Law Day 2019:

Permanent Total Disability: Law, Practices & Methods

Objective: The 1979 Revisions to the New Jersey Workers' Compensation Act sought to concentrate more dollars in the hands of the most severely injured workers. This was accomplished by, among other things, a revision of the disability chart, the redefinition of permanent partial and permanent total disability, and the adoption of recommendations that were part of a decade-old Federal survey of state workers' compensation laws.

Despite the reforms, the preparation and trial of permanent total disability claims remains almost a form of legal alchemy. We look for the "feel" of a permanent total disability case, and apply a patchwork quilt of cases, statutes, customs and biases to these cases. The following is an attempt to assist the practitioner and Judge in the systematic analysis and presentation of the permanent total disability claim. Where possible, examples are employed to help illustrate the approach.

Statutory Basis: The statutory underpinnings of permanent total disability are contained in N.J.S.A. 34:15-12, 36, and 95. Essentially, there are four distinct permanent total disability theories:

1. **Statutory Total Disability. N.J.S.A. 34:15-12c(20): The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof as the result of any one accident, shall constitute total and permanent disability to be compensated according to the provisions of subsection b. of this section.**
2. **Straight Permanent Total Disability. N.J.S.A. 34:15-36: "Disability permanent in quality and total in character" means a physical or neuropsychiatric total permanent impairment caused by a compensable accident or compensable occupational disease, where no fundamental or marked improvement in such condition can be reasonably expected.**

3. **Odd Lot Total Disability. N.J.S.A. 34:15-36: Factors 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.**
4. **Second Injury Fund Total Disability. N.J.S.A. 34:15-95: 34:15-95. Second Injury Fund The sums collected under R.S. 34:15-94 shall constitute a fund, to be known as the Second Injury Fund, out of which a sum shall be set aside each year by the Commissioner of Labor from which compensation payments in accordance with the provisions of paragraph (b) of R.S. 34:15-12 shall be made to persons totally disabled, as a result of experiencing a subsequent permanent injury under conditions entitling such persons to compensation therefor, when such persons had previously been permanently and partially disabled from some other cause; provided, however, that, notwithstanding the time limit fixed therein, the provisions of paragraph (b) of R.S. 34:15-12 relative to extension of compensation payments beyond 400 or 450 weeks, as the case may be, shall, with respect to payments from the Second Injury Fund, apply to any accident occurring since June 27, 1923, and in no case shall be less than $5.00 per week; provided further, however, that no person shall be eligible to receive payments from the Second Injury Fund:**

(a) If the disability resulting from the injury caused by the person's last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability within the meaning of this Title.

(b) (Deleted by amendment.)

(c) If the disease or condition existing prior to the last compensable accident is progressive and by reason of such progression subsequent to the last compensable accident renders the person totally disabled within the meaning of this Title.

(d) If a person who is rendered permanently partially disabled by the last compensable injury subsequently becomes permanently totally disabled by reason of progressive physical deterioration or preexisting condition or disease.

Case Law: The concept of permanent total disability in New Jersey has evolved over time, along parallel paths between case law and statutory refinement.

Statutory Total Disability

In a case of statutory total disability, the loss of use of any two of the hands, feet, arms, legs, or eyes constitutes permanent total disability. Thus, 100% of the loss of *use* of two legs, as in paraplegia, once adjudicated, proves a case for permanent total disability. *Tentle v. Colon Constr*., *Inc*. 2006 N.J. Super. Unpub. LEXIS 338. In *Martinez v. Silverline, 361* N.J.Super 69 (2003), we learned that under N.J. Stat. Ann. § 34:15-12(c)(8), the amputation of all five fingers of a hand is the amputation of a hand, rather than the cumulative weeks of all five lost fingers. (The holding of the case validated the award of the amputation enhancement in that circumstance.) Thus, the loss of ten fingers would = the loss of both hands, triggering permanent total disability on a statutory basis.

In a case of statutory total disability, the Petitioner is entitled to 450 weeks of permanent total disability benefits, followed by 12(b) benefits pursuant to Statute. A return to work during the 450 weeks does not vitiate the 450 week award, as no offset under 12(b) attaches for earnings until after the payment of 450 weeks of compensation. While N.J.S.A. 34:15-27 permits the revisiting of the quantum of permanent disability upon Application by either side, it is not contemplated that statutory total disability can be vitiated by any means.

