,876.05 divided by 12 = 2489.67	16,782.16 16,703.38 18,915.10 21,762.44 <u>29,876.05</u> 104,039.13	203,416.33 divided by 300 = 678.05
	104,039.13 divided by 60 = 1733.98	
100% ACE = 2489	100% ACE = 1733	100% ACE = 678

Highest of the three methods above is the "High-1" with a 100% ACE of \$2,489.

## **DI 52150.035 Determining the Workers' Compensation/Public Disability Benefit (WC/PDB) Amount Used to Compute Offset**

### **Citations:**

Social Security Ruling 82-68

### **A. Determining WC/PDB amounts for offset computation**

#### **1. WC/PDB amounts received by the number holder (NH)**

Offset disability insurance benefits (DIB) based on monthly WC/PDB amounts received by the NH, minus any excludable expenses. WC/PDB amounts paid on other than a monthly basis, including a lump sum (LS), also cause offset.

#### **2. WC/PDB amounts received by dependents (including inchoate payments)**

Some States pay additional amounts to the NH's dependents.

To compute offset, exclude benefits paid directly to the dependent rather than the NH; but include payments made to the NH.

#### **3. Deductions from the WC/PDB gross benefit**

Mandatory or voluntary automatic payroll-type WC/PDB benefit deductions are offsettable. These include, but are not limited to:

- Life insurance premiums,
- Health benefit premiums,
- Federal Insurance Contribution Act (FICA) taxes, or
- Garnishment (e.g., for unpaid taxes or child or spousal support).

#### **4. WC/PDB benefit rate adjustments**

When imposing offset, use the WC rate(s) and period(s) determined by the payer to be correct and payable, i.e., the rate that should have been paid rather than the rate actually paid. This difference in rates can occur, for example, when the WC carrier overpaid the beneficiary and subsequently reduced the WC rate to recover the overpayment. Whether the carrier recovers the excess amount paid is irrelevant to the offset computation. We impose offset based on the established WC rate that should have been paid.

### **EXAMPLE 1:**

For the 10-week period (05/01/2004 through 07/09/2004), NH received \$400.00 per week in temporary total WC.

Effective 07/10/2004, NH began to receive \$300.00 per week in temporary partial WC.

In 12/2006, a hearing is held and it is determined that NH's disability did not meet the requirements for temporary total WC. The \$300 payments should have started 05/01/2004 instead of 07/10/2004. This results in a \$1,000 overpayment.

The WC proof indicates the WC carrier agreed to withhold \$10 per week until the overpayment recovery is completed – resulting in 100 weekly payments of \$290 until the overpayment is recovered. (The WC overpayment issue is between the carrier and the beneficiary.)

Therefore, code the ICF with a continuing WC rate of \$300 per week for the period 05/01/2004 and continuing.

#### **EXAMPLE 2:**

NH received a letter from the insurer converting NH's TT benefits to PP benefits (at a lower rate). The letter informed the NH that she was paid TT benefits from 04/28/2006 to 04/13/2008 and determined to be "Permanent & Stationary" beginning 02/05/2008. The letter stated the insurer was asserting credit for the TT overpayment for 02/05/2008 to 04/13/2008 against permanent disability.

Code the ICF WC/PDB with the TT rate for 04/28/2006 through 02/04/2008 and the PP rate for 02/05/2008 and continuing.

#### **5. Periodic payments paid in a lump sum (LS)**

Use caution when interpreting legal documents. The payment may appear to be a LS, as defined in DI 52150.060, but may actually be a single payment that represents accumulated or past-due periodic payments. If a check represents past-due periodic WC/PDB payments that simply bring payments up to date, it is not a LS. For example:

- The parties agree that the claimant's disability began on 03/19/2002, and that, upon approval of this agreement for settlement, the Employer and Carrier will make a payment to the Claimant in the sum of \$83,235.32, which the parties agree is in full satisfaction of all accrued and unpaid weekly benefits through 06/30/2007.
- Respondent shall pay claimant compensation at the rate of \$212.12 per week from 08/01/2007 and continuing until further order of this court. Fifteen and one-half (15.5) weeks have accrued and shall be paid in a lump sum of \$3,287.86.

#### **B. Rounding WC/PDB rates**

Round daily WC/PDB rate to the nearest penny. For example, round \$7.1449 to \$7.14; round \$7.145 to \$7.15

### C. Converting WC/PDB rates

Convert weekly rates to monthly rates, monthly to weekly, etc.

#### 1. Computing a weekly rate

Use the following chart to compute a weekly rate and round to the nearest penny.

If WC is paid	Then Divide By
Monthly	4 1/3 (13/3)
Every two weeks	2
Twice per month	2 1/6 (13/6)
Every 28 days	4

**NOTE:** For rates paid in West Virginia, see DI 52120.270.

#### 2. Computing a monthly rate

Use the following chart to compute a monthly rate and round to the next lower dime.

If WC is paid	Then Multiply By
Weekly	4 1/3 (13/3)
Every two weeks	2 1/6 (13/6)
Twice per month	2
Every 28 Days	Divide by 4; multiply by 4 1/3 (13/3)

**NOTE:** For rates paid in West Virginia, see DI 52120.270.

### D. Mid-month adjustments, partial-month benefits or rate changes

To complete changes in the WC/PDB rate and mid-month adjustments, follow instructions in DI 52150.040 - Changes in Workers' Compensation/ Public Disability Benefits (WC/PDB) Benefits Paid

### E. Lump Sum (LS) awards

To prorate LS settlements, see DI 52150.060 - Prorating a Workers' Compensation/ Public Disability Benefits (WC/PDB) Lump Sum Settlement

## **F. More than one WC/PDB benefit received for a given period**

The Interactive Computations Facility (ICF) program can process a maximum of four separate WC/PDB claims at one time.

For manual computations, add all benefits together before applying offset. For example: two WC payments for separate injuries, a WC and a PDB payment, or multiple overlapping LS prorations. See DI 52170.001 - Paper Forms Used to Manually Compute Workers' Compensation/Public Disability Benefit (WC/PDB) Offset.

