

Evaluation of Disability

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Evaluation of Disability

Disability in General

■ Defined:

- ▶ *“Incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment, which incapacity and the extent thereof must be supported by medical findings.”*
Miss. Code Ann. § 71-3-3(I).

■ Types of Disability

- ▶ Temporary Total Disability
- ▶ Temporary Partial Disability
- ▶ Permanent Partial Disability
- ▶ Permanent Total Disability

Evaluation of Disability

Disability in General

- Waiting period: 5 days, but once you reach 14 days, you pay back to day 1 (unless claimant paid in full for day of accident, then day 2)
- Compensation Rate is 2/3 of AWW subject to statutory max (2008 max CR is \$398.93 (p/t \$179,518.50); Mileage rate at MWCC has not yet changed but IRS rate is \$.505 effective 01/01/2008)
 - ▶ <http://www.mwcc.state.ms.us/faq/rates.html>
- Salary paid in lieu of compensation: weekly credit (not dollar for dollar); not gratuitous but “in lieu”; does not include “earned wages”
- Long term and short term disability benefits:
 - ▶ If employer funds: receive credit up to weekly compensation rate (not dollar for dollar);
 - ▶ If claimant contributes to premiums: no credit

Calculation of Claim Exposure and Settlement Value

Information we need:

- Final Medical Report:
 - ▶ MMI? Impairment?
 - ▶ Restrictions? Future medical treatment?
- Claim Payment History:
 - ▶ Indemnity benefits.
 - ▶ Medical benefits.
- Present work status:
 - ▶ Working for insured? Position / wages?
 - ▶ Working elsewhere? Vocational opinions?

Evaluation of Disability

Types of Injuries

- **Body as a Whole (BAW) Injuries**
 - ▶ Back, neck, psychiatric injuries, etc.
 - Loss of wage earning capacity (LOWEC)
 - Limited to 450 weeks of benefits x compensation rate
 - Focus on permanent work restrictions
- **Scheduled Member Injuries**
 - ▶ Arm, leg, foot, finger, etc.
 - Loss of occupational / industrial use of the extremity (LOIU)
 - Limited to “schedule” unless PT (450 weeks)
 - Focus on medical impairment and industrial disability

Body as a Whole Injuries

Burden of Proof

- Initial Burden is on Injured Employee
 - ▶ Injury arising out of employment
 - ▶ Causal connection b/w injury and claimed disability
 - ▶ Inability to earn pre-injury wages
 - ▶ Supported by medical findings
- Shifting Burden of Proof to Employer/Carrier
 - ▶ Rebuttable Presumption of PT disability
 - Arises if employer refuses to reinstate / rehire claimant because of injury after he reaches MMI

Body as a Whole Injuries

Rebutting the Presumption of Permanent Total Disability

- Employer must show one of the following:
 - No medical support of an incapacity to earn wages
 - Claimant's efforts to find work were less than reasonable
 - Work was available to claimant
 - Duty of claimant to contact his employer once released to RTW
 - Employer's refusal to contact claimant does NOT constitute a refusal to rehire under Jordan v. Hercules (Presumption of PT)
 - Vocational rehabilitation and labor market studies

Body as a Whole Injuries

Measuring Loss of Wage Earning Capacity

- **Presumption of NO LOWEC:**
 - Presumption of no LOWEC when claimant RTW making equal to or greater than pre-injury wage
 - No presumption that lower post-injury wages represent claimant's post-injury earning capacity.
- **Pre-injury wages vs. Post-injury wages:**
 - Compare pre-injury AWW versus actual post injury wages.
- **Analysis of LOWEC must also examine:**
 - Age
 - Education
 - Training and work experience
 - Local economy and labor market
 -



Loss of Wage Earning Capacity

Must be Supported by Medical Findings

- ▶ Claimant's LOWEC must be supported by medical findings as opposed to merely the claimant's own subjective complaints of pain (*Fly v. NMMC*, 801 So.2d 119 (Miss. Ct. App. 2001)).
- ▶ Pain can be a sufficient "medical finding" in support of a disability. In *Hall of MS, Inc. v. Green*, 467 So. 2d 935 (Miss. 1985), Court held that an impairment rating alone can be sufficient "medical finding," particularly when claimant complains of ongoing pain.
- ▶ Fact scenario: claimant has an impairment rating and claims he cannot work because of pain: carrier should consider second medical opinion to address pain-related work restrictions.

Loss of Wage Earning Capacity

Hypothetical Claim Part I

- Determination of LOWEC is not based on just one factor such as post-injury wages, a labor market survey, or employer's willingness to re-hire the claimant. It is based on the evidence as a whole and the administrative judge has wide latitude in evaluating all factors.
- Practically speaking . . . the most important evidence is post-injury earning capacity in a legitimate job as compared to pre-injury earnings.
 - ▶ Hypothetical: Claimant made \$600 per week making furniture frames before herniating a disc in her back on February 1, 2007.
 - ▶ She can now make \$420 as a lawyer. Benefits are likely going to be based on $\frac{2}{3}$ of the difference between her pre- and post-injury earnings. What is her LOWEC and what is her compensation rate?
 - $\$600 - \$420 = \$180 \times \frac{2}{3} = \120×450 weeks

