FIGHTING PERMANENT TOTAL DISABILITY IN SOUP LINE TIMES

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. INTRODUCTION

The past year has seen significant changes in the national economy, resulting in business layoffs, business closings, and a significant pull-back in consumer demand, harboring concerns of even more future hardships. As of March 2009, national unemployment stood at 8.5 percent and unemployment in Illinois reached 9.1 percent, up from 5.9 percent in March 2008. On a national level, the economy lost over 663,000 jobs in March 2009.

Tough economic times impact no area of workers’ compensation harder than permanent total disability (PTD). Permanent total disability claims have historically been the most hotly contested of all workers’ compensation claims, in large part because the award subjects the employer to payments of weekly benefits for the duration of the disability, which, in many cases, is for the life of the claimant.

According to the most recent annual report of the Illinois Workers’ Compensation Commission (Fiscal Year 2007), there were five determinations of permanent total disability for every 100,000 employees in the State of Illinois. As of January 2009, there were 6,554,168 people employed in Illinois. Applying the 2007 percentage to the January 2009 workforce means that there could be as many as 328 PTD determinations across the state in 2009. Using the FY 2007 average weekly wage rate of $739.39 (yielding a PTD rate of $493.17 per week), a PTD finding would result in benefits of $25,644.84 per year. For a claimant with a remaining life-expectancy of 25 years, this would yield a total payout by the employer of $641,121.00.

The recent recession will undoubtedly result in a higher number of claimants seeking PTD awards using the so-called “odd lot” category. As discussed in more detail below, the “odd lot” classification depends on the claimant establishing the unavailability of work for a person in his or her condition. With fewer jobs in the current labor market and more people (the unemployed) competing for those jobs which remain, it will be a more difficult landscape for workers with limited skills and limited physical capabilities to find work.

II. PERMANENT TOTAL DISABILITY – THE FRAMEWORK

Illinois recognizes two types of permanent total disability awards: (1) “specific loss” total disabilities, also referred to as statutory permanent total disability, under section 8(e)(18) of the Act, and (2) “non-specific” total disability awards, which refer to individuals who are either “obviously unemployable” or who are adjudicated medically permanently totally disabled or as falling within the “odd lot” classification under section 8(f) of the Act. 820 ILCS 305/8(e)(18), 8(f).
In short, section 8(e)(18) applies where the claimant suffers the complete loss of two extremities or both eyes. These awards are known as the statutory permanent total and apply even where the claimant can return to gainful employment. *Scandrollo Construction Co. v. Industrial Comm’n*, 54 Ill. 2d 395, 400, 297 N.E.2d 150 (1973).

Concerning “non-specific permanent total disability” awards, the claimant can, under certain circumstances, establish an entitlement to total permanent disability benefits using section 8(f) of the Act. This section applies to any part of the body, although we most commonly see such benefits sought for injuries to the back or multiple body parts. In *Valley Mould & Iron Co. v. Industrial Comm’n*, 84 Ill. 2d 538, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981), the Illinois Supreme Court held that a claimant can establish a non-specific permanent total disability by three means: (1) a showing that he is obviously unemployable; (2) presenting medical evidence supporting the claim of total disability; or (3) by showing that there is no work available to a person in his circumstances. The last category is what is referred to as the “odd lot.”

Although all three types are of concern to employers, the area of “odd lot” permanent total disability will likely be impacted most severely by the economic recession we are experiencing today. Nevertheless, on any PTD claim, the claimant has the burden of proving the nature and extent of his injury by a preponderance of the evidence. *Esposito v. Industrial Comm’n*, 186 Ill. App. 3d 728, 737, 542 N.E.2d 843, 134 Ill. Dec. 497 (1st Dist. 1989). PTD benefits are available for both physical and mental disabilities. *South Import Motors, Inc. v. Industrial Comm’n*, 52 Ill. 2d 485, 489, 288 N.E.2d 373 (1972).

Regardless of the method used to prove a permanent total disability, the award is calculated in the same manner. Computation of a PTD award is based on sections 7 and 8 of the Act; a claimant receiving PTD benefits receives two-thirds of their average weekly wage for life, subject to the statutory minimum and maximums levels in effect at the time of the injury. Thus, for an injury occurring between January 15, 2009 and July 14, 2009, the maximum PTD rate is $1,231.41 and the minimum PTD rate is $461.78. For example, if a 30-year-old female employee was injured on March 22, 2009, and had an average weekly wage of $988.50, her PTD payment would be $659.32 per week, or $34,284.64 per year.