## **DI 52150.060 Prorating a Workers' Compensation/Public Disability Benefit (WC/PDB) Lump Sum Settlement**

### **Citations:**

Social Security Ruling 76-34 c, 87-21 c, 97-3

A lump sum (LS) WC/PDB settlement is prorated and excludable expenses deducted before offset is applied. All three proration methods must always be considered when prorating a lump sum settlement award. This section explains how to prorate a lump sum (LS) and how to determine the rate at which to offset.

For WC State-specific LS procedures, see DI 52120.001.

For PDB State-specific procedures, see DI 52135.001.

**NOTE:** Individual States may have specific procedures involving LS awards. For example, Puerto Rico WC LS differ greatly from general lump sum instructions.

For cases involving complex lump sum provisions (life expectancy, LS awards involving commuted value, advanced payments, structured settlements and subsequent addendums), see DI 52150.065.

### **A. Definition - Lump sum (LS)**

For proration consideration, a LS is a final settlement, award, compromise and release, or other approved agreement that represents a final WC/PDB payment due the number holder (NH). A check or other payment representing past-due periodic WC/PDB payments that simply bring payments up to date is not a LS for this purpose. See NOTE in DI 52140.001G to exercise caution when attorneys or claimants seek assistance in preparing a WC settlement and asking the affect, if any, such a settlement would have on the NH's benefits or specific questions regarding proration terms to be used in possibly avoiding offset.

### **B. LS amounts not subject to offset**

LS amounts not subject to offset (i.e., those amounts that do not qualify as excludable expenses, but instead are deducted off the top from the gross LS amount) are rare, and include:

- LS discounts
- Amounts to a spouse for inchoate rights (Massachusetts)
- Assessed penalties
- Accrued interest

Annotate these amounts in ICF as a SPECIAL AMOUNT DEDUCTED FROM THE GROSS on the WCLS screen in ICF. ICF deducts these amounts before the LS award is prorated.

## C. Offsettable LS amounts involving private loan repayments

Amounts deducted from the LS to repay private loans are **not** excludable expenses. Include the repayments in the LS gross amount for proration and offset purposes.

## D. Facts needed to prorate a LS

Verify the following before prorating an LS:

- Gross amount of the LS
- LS start date or periodic payment ending date
- Weekly rate at which to prorate
- Excludable expenses included in the gross amount of the LS

To verify and document the evidence, see instructions in DI 52145.001.

### 1. Determine the gross amount of the LS

The gross amount of the LS is the total settlement minus any amounts that are not subject to offset (e.g., inchoate amounts), but prior to any adjustment for excludable expenses.

Liens (a legal device for securing payment of an underlying debt or financial obligation) against a WC/PDB award settlement rarely affect the gross lump sum amount. Liens for unpaid medical bills or payment of attorney fees incurred by the worker to obtain the WC/PDB benefits are not deducted from the gross LS amount prior to proration, but are instead treated as excludable expenses. Liens for back taxes owed, unpaid child support, or unpaid alimony have no relevance to the offset calculation. Taxes, child support, alimony payments, or other personal obligations of the worker do not reduce the gross WC/PDB settlement amount.

**Example:** An entity other than a WC carrier, i.e., the Department of Public Aid, agrees to assist the family and pays \$20,000 pending a WC award. The disabled worker is subsequently awarded a WC lump sum settlement of \$100,000. The settlement stipulates that a lien amount of \$20,000 is due the Department of Public Aid. It is irrelevant whether the settlement stipulates the claimant receives the entire \$100,000 and then reimburses the Department of Public Aid, or the claimant receives \$80,000 and the remaining \$20,000 is paid directly to the Department of Public Aid. In either situation, offset is imposed based on the entire \$100,000 WC settlement awarded the claimant.

### 2. Determine the LS start date

The following order of priority determines the LS start date:

- a. Allocate the LS to the period specified in the award.
- b. If the LS award does not specify a start date and the worker previously received periodic payments, the LS proration begins the day after the day the periodic payments ended. Do not use the date of the settlement as the LS start date.

- c. If the LS award does not specify a beginning date, and the worker did not receive periodic payments, allocate the LS to:
  - o The period beginning with the date of the illness/injury for WC,
  - o The date the worker's employment terminated for occupational disease,
  - o The date the illness/injury began for PDB.

**NOTE:** Disfigurement benefits are offsettable, and can be paid as a lump sum in addition to other WC benefits. The WC award may **not** specify the start date for the disfigurement lump sum. Refer to State Specific Workers' Compensation (WC) Procedures in DI 52120.001 and Federal Employees' Compensation Act (FECA) in DI 52115.010 for possible specific state/federal instructions regarding disfigurement. If no specific state/federal instructions apply, and the start date for the disfigurement LS is not specified in the award, use the following order of priority to determine the proration start date for a lump sum disfigurement payment:

- The day after the day periodic payments end;
- If periodic payments are not ending, or the worker did not receive periodic payments, use the date of the award as the proration start date.

### **3. Determine the LS proration rate**

SSA prorates LS awards at an established weekly rate. See State specific WC procedures in DI 52120.001 for possible unique state lump sum payment and processing instructions before prorating an LS.

The priority for establishing weekly rates is as follows:

- a. The rate specified in the LS award.
- b. If the LS award specifies a rate based on life expectancy (LE), follow instructions and examples in DI 52150.065A (Complex Lump Sum Awards and Settlements) to determine whether excludable expenses have already been deducted to derive the LE rate stated in the settlement. If excludable expenses were deducted to derive the LE rate, recalculate the LE rate without considering the excludable expenses. Use this LE rate to compute offset to determine which of the three proration methods is most advantageous to the NH.  
**NOTE:** The requirement to consider all three proration methods when a life expectancy rate is involved represents a Change of Position (COP) effective 06/29/2006. Do not reopen determinations processed before that date.

If a life expectancy award appears unreasonable, for example, if the LE period ends when the beneficiary attains age 200, prepare the case for policy submittal per DI 52140.015. (DI 52150.065A.2 contains examples of unreasonable language in a LS award.)

- c. For awards involving subsequent addendums, see instructions in DI 52150.065E. of this section.
- d. If the award does not specify a rate and the NH received periodic payments, use the latest periodic rate paid prior to the LS award.