N.J.S.A. 34:15-95 specifically provides for Second Injury Fund liability where there are successive accidents which cumulatively cause permanent total disability, and where a previously statutorily totally disabled person, or one who has suffered 100% loss of an extremity or eye, returns to work and is thereafter the victim of a last compensable accident or injury:

Nothing in the provisions of said paragraphs (a), (c) and (d), however, shall be construed to deny the benefits provided by this section to any person who has been previously disabled by reason of total loss of, or total and permanent loss of use of, a hand or arm or foot or leg or eye, when the total disability is due to the total loss of, or total and permanent loss of use of, two or more of said major members of the body, or to any person who in successive accidents has suffered compensable injuries, each of which, severally, causes permanent partial disability, but which in conjunction result in permanent total disability. Nor shall anything in paragraphs (a), (c) and (d), aforesaid apply to the case of any person who is now receiving or who has heretofore received payments from the Second Injury Fund.

"Straight" Permanent Total Disability

A. Definition: For an injured worker to receive permanent total disability that is not statutory, as above, he/she must suffer a physical or neuropsychiatric total permanent impairment caused by a compensable accident or compensable occupational disease "where no fundamental or marked improvement in such condition can be reasonably expected." *Ramos v. M&F Fashions*, 154 N.J. 583, 596-597.

B. Distinguished from Permanent Partial Disability: Permanent total disability is to be clearly distinguished from permanent partial disability. The *Ramos* analysis permits counsel to use medical evaluations that are older than those generally accepted as "stale" under *Allen v. Ebon Services Intern.*, Inc., 237 N.J. Super. 132 (1989) The *Allen* & *Ramos* cases present a stark contrast between the judicial views of necessary proofs for permanent partial and permanent total disability. The *Allen* Court, quoting *Perez v. Pantasote* notes that "the validity of a medical finding of a permanent injury may decrease with the passage of time." The *Ramos* Court apparently assumes that a medical opinion of permanent total disability has greater finality, since the Legislature added to Section 36 the assumption that such a finding would not raise the expectation of a recovery, notwithstanding Section 12(b). But since the Court must determine based upon the quality and nature of the proofs adduced at Trial whether the medical opinions are credible and sufficient for a finding of permanent

total disability, does that create a presumption that a medical opinion of totality is somehow more valid, *ab initio* than a medical opinion of partial disability? While the statutory definitions give weight to the holdings, in reality, do the separate standards for "staleness" make sense?

C. Proving Totality: As far as the sufficiency of proof of disability necessary for a judicial finding of permanent total disability: "A workman need not be bedridden, paralyzed, or unable to get about, nor is ability for light or intermittent or sedentary work inconsistent with total disability." *Kalson v. Star Elec. Motor Co*., 15 N.J. Super. 565 (1951), aff'd 21 N.J. Super 15 (App. Div. 1952). "We think it clear that petitioner could not compete in the labor market, pass a preemployment physical or otherwise appear as one whom an employer would be interested in hiring other than as an act of charity." Id at 576. "The inability to find work, traceable to an employee's compensable injury, is tantamount to the inability to perform work." Barbato v. Alsan Masonry, 64 N.J. 514(1974).

Practically speaking, the Petitioner must adduce a report estimating disability as total and permanent, either on the basis of a single expert, or with one expert correlating and summarizing more than one report for "overall permanent total disability," as in a neurologist who examines and reads an orthopedist's report and estimate and concludes totality. Of course, the Respondent will carefully examine those reports, to prepare a cross-examination as to whether overlapping features render the "ultimate" estimate suspect. Respondents themselves have a problem in that regard: If their own expert reports gainsay the very existence of neurological disability in a spinal surgery case, as an example, they are in a poor position to then concede it at Trial but limit it as overlapping. Pleadings may certainly be alternative in our system, but proofs seldom compel Judges when they are placed in the "alternative."

One thought experiment for analysis is the effect of modern medicine on a finding of permanent total disability vs. permanent partial disability. For instance, a worker rendered deaf, or blind, or hobbled by a workplace accident is functionally restored, through the use of glasses, implants, or prostheses: Is it a functional loss for the purpose of awarding permanent partial or permanent total disability? What if a nearly industrially blinded worker has vision correctable to 20/20? They may have a high percentage of permanent partial disability, but are they permanently totally disabled simply because the weeks add up to more than 450? Can it be said that they cannot fulfill any job that exists in the industrial marketplace, when vision is corrected to nearly normal, or even normal? Recall that *Johannsen v. Union Iron Works*, 97 N.J.L. 569 (1922) instructs us to measure the disability by the function without the eyeglasses, in a vision case. Does this venerable old case mean that we should declare the worker permanently, totally disabled in 2019, short of a finding of statutory total disability?