Loss of Wage Earning Capacity

Hypothetical Claim Part II

- Hypothetical Continued:
- Until she reached MMI, she is entitled to TTD. Her AWW is \$600. What is her Comp Rate?
 - ▶ $2/3$ of \$600 is \$400, which is just over the maximum CR for 2007 (\$387.68)
- When Claimant reaches MMI, obligations for TTD end. If restrictions that employer cannot accommodate, carrier should continue paying benefits (PPD), but carrier receives credit for any permanent benefits towards an award for permanent disability. So . . .
 - ▶ If this claimant has a \$180 per week LOWEC, and a CR of \$120, benefits would be paid x 450 weeks ($\$120 \times 450$ weeks).
 - ▶ Remember if paid in a lump sum, carrier receives 4% per year discount.
 - ▶ If carrier paid indemnity after MMI (PPD benefits), carrier receives credit towards obligations for permanent benefits

Scheduled Member Injuries

Defining Scheduled Member Injuries

- Arm = 200 weeks
- Leg = 175 weeks
- Hand = 150 weeks
- Foot = 125 weeks
- Eye = 100 weeks
- See “cheat sheet” for other scheduled member injuries

Scheduled Member Injuries

Defining Scheduled Member Injuries

▶ Loss of Hearing

- One Ear 40
- Both Ears 150

▶ Loss of Vision- A claimant is entitled to 100% loss of use of the eye if there has been:

- Loss of binocular vision
 - Vision in which both eyes are used together
- Loss of 80% or more of the vision of any eye.
 - P. 201 (4): *White v. R.C. Owen Co.*, 98 So. 2d 650 (Miss. 1957)-A slight loss of binocular vision is not enough. Practically speaking, to get 100%, you must have a greater than 80% impairment

Scheduled Member Injuries

Scheduled Member Cases

- Injuries to more than one member
 - ▶ Loss of both hands, arms, feet, legs, eyes, or any two thereof shall constitute permanent total disability. 71-3-17(a)
 - So, 100% to both arms: $200 + 200 = 450$
 - ▶ Compensation for injuries to more than one member, not constituting permanent total disability, run consecutively (not concurrently)
 - So, 50% to Arm = 100 weeks, plus 50% to Leg = 87.5. Total compensation due is 187.5 weeks
- Serious facial or head disfigurement - Commission can award up to \$2000, even absent a showing of any occupational effect, 1 year after the injury. Does not apply to scarring on other parts of the body besides face or head. 71-3-17(c)(24)

Scheduled Member Injuries

Two Components of Permanent Partial Disability

- **Medical Disability (Functional Disability)**
 - Actual physical impairment
 - Medical testimony / % impairment to member
 - Must be paid timely to claimant (as opposed to BAW injury)
- **Industrial Disability (Occupational Disability)**
 - Effect on claimant's ability to perform duties of employment
 - Greater than medical rating
 - Somewhere b/w medical impairment rating and 100% loss of use of extremity

Scheduled Member Injuries

Limited to the Schedule?

- Yes, unless claimant deemed PT
 - ▶ Smith v. Jackson Constr. Co., Inc. 607 So.2d 1119 (Miss. 1992)
 - Hypothetical:
 - Employee sustains 30% medical impairment to leg
 - Judge rules that such renders him totally occupationally disabled
 - Recovery not limited to 175 weeks but he receives 450 weeks.
 - “Either / or” situation: claimant receives up to 175 weeks (within schedule) OR he receives 450 weeks (nothing in between)

Scheduled Member Injuries

Determining Industrial Disability

- Can claimant return to the substantial acts of his “usual employment”?
- Other factors to analyze for loss of use:
 - Education and training
 - Inability to work
 - Failure to be hired elsewhere
 - Continuance of pain

Scheduled Member Injuries

What constitutes claimant's "usual employment"?

- Supreme Court definition:
 - ▶ Broader in scope than job held at time of injury
 - ▶ Jobs requiring:
 - Similar skills
 - Jobs for which worker is otherwise suited by:
 - Age
 - Education
 - Experience
 - "Any other relevant factual criteria"

Scheduled Member Injuries

Rebuttable Presumption of Total Loss of Use of Member

- **Presumption arises:**
 - Inability to continue in the position held at time of injury
- **Claimant must establish:**
 - Made reasonable efforts to find work in “usual employment” OR
 - Provide other proof of inability to perform substantial acts of usual employment
 - NOT required to look for work (but helps to show effort)
 - Convince MWCC that employment comparable to occupation prior to time of injury is no longer attainable.

Scheduled Member Injuries

Rebuttable Presumption of Total Loss of Use of Member

- Rebutting the presumption:
 - ▶ Proof of claimant's ability to earn the same wages which claimant was receiving at time of injury
 - ▶ Employer can reduce exposure by actual evidence of post injury earning potential
 - Job search efforts (if any) were a sham / not reasonable
 - Vocational expert

Evaluation of Disability

Conclusion

■ Remember:

- ▶ Two different types of injuries in Mississippi
- ▶ Know difference in evaluating LOWEC v. LOIU
- ▶ Be aware of rebuttable presumptions and what must be done to rebut them
- ▶ Know what we need from you to accurately estimate claim exposure / settlement value.