- e. If the LS award does not specify a rate and the NH received no prior periodic payments, but the language of the LS award implies a compensation rate, use the implied rate and develop for any needed clarification. For example, if the settlement says the NH had an average weekly wage of \$450 entitling him to weekly compensation of \$300, use the \$300 rate to prorate even though this rate is not specified in the award.
- f. If the award does not specify a rate and the worker received no prior periodic payments, use the State's WC maximum in effect on the date of the injury or illness. See the chart of State WC maximums in DI 52150.045.

**CAUTION:** Be alert to a payment that appears to be a LS, but is actually a single retroactive accumulated or past-due periodic payment. A check representing past-due periodic WC/PDB payments to simply bring payments up to date is not an LS for this purpose.

#### **4. Determine the excludable expenses**

Review the award to determine the qualifying expenses incurred by the worker. To determine if the expense is excludable from the offset, follow instructions in DI 52150.050 – Excludable Expenses.

#### **5. Subsequent allegation of expenses**

For purposes of this section, a subsequent allegation of expenses refers to expenses not mentioned in the award or expenses that are in excess of the amount specified and proven at the time of the initial proration of the award.

If the expenses are verified, recalculate the LS proration, combining the new expenses with the previous expenses if the evidence relates to a prior determination and represents new and material evidence. Compare the methods of proration.

#### **E. Methods of prorating a LS with excludable expenses**

There are three methods of prorating a LS with excludable expenses. If expenses are involved, consider all three proration methods described in this subsection to determine the method that is most advantageous.

##### **1. Method A**

Method A excludes the expenses from the beginning of the proration period thereby delaying the imposition of offset.

Method A is more likely to be advantageous if, for example,

- the worker is nearly age 62/65 before December 19, 2015,
- the worker is near attaining full retirement age (FRA)(see NOTE),
- a closed period of disability insurance benefits (DIB) exists; or
- reverse offset is involved (e.g., Florida).

NOTE: Effective December 19, 2015 or later, WC offset termination now extends from age 65 to FRA. See 2015 Amendment in DI 52101.005.

**To prorate using Method A:**

- Divide the excludable expenses by the weekly rate, resulting in a number of weeks.
- Delay imposing offset for this number of weeks beginning with the date DIB would have been offset (the offset first considered date or the day after periodic payments end, whichever is later).
- Impose offset when the resulting number of weeks expire.

**2. Method B**

This method of proration spreads the expenses out over the life of the award.

**To prorate using Method B:**

- Subtract the expenses from the LS.
- Divide the result by the total LS.
- Multiply this percentage by the weekly rate, resulting in a reduced weekly rate.
- Use the new weekly rate determined above to offset the LS.

**3. Method C**

This method excludes the expenses from the end of the proration period, thereby shortening the offset period. This removes offset at the earliest possible time. The proration could potentially expire prior to the first possible month of offset.

**To prorate using Method C:**

- Subtract the expenses from the LS.
- Prorate only the balance determined above.

**CAUTION:** Never rely exclusively on the most advantageous method selected by ICF on the WCWE screen, particularly if the Total Benefits Payable results for all three proration methods are nearly equal. ICF does not consider future events, such as future COLAs, triennial redeterminations of the ACE, age 62 attainment and possible RIB election, or future changes to the family composition.

Check to see if any of these factors are involved. If all offset will end when an auxiliary terminates, Method A may be most advantageous, depending on the effective month of termination. If the NH is almost age 62, Method A with a reduced RIB election may be the best choice. Method B may be optimal when triennial redeterminations are considered.

If you select a proration method other than the proration method automatically selected by ICF, you must annotate the basis for your decision to the remarks screen.

## **F. Systems proration of the LS**

### **1. MCS earnings computation (EC)**

Follow instructions in DI 52155.010 to process WC/PDB LS actions involving an MCS claim.

### **2. ICF**

Prorate the LS through the ICF unless a program limitation applies. Follow instructions in DI 52165.001 - Interactive Computations Facility (ICF) for Workers' Compensation/Public Disability Benefit (WC/PDB) Computations.

**NOTE:** Future proration end dates computed via MCS or ICF WC/PDB are propagated to the MBR. When the future date matures, RETAP selections and alerts enable the T2 process to adjust the WC/PDB automatically or alert the PC to complete the adjustment action.

## **G. Manually prorating the LS**

Prorate the LS manually on the reverse side of the form SSA-2455 if the ICF #31 or #32 cannot process the computation. Verify all of the following:

- Gross amount of the LS
- Start Date
- Weekly rate at which to prorate
- Excludable expenses

For manual processing, follow instructions outlined in DI 52170.030. After completing the manual proration, enter the results in ICF WC/PDB Function #34 (OREO) and forward to the BA/BTE for input into MACADE and MBR update.

## **H. LS case situations requiring special ICF considerations**

There is a continually evolving area of identified system limitations and program problems. These cases require special consideration when processing. For a list of program limitations and case specific processing instructions, see Interactive Computations Facility (ICF) Resource Page for WC/PDB Offset Computations.

### **1. Multiple injury or disability cases**

Prorate LS awards for different injuries or disabilities separately. The total amount of WC for offset purpose can exceed the State maximum in this situation.

**a. Manual computations**

For offset purposes, add together monthly amounts for any concurrent period. See DI 52170.030 - Manual Proration of a Lump Sum Award.

**b. ICF**

Enter any concurrent injury or disability into ICF as separate claims. The system has the capability of processing a maximum of four separate WC/PDB claims at one time.

**DI 52150.065 Complex Lump Sum (LS) Awards and Settlements**

**Citations:**

Social Security Ruling 87-21 c, 85-6 c, 87-20 c, 97-3

A lump sum (LS) is a final settlement, award, compromise and release, or other approved agreement that represents a final WC/PDB payment due the worker based on the injury or illness. LS settlements use a variety of methods for payment.

**NOTE:** Do not reopen prior determinations involving Lump Sum (LS) Settlements that were correct based on POMS instructions in effect prior to the September 2008 POMS issuance.

This section defines certain types of LS WC awards and provides offset computation instructions. There is a subsection for each of the following types of LS awards:

Type of Award	Subsection
Life expectancy (LE) awards	DI 52150.065A
LS awards involving a commuted value of future periodic payments	DI 52150.065B
LS awards involving advance payments	DI 52150.065C
Structured settlements	DI 52150.065D
Subsequent addendums to LS settlements	DI 52150.065E

**NOTE: Voluntary settlement agreements** negotiated directly between the employee/attorney and the employer/insurance carrier, sometimes known as “sidebar agreements,” are subject to offset in the same manner as a WC lump sum settlement approved by the State WC Board. For a complete definition of voluntary settlement (sidebar) agreements, see the WC Glossary in DI 52120.001I.

