

Workplace Injuries & *2012 NJAJ Meadowlands Seminar Guide*

Understanding Permanent Total Disability Claims

By Dennis M. Baptista

The first consideration in handling a total disability claim is whether the petitioner qualifies under workers' compensation law for permanent total disability benefits. It is quite common for a petitioner to be totally disabled for Social Security purposes, but only partially disabled for workers' compensation purposes.

The Appellate Division has ruled that "[t]otal and permanent disability exists where a worker is rendered unemployable in a reasonably stable job market after a work-related accident, notwithstanding that factors personal to the individual play a contributory part in such unemployability." *Zabita v. Chatham Shop Rite*, 208 N.J. Super. 215, 220 (App. Div. 1986). The New Jersey Supreme Court has ruled that the "ability for light or intermittent work or labor is not inconsistent with total

incapacity." *Germain v. Cool-Rite Corp.*, 70 N.J. 1, 8 (1976).

The Odd-Lot Doctrine

The "odd-lot doctrine" stems from statutory language contained in N.J.S.A. 34:15-36, which defines many terms used throughout the Workers Compensation Act, including "permanent total disability." The statute states that "[f]actors other than physical and neuropsychiatric impairments may be considered in the determination of permanent total disability where such physical and neuropsychiatric impairments constitute at least 75% or higher of total disability." Under the odd-lot doctrine, total disability may be based on factors other than medical ones, such as the claimant's "physical condition, age, education, background, post-accidental neurological and emotional condition and great unlikelihood of his finding new employment, absent a charitable employer." *Lister v. J.B. Eurell Co.*, 234 N.J. Super. 64, 75 (App. Div. 1989).

The Second Injury Fund

The Second Injury Fund was created to help prevent discrimination by employers against partially disabled workers. It assures a potential employer that if a

worker sustains a permanent partial disability in the course of his employment, but it renders that worker totally disabled because it is superimposed upon a previous disability, that employer will only be responsible for the percentage of disability related to that last compensable accident arising out of its employment of the petitioner, and the Second Injury Fund will pay the balance of the benefits.

However, despite the existence of any pre-existing disability, the Second Injury Fund is not responsible to pay benefits if the injury caused by the petitioner's last compensable accident was sufficient to render the petitioner totally and permanently disabled. N.J.S.A. 34:15-95(a). The fund is also not liable to pay a person who is rendered partially disabled by the last compensable injury and subsequently becomes permanently totally disabled by reason of progressive physical deterioration of that injury. N.J.S.A. 34:15-95(d). Also, if the disease or condition pre-existing the last compensable injury is progressive, and by reason of such progression the petitioner is rendered totally permanently disabled *subsequent* to the last compensable accident, neither the fund (nor the respondent for that matter) is responsible for total disability. N.J.S.A. 34:15-95(c).

Odd Lot vs. Second Injury Fund

In the interesting but unreported case of *Andrew Linke v. Freehold Dodge*, C.P. # 94-440066, June 25, 2001, the petitioner,

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an auto mechanic whose job required a great deal of heavy lifting, bending and twisting, was found to have sustained an 80 percent permanent partial disability in an admittedly compensable accident which led to three back surgeries over a two-year period. All of the doctors who treated and evaluated the petitioner agreed that the nature of his back pathology and the now-fragile condition of his spine would prohibit his return to any kind of strenuous work. However, even the petitioner's experts did not find him totally disabled from a medical perspective.

The petitioner testified that he left school before finishing the ninth grade. He could recognize letters and simple words, but for all practical purposes, he was unable to read and write. A certified learning consultant testified that she tested him and found that his verbal skills were those of a third grader and his mathematical skills those of a fifth grader. The petitioner stated that he had a great deal of difficulty with any more than simple verbal and mathematical tasks. The petitioner's attorney argued that these were factors "other than physical or neuropsychiatric impairment" entitling the petitioner to total disability under the odd-lot doctrine for which the respondent alone would be responsible to pay. However, the respondent's attorney argued that the petitioner's functional illiteracy constituted a prior physical or psychiatric impairment for which the Second Injury Fund would be responsible.

