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**Permanent versus Temporary and Partial versus Total
Benefits**

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**Workers
Compensation
Symposium #3**

To Be As Concrete as Possible . . .

- Assume a worker has suffered an injury arising out of and in the course of employment (because of work, while at work)
- How hurt is the worker?
- What types of benefits is the worker entitled to?
- How are the benefits calculated?

Please Understand

- Workers' compensation benefits are not welfare benefits
- Worker pays for benefits in at least two ways
 - Foregone negligence lawsuits (exclusive remedy rule)
 - Lower wages

Is there a “Proper” Measure of Benefits?

- To me, the *Quid Pro Quo* is the starting point
 - What is adequate in light of tort rights that have been foregone?
 - Complicated because some victims would have been entitled to a tort remedy were it not for the quid pro quo, some would not

Categories of Benefits

- Indemnity (weekly/monthly)
 - Some percentage of the average weekly or monthly wage
- Medical Benefits (for “reasonable and necessary treatment”)
- Permanent Impairment Benefits
- Disfigurement Benefits
- Death benefits (for statutorily defined beneficiaries)
 - *Quid pro quo* for wrongful death suits

▸ Incapacity versus Disability

- Courts often use interchangeably and depends on statute in jurisdiction
- Consider the genius physicist who hurts his back severely
 - Physically disabled – you bet
 - Incapacitated from work – different question

▶ ***Incapacity* Caused by Work Injury**

- **Total**
- **Partial**



Duration of Incapacity

- Permanent
- Temporary





Most Frequently Litigated Claims

- Permanent of Any Type
- In aggregate, permanent partial most expensive

Common Factual Scenario

- Temporary Total Incapacity
 - Employee is hurt and goes out of work
 - A few weeks/months later comes back to work
 - The injury resolves uneventfully

In Some Jurisdictions Presumption of Permanent Total Incapacity

- Certain combinations of losses of members
- Presumption may be prima facie or conclusive
- Typical statute applies presumption to “loss or loss of use of both hands, both arms, both legs, both feet, both eyes, or any two of these”

“Easiest” Conceptual Permanent Total Incapacity

- Employee is obviously 100% disabled and will never work again

Formulation from Larson's Treatise

- “An employee who is so injured that he or she can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled.”

“Effective” Permanent Total Incapacity #1

- Distinguish –
- Worker permanently awarded total incapacity benefits even though arguably not COMPLETELY “disabled”
 - Courts=worker need not be completely disabled to receive
 - Odd lot doctrine

“Effective” Permanent Total Incapacity #2

- Worker provisionally awarded total incapacity benefits even though only partially “disabled”
 - Duty to perform work searches or otherwise show work unavailable
 - Often litigated at hearings through vocational-rehabilitation (“voc-rehab”) experts

“Permanent” Total Sometimes a Misnomer

- 1972 National (Burton) Commission recommended:
 - “no arbitrary limits on the duration of benefits for permanent total disability or death, including that total disability benefits be paid for the duration of the worker’s disability or for life”
 - Kansas = \$155,000 maximum for permanent total; South Carolina = 500 weeks

Calculation of Total Incapacity Benefits

- Fairly straightforward
 - $\frac{2}{3}$ x the average weekly wage (AWW) at time of injury
 - Capped at SAWW or percentage thereof

Permanent Partial Incapacity

- Tremendous variability across the country and more than a little incoherence
- Are we compensating wage- loss/earning capacity/disability/all three?
- Original WC statutes were all wage loss

Calculation of Partial Incapacity Benefits

- Very NOT straightforward
 - Percentage of difference between pre-injury and post injury wages?
 - Percentage of difference between pre-injury wage and post-injury earning capacity?
 - Compensation based on physical “impairment”?

Concept of “Schedule” Benefits

- Schedule benefits for permanent partial “disability” are authorized by the statutes of all American jurisdictions

Schedule Benefits

- Typical schedule provides that, after injury has stabilized and permanent effects can be appraised, benefits described in terms of regular weekly benefits for specified numbers of weeks shall be paid
 - certain # of weeks for an arm, leg, hand, foot, eye, great toe, one phalange of the little finger.

As the Larson Treatise Says

- “The origins of the exact numbers of weeks assigned to losses of particular members are lost in the mists of early compensation history.”
(7-86; §86.02)
- Presumption of wage loss, or impact on earning capacity?

▶ **“Permanent” Partial Almost Always a Misnomer**

- The trend has been to create limited awards
- Benefits for a certain period of weeks/months plus some amount for “disability”

Partial Benefit Approaches: SSA Discussion

- Impairment-Based Approach. About 19 states use this approach to compensate for an unscheduled permanent partial disability.
- In 14 of those states, the worker with an unscheduled permanent partial disability receives a **benefit based entirely on the degree of impairment**.
- Future earnings losses are not considered.

▶ **Partial Incapacity Approaches**

- **Loss-of-Earning-Capacity Approach**. Roughly 13 states use this approach for an unscheduled impairment.
- **Links benefit to worker's ability to earn**; that is, it involves a forecast of the economic impact that the impairment will have on the worker.

Partial Incapacity Approaches

- **Wage-Loss Approach**. In 10 or so states, benefits paid for the **actual or ongoing wage losses** that a worker incurs.

Partial Incapacity Approaches

- **Bifurcated Approach**. In 9 jurisdictions, benefit depends on **worker's employment status at time that the worker's condition is assessed**, after the condition has stabilized.
- If worker has returned to employment with earnings at or near the preinjury level, benefit based on degree of impairment.
- If worker has not returned to employment, or returned at lower wages, benefit based on degree of lost earning capacity.

Maximum Medical Improvement

- EE's condition not going to get better
- Once MMI is reached we know whether incapacity is permanent or temporary & total or partial
- Also establishes “permanent impairment” or “scheduled benefit” levels = LSS

Permanent Impairment Guides

- Critique: measure loss of physical function but not necessarily “disability”
- One thing if they are presuming disability based on loss of function
- Quite another if this is reflexive compensation of physical impairment