## A. Life expectancy (LE) awards

A lump sum award may specify a payment amount based on the number holder's (NH) life expectancy determined by insurance life expectancy tables. The life expectancy of the NH is often given in weeks, months, or years. These awards usually specify a life expectancy (LE) rate.

If the award does not stipulate a specific length of time for the life expectancy, develop for clarification, as necessary. List all life expectancy lump sum proration cases under **listing code 557**.

**NOTE:** The mention of a monthly LE rate in a LS award does not bind SSA to allocate expenses in a specific manner.

### 1. Determining the LE rate

If the LS award specifies a rate based on LE, determine whether excludable expenses were deducted in deriving the LE rate specified in the award:

**NOTE:** The requirement to consider all three proration methods in a LE case represents a change of position (COP). Implementation of the change is effective 06/29/2006. Do not reopen determinations processed before that date.

#### EXAMPLE 1:

A LS award of \$100,000 is approved with a valid excludable attorney fee of \$20,000 and a valid excludable medical expense of \$10,000.00. The LS settlement states the NH's LE is 2,000 weeks and a life expectancy rate of \$40 per week.

- The \$20,000 attorney fee was taken into consideration to compute the life expectancy rate ( $\$100,000 - \$20,000 = \$80,000$  divided by 2,000 weeks = \$40.00 week.)
- The correct LE rate for proration purposes is determined by dividing the gross LS by the NH's life expectancy:  $\$100,000$  divided by 2,000 weeks = \$50.
- To prorate the LS, the correct weekly WC rate to use is \$50 (i.e., the amount to enter in the Modernized Claims System (MCS) or the Interactive Computation Facility (ICF).
- Medical expenses of \$10,000 and attorney expenses of \$20,000 are then deducted from the gross LS (i.e., enter expenses in the appropriate data fields in MCS or ICF). MCS and ICF use all three proration methods to determine the method most advantageous.

#### EXAMPLE 2:

A NH receives a LS award of \$45,000 with valid attorney expenses of \$11,250 and valid medical expenses of \$1,730.77. The award contains language indicating the settlement represents \$57.63 per month for 46.3 years. To determine whether excludable expenses were deducted in deriving the \$57.63 LE rate in the LS award:

- Multiply  $\$57.63 \times 12$  (months)  $\times 46.3$  (years) = \$32,019.23.

- $\$32,019.23 + \$11,250.00 + \$1,730.77 = \$45,000.00$  (total award amount)

This example illustrates that all attorney and medical expenses were deducted. Therefore, we must determine the correct LE rate for proration purposes.

- Consider all three proration methods and determine which is most advantageous. Compute the monthly rate before deduction of the expenses.
- Multiply  $46.3 \times 12 = 555.6$  (total months represented in award)
- Divide  $\$45,000$  by  $555.6 = \$80.99$  (rounded to the next lower dime) =  $\$80.90$  (LE monthly rate before expenses).

To input into the MCS and ICF programs, enter the gross LS amount of  $\$45,000$ , the LE monthly proration rate of  $\$80.90$ , excludable attorney expenses of  $\$11,250.00$ , and excludable medical expenses of  $\$1,730.77$ . MCS and ICF use all three proration methods to determine the most advantageous method.

## 2. LS award language

If the wording in an LS award appears to be unreasonable and existing Regional Office of the General Counsel (OGC) precedents, fail to provide guidance:

- Prepare the case for policy submittal per DI 52140.015.
- Continue to offset at the previous weekly rate to prevent overpayment but do not make any determination on the lump sum until receiving a submittal response.

NOTE: Effective December 19, 2015 or later, WC offset termination now extends from age 65 to full retirement age (FRA). See 2015 Amendment in DI 52101.005.

Examples of unreasonable language in a LS award include:

- A proration period that greatly exceeds life expectancy

**EXAMPLE:** The LE period ends when the worker attains age 200.

- Stipulation of a proration start date that precludes offset

**EXAMPLE:** The terms of the settlement specify that the lump sum settlement is “for WC benefits payable beginning at age 65. (See PR 02505.046 South Dakota)

- Settlement language cites a small monthly rate up to age 65 with a significantly larger rate beginning at age 65 and continuing

**EXAMPLE:** The plaintiff’s average weekly wage is determined to be  $\$350.00$ . Based on this, the rate for temporary total WC payments is determined to be  $\$250.00$  weekly and permanent total payments to be  $\$175.00$ .

The NH is found permanently and totally disabled as a result of an injury occurring on 05/08/2001 and is awarded benefits from the date of maximum medical improvement, 07/12/2001 and continuing.

The award states the settlement represents weekly WC payments of \$100 beginning the date of maximum medical improvement (07/12/2001) up to age 65 (09/02/2012) and weekly payments of \$250.00 effective age 65.

**NOTE:** Contradictory language in a lump sum settlement requires further development for clarification.

## **B. LS Awards involving a commuted value of future periodic payments**

### **1. Definition of commuted periodic payments**

Commutation awards are typically an order by a WC judge for a LS payment paid in lieu of future periodic payments to compensate the individual for a work-related injury or illness. The commuted amount is merely a change in payment of part or all of a worker's future WC benefits from that designated in the original WC award. The commuted amount can be a lower total WC amount than designated in the original settlement, and/or may hasten the timeframe for payment of future WC payments due. A commutation award can specify payment in a variety of ways.

### **2. Processing a commutation order**

Apply the following to any award involving a commuted value of future periodic payments:

- a. Impose offset based on the commuted WC amount.
- b. If the award involves a LS, use all three proration methods described in DI 52150.060 to compute offset and select the most advantageous method.
- c. If the award does not specify a proration rate based on the commuted value of the award but specifies an exact timeframe that the commuted amount will be paid, prorate the commuted value of the award over the entire specified period as described in the example in DI 52150.065B.3. in this section.
- d. If the award does not provide an exact timeframe, but does provide the specific commuted amounts to be paid; offset at the specified amount as described in the example in DI 52150.065B.4. in this section.