The court agreed that if the petitioner's learning deficiency was in fact the product of physical or neuro-psychiatric illness, disease or condition, then it would be a pre-existing medical disability for which the Second Injury Fund must pay. However, if it were something else, something non-medical in nature, and permanent partial disability is at least 75 percent of partial total, then the respondent alone is liable under the odd-lot doctrine.

The court found that the respondent failed to meet its burden of proving that the petitioner's functional illiteracy resulted from some sort of neurological pathology. The experts who testified could not pinpoint any sort of pathology as the source of the petitioner's illiteracy. No objective test such as an MRI or a CT scan of his brain demonstrated any problem with the petitioner's brain or central nervous sys-

tem. The petitioner could just as easily have been functionally illiterate because he never applied himself in school or because his educational needs were not met while he was growing up.

Accordingly, the court found the petitioner totally disabled pursuant to the odd-lot doctrine, and a dismissal was entered as to the Second Injury Fund.

Permanent Total Disability Rate and Section 12(b) Benefits

An award of permanent total disability benefits *potentially* entitles the petitioner to receive the same amount of money paid for temporary disability benefits for the rest of the petitioner's life. That is the maximum recovery available to an injured worker under our workers' compensation system here in New Jersey.

However, whether or not the petitioner will actually receive all those benefits, after an award of permanent total disability by a judge of compensation, will depend upon many uncertainties that lie ahead in the future.

N.J.S.A. 34:15-12(b) provides that permanent total disability benefits shall be paid at the rate of 70 percent of the weekly wages received at the time of the injury, subject to the maximum rate for that year (the same formula for determining the rate of temporary disability benefits). This compensation will be paid for 450 weeks, after which time the payments *will cease*, unless the employee has submitted to such physical or educational rehabilitation as may have been ordered by the rehabilitation commission, and can show that because of the employee's disability it is impossible for him or her to obtain wages or earnings equal to those earned at the time of the accident. If that is the case, further weekly payments will be made during the period of disability, the amount of which shall be "the previous weekly compensation payment diminished by that portion thereof that the wage, or earnings, the employee is then able to earn, bears to the wages being received at the time of the accident." Section 12(b) goes on to state that payments beyond 450 weeks shall be subject to periodic reconsiderations and extensions as the case may require.

In most cases, totally disabled workers receive in the mail during the months preceding the expiration of 450 weeks a cer-

tification from the Division of Vocational Rehabilitation for completion by their family doctor. If the employee's family doctor certifies that the worker remains totally disabled, then the carrier (or in some cases the Second Injury Fund) continues to pay the 12(b) permanent disability benefits for the rest of the petitioner's life. Occasionally, however, particularly when a private insurance carrier is liable for the payment of 12(b) benefits, the insurance company will use this opportunity to have the petitioner examined by their designated medical expert. If their designated expert is of the opinion that the petitioner is less than totally disabled, the carrier can relitigate the entire issue of permanent disability, essentially getting a second bite at the apple. In fact, under N.J.S.A. 34:15-19, the respondent can demand an examination of the petitioner at any time and, theoretically, take an infinite number of additional proverbial bites over the life of the petitioner.

Permanent Total Disability Rate and Social Security Set-Offs

As previously stated, it is common for a petitioner to be totally disabled for Social Security purposes, but only partially disabled for workers' compensation purposes. Conversely, if a petitioner is permanently, totally disabled for workers' compensation purposes, then the petitioner is most likely also totally disabled for Social Security disability purposes and therefore eligible for Social Security disability benefits. The initial amount of money to which the petitioner is entitled from Social Security disability could reduce the workers' compensation permanent total disability rate.

In order to discourage fraud or malingering, it is not desirable to have an injured worker eligible to receive more money after becoming disabled than the worker was earning before the onset of the disability. Accordingly, the amount of money that an injured worker initially receives from Social Security disability and the amount of money received from workers' compensation total disability, when added together, cannot exceed 80 percent of the worker's average cumulative earnings (ACE) for the last five years. To the extent that the combined Social Security and workers' compensation benefits do exceed that amount, the workers' compensation carrier

is entitled to reduce the amount of its benefits so that the combined amount equals 80 percent of the ACE. However, since Social

Security disability benefits are automatically converted to Social Security retirement benefits upon the recipient's 62nd

birthday, there is never a Social Security offset in workers' compensation once the petitioner reaches the age of 62. ■