Using a life expectancy of 47.7 years, should the disability not cease, the total payout could reach $1,635,377.32.

**III. ESSENTIALS OF THE “ODD LOT” CLAIM**

“Odd lot” claims are the most heavily litigated of all PTD claims, since there is often a strong disagreement between the parties as to the claimant’s entitlement to such benefits. A claimant falls within the odd lot classification if he shows that, because of his condition (physical restrictions) and circumstances (training, age, and job skills), there is not employment available. According to *Alano v. Industrial Comm’n*, 282 Ill. App. 3d 531, 537-538, 668 N.E.2d 21, 217 Ill. Dec. 836 (1st Dist. 1996), the “odd lot” designation applies where the claimant’s disability is not
obvious in nature and there is no medical evidence stating that he is permanently and totally disabled.

According to the case law, a claimant is totally and permanently disabled when she is unable to make some contribution to the work force sufficient to justify the payment of wages. *Ceco Corp. v. Industrial Comm’n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983). A claimant, however, need not be reduced to total physical incapacity before a permanent total disability award may be granted. Instead, the claimant must show that she is unable to perform services except those that are so limited in quantity, dependability, or quality that there is no reasonable stable market for them. *A.M.T.C. of Illinois, Inc. v. Industrial Comm’n*, 77 Ill. 2d 482, 487, 397 N.E.2d 804, 34 Ill. Dec. 132 (1979).

Where a claimant’s disability is of a limited nature such that she is not obviously unemployable, or where there is no medical evidence to support a claim of total disability, the claimant has the burden of establishing that she falls into the “odd-lot” category – one who, though not altogether incapacitated from work, is so handicapped that she will not be employed regularly in any well-known branch of the labor market. *Ceco Corp. v. Industrial Comm’n*, 95 Ill. 2d 278, 287, 447 N.E.2d 842, 69 Ill. Dec. 407 (1983).

A claimant satisfies her burden that she falls within the “odd lot” category in one of two ways, if, by a preponderance of the evidence, she can show:

- A diligent but unsuccessful job search; or
- That because of her age, skills, training, and work history, she is not employable in any well-known branch of the labor market.


Once the employee makes this showing, the burden of proof then shifts to the employer to show that some kind of suitable work is regularly and continuously available to the claimant. *Valley Mould & Iron Co. v. Industrial Comm’n*, 84 Ill. 2d 538, 547, 419 N.E.2d 1159, 50 Ill. Dec. 710 (1981). The claimant must present more than a *prima facie* case; he must prove by a preponderance of the evidence that he falls within the “odd lot” category before the burden shifts to the employer. *Lanter Courier v. Industrial Comm’n*, 282 Ill. App. 3d 1, 6-7, 668 N.E.2d 28, 217 Ill. Dec. 843 (5th Dist. 1996). Employers can meet this burden by (1) making a job offer within the claimant’s restrictions, (2) presenting a vocational assessment showing a reasonably stable market for jobs within the claimant’s physical restrictions and age, education, training, and work experience, or (3) obtaining the testimony of an independent medical examiner (IME) disputing the claimant’s restrictions and/or inability to work.
IV. DEFENDING THE “ODD LOT” PERMANENT TOTAL DISABILITY CLAIM

Recent economic hard times now mandate more than ever that employers must aggressively defend potential PTD claims. A PTD benefit claim should be anticipated any time the claimant’s physician states that he cannot return to his former employment. In evaluating the “odd lot” claim, the following information is critical:

- Is there medical evidence that the claimant cannot work or return to his former job?
- What is the claimant’s age, education, training, and work experience?
- Has the claimant looked for work?
- Can the claimant be returned to gainful employment by rehabilitation?
- Has the employer offered new employment to the claimant within his restrictions?