### **3. Processing a commutation order involving a specified period**

In the following example, the commutation order does not provide a specified rate based on the commuted value. Therefore, the proration rate is derived using the remaining timeframe and commutation amount. The commuted WC amount (and offset computation) are spread out over the entire period specified.

**EXAMPLE:**

The NH receives a letter dated 09/25/2005 and it shows the following:

- Date of Maximum Medical Improvement: 04/24/2005
- Period of Award: 04/24/2005 to 04/14/2009
- Number of Weeks of Compensation: 207.36
- Weekly Compensation Rate = \$282.28
- Effective Date of Pay Rate: 11/01/2003
- After cost of living adjustments (COLAs), weekly compensation: \$289.00
- First payment and the period covered: \$5,614.86 for the period 04/24/2005 through 09/06/2005
- Continuing Payment every four weeks: \$1156

The letter also states the NH has the option to a LS of \$49,995.67 in payment of compensation representing a commuted value of future payments due for the remainder of the award payable from 10/05/2005 to 04/14/2009. If the NH did not opt for the commuted value, the remaining value of his original WC award is \$53,156.18, as follows:

$$\$59,927.04 = \$289.00 \times 207.36 \text{ weeks}$$

- 5,614.86 (paid 04/24/05 through 09/06/2005)

- \$1,156.00 (paid 09/07/05 through 10/04/2005)

\$53,156.18 (balance to be paid by 04/14/2009)

The difference between the \$53,156.18 remaining balance of the original WC settlement amount and the commuted value of \$49,995.67 for future payments is \$3,160.51.

This commutation award specifies a total commuted amount and the timeframe it represents, but there is no rate specified in the commutation order. Therefore, we must prorate the commuted value (\$49,995.67) over the entire period remaining in the award (10/05/05 to 04/14/09) to determine the appropriate periodic rate.

**NOTE:** The alternative of using the previous weekly periodic rate of \$289.00 against the commuted figure would cause the proration to end approximately 11 weeks earlier than the 04/14/2009 end date specified and, therefore, would not conform to the specified period of the award.

The following calculations are required to determine the weekly rate of the commuted \$49,995.67 amount:

- Determine the number of days from 10/05/2005 through 04/14/2009 (1288)
- Divide the commuted value of \$49,995.67 by the number of days remaining in the specified period (compute to 3 decimal places and round to the nearest penny):

- \$49,995.67 divided by 1288 = \$38.817 daily rate
- Multiply the resulting figure by 7 to determine the weekly rate: \$38.817 X 7 = \$271.719 rounded to the nearest penny = \$271.72
- \$271.72 is the weekly rate used to compute offset for \$49995.67 over the 10/05/2005-04/14/2009 timeframe specified in the commutation award.

#### **4. Processing a commutation order that does not specify a timeframe**

In the following example, the commutation agreement does not specify a particular timeframe the commuted award represents. It does provide the specific amounts to be paid (i.e., a WC lump sum, then the remaining commuted amount to be paid via specific monthly amounts).

##### **EXAMPLE:**

- The NH receives weekly WC of \$170.00 and subsequently requests a lump sum (LS) commutation of \$85,000.00.
- The commutation is approved, but the claimant elects to receive the benefits in accordance with an agreement for payment of proceeds. This agreement provides an initial LS payment of \$25,000 less \$17,000 for the attorney. It also states the NH will receive \$1,000 per month for 60 months with payments beginning the month after the approval of the commutation petition.

In order to best reflect the actual payment amounts and how they will be paid, offset will be based on the \$25,000 LS prorated at \$170 per week with excludable attorney expenses of \$17,000, and periodic payments of \$1,000 a month for 60 months. This example does not specify a particular timeframe the WC payments represent, and since the first payment under the commutation order is the lump sum, the start date for the LS is the day after the previous weekly WC of \$170.00 stop (per the order of priority in establishing the LS start date in DI 52150.060D.2.). The subsequent \$1,000 periodic payment start date is the month after the approval of the commutation petition. If the lump sum proration and subsequent \$1,000 periodic payments overlap, a manual computation is necessary. ICF cannot accurately compute offset when periodic WC/PDB payments and lump sum prorations overlap, or when one lump sum proration period overlaps another lump sum proration period.

#### **C. LS awards involving advance payments**

In several States, the WC carrier may make “advances” to the worker pending a settlement agreement that will dispose of the LS claim. Advance payments may be issued on a set periodic basis, or may be issued sporadically. These advances are then subtracted from the gross lump sum settlement when the LS settlement is finally awarded. When prorating the lump sum, the amount to prorate is the gross amount, not the amount after subtraction of the advances. The start date for the proration is determined in the normal manner.

##### **EXAMPLE:**

- The NH was receiving California weekly temporary total WC payments of \$275.00 ending 05/23/2007.
- The carrier makes advance permanent partial payments of \$250.00 weekly from 06/01/07 to 08/09/07 (a total of ten weeks of advance payments) totaling \$2,500.00.
- On 10/10/07 a \$40,000 settlement is approved, less any advances paid, with \$4,500 authorized for attorney fees. The net check received by the worker is \$33,000. The amount to prorate is \$40,000. The start date for the proration is 05/24/07 (the day after regular periodic payments ended). The only excludable expense is the \$4,500 attorney fee.

**NOTE:** Not all payments are advances against a LS and it can be difficult to distinguish regular continuing WC payments from LS advances. Refer to State-specific procedures in DI 52120.001 and DI 52135.001 for specific information about advances.

## **D. Structured settlements**

WC settlements may involve an initial LS payment and subsequent installments paid at specified intervals. These are generally referred to as structured settlements.

Review State procedures in DI 52120.001 for structured settlements (e.g., LS settlements in the State of Maine frequently end in structured settlements, see DI 52120.110).

To compute offset, prorate the initial LS payment using regular LS proration procedure and treat each subsequent yearly installment as a separate LS using the beginning date specified.

### **1. Allocating installment payments**

- Allocate installment payments to the period specified in the award.
- Do not allocate payments to a period other than what is specified in the award.
- Disallow award language that deems payments or expenses to be allocated to periods that are different than the periods for which the payments are actually made or expenses incurred.

### **2. Rate for proration**

- If a rate is specified for the initial LS payment only, use that specified rate to prorate both the initial LS payment and the subsequent installment payments.
- If the award does not stipulate any rate, use the prior periodic payment rate for proration of both the initial LS payment and the subsequent installment payments.
- If the award does not stipulate any rate and no previous periodic payments were paid, see DI 52150.060D.3.e. and DI 52150.060D.3.f., Determine the LS proration rate.

#### **Example:**

- DOB: 02/04/1958
- DOI: 01/19/1998

- DOED: 07/1998
- Periodic payments issued 01/20/1998-02/15/2003 at \$262.56 weekly.

Structured settlement approved 07/19/2003, paid in installments as follows:

- \$20,000.00 at time of approval, \$2,000.00 allotted for future medical
- \$30,000.00 payable 07/01/2004, \$3,000.00 allotted for future medical
- \$50,000.00 payable 07/01/2006, \$5,000.00 allotted for future medical
- \$50,000.00 payable 01/01/2010, \$5,000.00 allotted for future medical

No stipulation found in the award for prorating the various LS payments.

- When making MCS or ICF inputs - enter the periodic payments as indicated above
- Enter the initial LS amount of \$20,000, the proration rate of \$262.56 weekly, a start date of 02/16/2003, and \$2,000 excludable medical expenses. Select the most advantageous proration method.
- Enter the second LS as a second claim (e.g., assign a different WC claim number on the WPMU screen in MCS and the WCCL screen in ICF, such as #WC 634JB-1 for the initial \$20,000 LS installment amount and #WC 634JB-2, for the \$30,000 second LS installment, etc).
- Enter the LS amount of \$30,000.00, the proration rate of \$262.56 weekly, a start date of 07/01/2004, and excludable medical expenses of \$3,000.00. Select whichever proration method is most advantageous.
- Enter the third LS as a third claim (e.g., assign a different WC claim number on the WCCL screen in ICF: #WC 634JB-1, #WC 634JB-2, #WC 634JB-3, etc). Key the LS amount of \$50,000.00, the proration rate of \$262.56 weekly, a start date of 07/01/2006, and excludable medical expenses of \$5,000.00. Select the most advantageous proration method.
- PC prepares a PCACS diary for the fourth LS to be paid 01/2010 at the time the final installment will be added to the current computation as a fourth LS claim. The LS amount to key at that time is \$50,000.00, the proration rate remains \$262.56 weekly, the start date is 01/01/2010, and excludable medical expenses are \$5,000.00. Select the most advantageous proration method.

**NOTE:** If gaps result in the offset computation due to one proration ending before issuance of the next payment, consider all payments are based on the same injury/illness award. Therefore, there is no break in WC entitlement and all COLA increases are protected.

Regarding breaks in WC/PDB offset, payment, and entitlement, review DI 52150.055.

Be alert to potential systems limitations when processing a structured settlement. MCS cannot process an offset computation when there are breaks in the offset between each LS.

**NOTE:** Some cases may require a combination of workarounds in ICF WC/PDB or manual computations. See Interactive Computations Facility (ICF) Resource Page for WC/PDB Offset Computations) to process:

1. Multiple WC/PDB claims (more than one injury or illness)

Make the following selections when **no** ongoing periodic payments are involved:

- ICF FUNCTIONS 31 (WC/PDB: PRE-ADJUDICATE CLAIM) AND 32 (WC/PDB: ADJUDICATE CLAIM)
  - Other Program Limitations (Not Documented in MSOM)
  - Gap Between Two Different WC/PDB Claims
2. One WC/PDB claim (one injury/illness)

Make the following selections when periodic payments are involved:

- ICF FUNCTIONS 31 (WC/PDB: PRE-ADJUDICATE CLAIM) AND 32 (WC/PDB: ADJUDICATE CLAIM)
- Known Program Problems (With Workarounds, if Any)
- Problems Relating to Lump Sum Prorations
- Overlapping LS and Periodic Payments for Same WC Claim

## **E. Subsequent addendums to LS settlements**

Some States allow an injured worker to obtain a subsequent addendum (i.e., something that has been added) to the terms or stipulations of the original WC lump sum settlement award and allow a certain time limit to make changes in the settlement or the settlement can be amended with court permission.

Also, there are instances when the original award is “vacated” (i.e., the original award is voided or annulled), and a new settlement document is issued. A new LS award which vacates the original award, but which does not change the dollar amount of the award or make other substantive changes as indicated in DI 52150.065E.3. below, should be treated as a LS addendum. Consider language similar to “**vacating a prior settlement**” to be equivalent to a LS addendum regardless of what state is involved.

SSA is not bound by the terms of a second or amended stipulation in determining whether and by what rate a disabled worker's DIB should be offset on account of a WC lump sum.

When an award includes an addendum to a settlement:

1. Evaluate both the original and amended stipulations.
2. Check the date of any addendum. In some States, it is usual practice to include addendums as part of the original award, so review the State WC procedures in DI 52120.001 for State-specific instructions regarding addendums. Generally, if the addendum is completed on the same day as the settlement, consider it a valid part of the original settlement. Where you cannot determine that the judge or authorizing official reviewed and approved the addendum at the same time as the award, initiate development.

3. If the addendum is not part of the original award, disregard any language that has the effect of altering the terms of the original stipulation concerning the actual intent of the parties and has the effect of avoiding the WC offset provisions. An example is an amended stipulation that does not change the dollar amount of the award, does not involve any appeal of the award, does not change the actual payment of WC benefits, or in any way affect the rights, liabilities, or obligations of the parties with respect to the actual WC award, but merely includes additional language which, if applied, results in reduction or removal of offset. Check for changes in dates and the signature of the WC judge or approving official.
4. Do not recompute or remove offset if the intent of the amended stipulation is to avoid SSA's offset. Send a notice to the NH and include language similar to the following:
  - “The Social Security Administration received your amended workers’ compensation lump sum settlement. However, we consider the original settlement as final. Therefore, the amended workers’ compensation lump sum settlement you submitted has no effect on your Social Security disability benefits.”

## Social Security/NJ Workers' Compensation Offset - Important Citations

**Social Security Act Section 224 (42 U.S.C. 424a).** This is the section of the Social Security Act which deals with reduction of benefits for receipt of Workers' Compensation.