CAVEAT: The fact that a claimant can work for occasional wages on a part-time or intermittent basis will not defeat a claim for TPD based on an “odd lot” theory. Smallwood v. Industrial Comm’n, 53 Ill. 2d 151, 290 N.E.2d 234 (1972) (injured maintenance man received some income from preaching). Evidence that the claimant has been able to earn occasional wages or can perform some useful services is likewise not dispositive. J.M. Jones Co. v. Industrial Comm’n, 71 Ill. 2d 368, 373, 375 N.E.2d 1306, 17 Ill. Dec. 22 (1978).

Towards the goal of reducing the likelihood of a PTD award, the employer should evaluate several courses of action.

A. Send the Claimant for a Section 12 Examination to Confirm the Restrictions

Use the section 12 Independent Medical Exam (IME) to confirm the nature and extent of the disability, i.e., the claimant’s physical restrictions. 820 ILCS 305/12. The IME physician should not only review all medical records in the case but also meet with and examine the claimant so as to remove any potential grounds for damaging cross-examination. Care should also be taken to obtain a physician in the appropriate specialty for your case. In certain cases, it might also be wise to utilize two IMEs to defeat what might appear to be an otherwise strong petitioner’s IME or treating physician opinion.

One word of caution – the IME physician selected should be significantly qualified and not someone who can be easily dismissed by the arbitrator or the Commission as a professional testifying expert.

B. Obtain a Vocational Assessment

A vocational assessment should be utilized whenever there is potential for a PTD award. The vocational expert must have all information on the claimant and should meet with the claimant, and further, should assist in the job search effort. Moreover, the vocational expert should concentrate her efforts on locating employment in the geographic regions where the claimant lives and should be sure to inquire whether the potential employer could accommodate any
unusual restrictions. To illustrate the latter, in a recent case, an employer’s vocational expert identified several jobs that the claimant could possibly perform within her restrictions, but she failed to inform the potential employers that the claimant had to lay down for ten minutes every hour and that she had to keep her legs elevated for a portion of the day. Likewise, the identified jobs were not located where the claimant lived, but some three hours away.

**C. Offer the Claimant a Job**

Offering the claimant a job within his or her restrictions is one of the most effective means of eliminating a potential PTD claim. If the claimant accepts the job, the claim then reverts to a PPD award, which will have substantially less value. Also, Illinois law provides that a claimant’s refusal to accept a legitimate job offer within his or her restrictions can result in the denial of PTD benefits. *Presson v. Industrial Comm’n*, 200 Ill. App. 3d 876, 558 N.E.2d 127, 146 Ill. Dec. 164 (5th Dist. 1990).

**D. Attack the Claimant’s Medical Evidence, Job Search, and Vocational Assessment**

Attacking the claimant’s case can be done, as noted above, through the use of an IME and the employer’s own vocational specialist, but also through focused cross-examination of the claimant. If the claimant has performed a job search, inquiries should be made concerning the number of employers contacted, over what period of time, what types of jobs were sought, and whether a general inquiry was made versus a specific job application. On potentially large exposures, the lack of any discovery mechanisms provided by the Act might justify the hiring a private investigator to research the claimant’s past work history and educational status.

If a vocational expert is offered by the claimant, did the expert assist in the job search? Did the expert adequately consider the claimant’s prior job skills? Were the expert’s assessments supported by any objective testing? Concerning the claimant’s physician, was the doctor offering the opinions a generalist or a specialist? Were the opinions concerning employability and/or restrictions based on a functional capacity assessment?

Another related approach is to authorize surveillance on the claimant in the hopes of catching the claimant performing acts inconsistent with his restrictions.

**E. Aggressive Settlement Options**

Anticipating a PTD award, the employer may wish to consider several approaches to settling the case early, perhaps by making a larger PPD offer coupled with open or limited open-ended medical benefits. Employers can also investigate using a structured settlement or combining a lump-sum payment with an annuity. Another option (perhaps for older claimants) is to offer to include in the settlement language Social Security offset language, which will allow the claimant to more of her Social Security disability income.
One problem with settling PTD awards after they have been entered is that the current interest rates are extremely low. Thus, it will take a larger payment up front to represent the value of the claim. Using our prior PTD example, if an employer is facing a total exposure over the employee’s 47.7 year life span of $1,635,377.37, the present value of the PTD award at 6 percent interest is $101,514.53. At the much lower 3 percent interest rate, the present value is $399,284.41.