**POMS DI 52120.165** is the manual section that contains the Social Security field instructions that deals with the New Jersey WC Reverse Offset.

**NJSA 34:15-12** is the section of the New Jersey Workers' Compensation Act which deals with payment of cash benefits. Subsection (a) deals with the payment of temporary benefits, subsection (b) deals with the payment of permanent and total disability benefits, subsection (c) deals with payment of permanent partial disability benefits.

**NJSA 34:15-95** is the section of the New Jersey Workers' Compensation Act which deals with permanent and total disability benefits paid by the Second Injury Fund.

**NJSA 34:15-95.5** deals with the reverse offset as applied by the New Jersey Workers' Compensation Act.

**20 C.F.R 404.408** is the Code of Federal Regulations section dealing with the definition of "Average Current Earnings". **Also DI 52150.101**

**Social Security Ruling 82-5** is a Social Security Ruling whereby Social Security asserts that they may prorate a Section 20 settlement and apply the offset to those benefits.

**Sciarotta v. Bowen.** 647 F.Supp. 132 (DNJ 1986), order rev'd 832 F.2d 135 (3d Cir. 1988), on remand 735 F.Supp. 148 (DNJ 1989). The Sciarotta case is the primary case dealing with the conversation of a Section 20 award into the theoretical stream of periodic benefits. The case holds that Social Security may apply the offset to these benefits and prorate them in a rational fashion.

**Rodlin v. Secretary of Health and Human Services.** 750 F.Supp. 146 (DNJ 1990). This case stands for the proposition that Social Security may rationally utilize the rate of benefits previously paid for proration and offset purposes.

**Fiore v. Trident Construction Company,** 251 NJ Supra 101, (App. Div. 1991) stands for the proposition that a totally disabled person receiving a Third Party recovery equaled to or greater than the Workers' Compensation benefits paid will suffer no Social Security offset since the benefits being paid to the injured person by the Workers' Compensation carrier, after the application of Section 40, are not Workers' Compensation benefits but are rather counsel fee.

**Owens v. C&R Waste Disposal**. 76 NJ 584 (1978) stands for the proposition that the Petitioner in the Workers' Compensation case, after application of Section 40, is not being paid Workers' Compensation benefits but is rather being reimbursed counsel fee and that such counsel fee reimbursement must be paid in a lump sum.

**Rivera v. SSA**, 102 F.Supp.2d 545 (D.N.J. 2000) - Section 20 settlements are not excluded from the Social Security/Workers Compensation offset rules.

**DI 52105.010 - Third Party Settlements** – SSA’s rules for dealing with repayment of WC after a third party settlement. Under the New Jersey Comp Act, this is governed by Section 40. **N.J.S.A. 34:15-40.**

**DI 52150.060** – Prorating a Workers’ Compensation Lump Sum Settlement – SSA’s rules for dealing with WC settlements where payment is made in a lump sum. Beware SSA treating as a lump sum a benefit paid to a claimant that represents not a lump sum but rather a stream of benefits already accrued. This occurs where there is a gap between the end of temporary benefits and the beginning of permanency benefits. Such payments are NOT lump sums. Because the claimant received a large accrued award, they may report a “lump sum” to SSA. True lump sum awards are paid under a settlement pursuant to Section 20, which represents a lump sum settlement with dismissal.

**PR 02505.035 New York – PR-06-035 \_ Opinion regarding a NY WC Settlement where the proration in the Order was disregarded by SSA.**

To guide Agency adjudicators, longstanding policy in the Program Operation Manual System ("POMS") set forth a three-tiered set of priorities for prorating state lump-sum workers' compensation awards at an established rate. In priority order, the Agency is to prorate the award at:

1. The rate specified in the lump-sum award.
  2. The periodic rate paid prior to the lump-sum, if no rate is specified in the lump-sum award.
  3. The state's maximum workers' compensation in effect in the year of the injury, if no rate is specified in the award and there was no preceding periodic benefit.
- POMS § DI 52150.060(C)(4)(a).

However, the Agency has for some time been aware that attorneys have seized upon the opportunity offered by these POMS instructions to insert artificially low rates in settlement agreements to lessen or perhaps avoid entirely the reduction that otherwise would be required by section 224 of the Act. We recognize the inconsistency between the first step of the POMS proration policy as applied to cases where the rate specified in the lump-sum settlement agreement is an artificially low rate designed to avoid offset, and the statutory requirement that the Agency prorate lump-sum settlements in a manner that will approximate the offset that would have applied had the individual received periodic workers' compensation payments. Social Security Ruling ("SSR") 97-3 is instructive on

this point. SSR 97-3 instructs that where a document would have the effect of circumventing the workers' compensation offset provision of 42 U.S.C. § 424a, the Agency is not bound by the terms of the document in determining what rate a disabled worker's disability insurance benefits should be offset on account of a workers' compensation lump-sum payment. The courts have upheld the Agency's refusal under SSR 97-3 to accept rates specified in amended settlement agreements.

### **DI 52150.030 – Considering the Retirement Benefit Option (RIB/DIB Election)**

Workers' Compensation/Public Disability Benefit (WC/PDB) offset can be imposed on a number holder (NH) and his family until the NH attains age 65 before December 19, 2015. Effective December 19, 2015 or later, WC offset termination now extends from age 65 to full retirement age (FRA). See 2015 Amendment in DI 52101.005. When the NH becomes eligible for RIB, the NH should consider the option to file for RIB.

### **DI 52120.165B2 – POMS NJ Reverse offset considerations –**

#### **B.2. Age 62**

RJ WC ends at age 62, and in that month NJ pays reduced (RJ) WC prior to the age 62 attainment date and full WC from the day of age 62 attainment on. The correct amount of WC to use for offset for the age 62 month is the total amount of WC paid for the FULL month, which includes the RJ WC due that month.

- a. As offset is applicable for all types of WC from the worker's attainment of age 62 until full retirement age, take the following steps:
  - o Diary these cases for 4 months prior to age 62 since the system will not produce an age 62 alert, and
  - o Develop for WC verification, proof of age (if necessary), and a possible RIB election.

**NOTE:** Effective December 19, 2015 or later, WC offset termination extends from age 65 to full retirement age (FRA). See 2015 amendment in DI 52101.005.

- b. When imposing offset at age 62, remember that for periods of continuous WC, the computation of the ACE and TFB (and any protected increases) should be based on the **first** month that offset was imposed or considered.
  - o If offset was imposed and then removed because of RJ, and then imposed again at age 62, the offset effective date is not changed at age 62. The original ACE and TFB (based on the current family configuration) are used.
  - o If RJ applied for **all** months of disability entitlement prior to age 62, the month of attainment of age 62 is that first month of considering WC offset. The TFB is then based on the age 62 month, and there are no protected increases at age 62.

***“We’ve figured it 17 different ways...and every time we figured it, somebody didn’t like the way we figured it....So, now there’s only one way to figure it...and that is every man, including the Old Bag, for himself!”***

- actual transcript of a discussion among high management types at Social Security HQ in Baltimore discussing how WC offsets are to be decided.....coincidentally also uttered by Buddy Hackett in It’s a Mad, Mad, Mad, Mad World.

### **Social Security and Income Tax**

This is general income tax information with respect to Social Security benefits, and should not be used as the basis for tax advice in individual cases. Please seek guidance from competent tax professionals.

I.R. Code Section 86(e) provides an election to allow the impact of a lump sum retroactive award of Social Security to be spread over the retroactive years covered by the lump sum

The basic rule taxes up to 50% of Social Security benefits if “provisional” income exceeds a certain base amount. There is a second tier where 85% of benefits are taxable where the provisional income exceeds a higher amount.

Where the workers’ comp offset applies and Social Security disability is reduced, the 1099 the petitioner claimant receives will INCLUDE the offset benefits for tax purposes. The practical effect is to convert non-taxable workers’ comp into potentially taxable Social Security. Refer clients to I.R. Code Section 86(d)(3).

Auxiliary benefits are potentially taxable to the person who has the legal right to receive them.

### **Questions posed in the Comp Court hallways....**

Take the answers or leave them as they work for you. In no particular order, as they say, “your mileage may vary”...

### **To File or Not to File...**

Never tell a petitioner not to file for Social Security. Never tell a petitioner they cannot collect both benefits. Even in a case with low earnings and a total offset, the claimant can still benefit from the finding of “disabled” under the Social Security Act. COLAs are not offsettable. Medical assistance may be available. A finding of “disabled” also freezes the petitioner’s earnings record so that “zero” earnings years do not drag down their ultimate SS benefit. I have received inquiries from legal malpractice attorneys asking me to quantify the damage caused by such advice.

Be sure to ask if the petitioner has filed a Social Security claim. Even without considering the CMS issues, you want to be sure you can advise the petitioner of the potential impact of the combined benefits. There is no situation where pursuing both benefits will result in less money being paid to the petitioner, but the petitioner’s expectations of full WC and full SSD will likely be unrealistic.

### **Beware the Age 62 problem...**

Advise petitioners with Total awards or large Perm Partial particularly of the RIB/DIB election. Actually, it applies in all such cases, but is most likely to be a significant issue in larger cases. Early retirement Social Security benefits at age 62 are not offset by because of WC. Reduced RIB benefits may be higher than offset DIB benefits. SSA is supposed to notify such claimants of this option, but they do not always do so. Advise the petitioner to go into SSA at age 62 even if the Comp claim is pending or being tried and no benefits are being paid. SSA’s position is that the claimant must FILE an application for such benefits even if they are not being offset at the time. For example, a petitioner with a complex comp claim settles his comp claim at age 64. He is on SSD the whole time. He settles his comp claim and receives accrued perm going back three years. SSA will offset it all. SSA can retroactively impose the offset but will not give the claimant the benefit of the election he would have had at age 62 unless he filed.

### **“Paid and adequate” is not adequate. The petitioner’s benefits may be delayed...**

On all Court Orders, provide all benefit information, including all temporary benefit information. “Adequate as paid” does not help the petitioner and his SSD award will be held up until SSA gets that information. In a recent telephone conversation (memorable if for no other reason than I was able to get a claims representative on the telephone) an SSA rep told me that he had a compensation Judge in recently applying for retirement benefits. He asked the Judge about the “paid and adequate” temp language. The rep was astounded to hear that “nobody cares about

that.” We should care. After we settle a case, we all, petitioners, respondents, carriers, adjusters just want to close the file. Once closed it is hard to get the details SSA needs.

SSA will not accept a letter from petitioner’s counsel about benefit payments. They may not accept the information from respondent’s counsel, either. SSA WILL accept a legible, complete court order. Help the petitioner and each other by putting the complete benefit information on the Order. Putting the dates on the Order is better still.

### **Section 20’s...**

Section 20 settlements are especially troublesome without specific language. If you read the sections above, you will find many complex situations. Hybrid settlements can cause problems if orders are not properly drafted. Even a relatively small section 20 settlement can be troublesome and cause a Social Security overpayment where none need be. There is no way to “fix” a problem once the Order is entered. Subsequent addenda or amended orders will be disregarded by SSA except in unusual circumstances.

Compute the potential offset all possible ways and use the method that protects the petitioner best. Consider an analogous tax situation: Tax avoidance is encouraged, even used as a tool to advance particular behaviors; tax evasion, not so much. Using SSA’s methods and selecting one is the former not the latter.

Lifetime proration language gets the most scrutiny. Use it only when the other methods fail. Base the calculation on CMS Life Expectancy Tables; SSA cannot argue with them.

Often using the rates on the chart or in OSCAR will protect the petitioner. SSA cannot argue with them. These are rates set by statute; they are not made up by lawyers. Sometimes, you will want to use the maximum state rate for the year to “use up” the Section 20 money in the petitioner’s SSD waiting period. Also, non-offsettable fees and costs can be front loaded, back loaded or spread over the whole proration period. SSA will accept a reasonable proration detailed on the Order.

### **Section 40 Liens...**

When Comp gets paid back out of a third party award, comp gets all of their money back except a reasonable attorney’s fee not to exceed one-third and \$750 in costs. The petitioner, therefore, is in the same position as not having received comp at all and there should be no offset by SSA. If SSA took an offset, SSA owes an underpayment to the petitioner. See Owens, Fiore and DI 52105.010 cited above.