**F. Attacking the PTD Award Post-Award – Sections 8(f) and 19(h)**

An award of PTD benefits is payable for the duration of the disability. In many cases, this means for life. However, two provisions in the Act allow an employer to reopen the disability assessment and to modify the permanency finding, perhaps eliminating the PTD award and resulting in a section 8(e) permanent partial award or a section 8(d)(1) wage differential.

Section 8(f) provides for the termination of a PTD award where the employee either returns to work or is able to do so and earns or is able to earn as much as before the accident. Section 8(f) focuses on the petitioner’s earning aspects. There is no time limit on when a section 8(f) petition may be filed.

Section 19(h) also provides an employer with a means to end the PTD award. However, this section focuses not on the claimant’s ability to earn money, but on the disability. To succeed on a section 19(h) petition, the employer must show by a preponderance of the evidence that the disability has decreased or diminished and must do so by showing a material change in the claimant’s condition. Moreover, a section 19(h) petition must be brought within 60 months of the original award, or else the right is lost.

**G. Recent PTD Cases of Interest**

*Economy Packing Co. v. Workers’ Compensation Comm’n*, 387 Ill. App. 3d 283, 901 N.E.2d 915, 327 Ill. Dec. 182 (1st Dist. 2008) – The Appellate Court, Workers’ Compensation Commission Division, in a 3-2 decision, upheld the award of PTD benefits to an illegal alien, despite the fact that an illegal alien cannot legally be employed in the United States in any capacity. The Court looked to whether a resident in the claimant’s condition could have found work, regardless of the fact that the claimant was an illegal alien. Despite five justices certifying the case for Supreme Court review, the Court denied the employer’s petition for leave to appeal.

*Westin Hotel v. Industrial Comm’n*, 372 Ill. App. 3d 527, 865 N.E.2d 342, 310 Ill. Dec. 18 (1st Dist. 2007) – The Appellate Court (in a 4-1 decision), reversed the Commission’s award of “odd lot” PTD benefits because the claimant failed to present any evidence of unsuccessful job search. The court noted that the only witness to testify regarding the claimant’s unemployability was his physician, Dr. Coe, who was a specialist in occupational medicine. The Court observed that Dr. Coe had not ordered or reviewed any vocational or rehabilitative tests, had not conducted a labor market survey, and had made no attempt to find claimant employment within his restrictions. Moreover, Dr. Coe did not prescribe a functional capacity evaluation. The employer’s
IME physician testified that the claimant was capable of returning to medium-level work. Finally, the Court stated that most cases have required evidence from a rehabilitation services provider or vocational counselor, of which claimant had none.

_City of Chicago v. Illinois Workers’ Compensation Comm’n_, 373 Ill. App. 3d 1080, 871 N.E.2d 765, 313 Ill. Dec. 38 (1st Dist. 2007) – The Court affirmed the Commission’s award of PTD benefits based on an “odd lot” status, finding that although the claimant failed to conduct a job search, “he did attend various interviews scheduled by respondent.” The claimant attended meetings with potential employers and was placed on at least two eligibility lists. The Court further pointed out that the employer did not offer the claimant a position and failed to refute the claimant’s vocational testimony that the claimant would be unable to find work in any field.

_Ameritech Services, Inc. v. Illinois Workers’ Compensation Comm’n_, No. 1-08-1412WC, 2009 WL 723476 (4th Dist. March 17, 2009) – The Court affirmed the Commission’s award of PTD benefits where the employer failed to carry its burden of showing that some kind of suitable work is regularly and consistently available to the claimant. The employer failed to present any testimony of a vocational rehabilitation specialist and failed to offer the claimant a job within his restrictions. Although one of the employer’s managers testified that a job was offered, there was no documentation, and the Commission rejected the testimony.

_Barabba v. Fellows, Inc._, No. 04 WC 15912, No. 08 IWCC 0733, 2008 WL 2805418 (IWCC, June 19, 2008) – PTD benefits were awarded to a 60-year-old claimant despite her having accepted a severance package due to her fear of an economic lay-off and job loss. The Commission held that the employer was not relieved of demonstrating that there existed a reasonably stable job market for a person in the claimant’s condition and with her experiences.
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Jim currently chairs the firm’s real estate practice group where he concentrates much of his current legal practice representing buyers, sellers, builders and providing closing services on residential real estate transactions.

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