Odd-Lot Totality

It is often posited that the 1979 effectively eliminated the Odd Lot Doctrine. Because physical or neuropsychiatric disability must comprise at least 75% of total disability in order for the Court to incorporate other factors (education, training, language, etc.), Judges have often observed that once a worker is going to be adjudicated 75% disabled, the residual working capability is so low, it is simpler and more straightforward to accept that the medical evidence is sufficient to render the worker permanently totally disabled. While somewhat intellectually dishonest, it does point up the fogginess of the legal doctrine surrounding permanent total disability: If a Judge can simply conclude that the injuries render a worker unemployable in a reasonable stable job market at 75% of partial total

disability, why is Odd Lot still part of our jurisprudence? It may be that the proofs adduced during an Odd Lot Trial actually enhance the Judge's understanding of the effect of the injury on the worker (Lending context, as mandated in *Perez v. Capitol Ornamental Concrete infra*) , enabling a judicial finding of permanent total disability to be rendered with greater detail, specificity, and rooting in the actual context of the worker's life and employment history.

Odd Lot cases can be developed using vocational experts using a variety of criteria, including intelligence, training, and education. The report should be identified on the Pretrial Memorandum, or the Court can bar the theory from being pursued. *Germain v. Cool-Rite Corp.,* 70 N.J. 1 (1976). Once a *prima facie* case is established, the burden is on the Respondent to prove that appropriate employment actually exists for the injured worker. *Zanchi v. S & K Constr. Co*., 124 N.J. Super. 405, 307 A.2d 138, (1971). It should be noted that at the very least, an Odd Lot theory on a serious case can help the Petitioner prove disability within the greater context of his or her actual life, a requirement of *Perez v. Capitol Ornamental Concrete*, 288 N.J. Super. 359 (1996), even if totality is not ultimately the result of the case.

Second Injury Fund Totality

I. History & Purpose: The Second Injury Fund (once known as the One Percent Fund) is a relic of the post WWII period, when social policy dictated that returning, injured veterans should reintegrate into the workforce without barriers. The Fund pre-existed the Americans With Disabilities Act and the Law Against Discrimination by decades. Since employers feared the consequence of hiring a "fragile" or "damaged" employee, the Fund was instituted to carry part of the indemnity paid on permanent total disability cases. Over the years, Fund practices and Fund

liabilities have changed considerably. The philosophical question is whether, given the plethora of State and Federal laws protecting prospective or present workers with physical challenges from discrimination, does the Second Injury Fund act as an adjunct to those laws, or has it become an anachronism? In 2019, is the Second Injury Fund simply a form of inefficient reinsurance for insurance companies and self-insureds?

The Second Injury Fund is intended to foster the award of permanent total disability for the most injured workers, where a pre-existing condition either compensable or non-compensable, combined with a last compensable condition, prevents future employability.

II. The Fund's Defenses

The Funds defenses are statutory:

(a) If the disability resulting from the injury caused by the person's last compensable accident in itself and irrespective of any previous condition or disability constitutes total and permanent disability within the meaning of this Title.
(b) (Deleted by amendment.)
(c) If the disease or condition existing prior to the last compensable accident is progressive and by reason of such progression subsequent to the last compensable accident renders the person totally disabled within the meaning of this Title.
(d) If a person who is rendered permanently partially disabled by the last compensable injury subsequently becomes permanently totally disabled by reason of progressive physical deterioration or preexisting condition or disease.
N.J. Stat. § 34:15-95

Fund benefits are not vested. They do not accrue to the benefit of the Estate of a deceased worker, or to the dependents. Should a beneficiary of Second Injury Fund Benefits perish as a result of the last compensable conditions, a Dependency Petition should be filed on behalf of the Dependent. The practitioner may find the case of *Gierman v. M & H Mach. Co.,* 213 N.J. Super. 105 (1986) helpful insofar as the *res judicata* issue of the compensability of the cause of death may be expeditiously resolved against the Respondent alone.

III. Joinder & Limitations: The actual practice of joinder and pursuit of Second Injury Fund benefits bears discussion as far as one, additional defense: The Fund, by Statute (N.J.S.A. 34:15-95.1) and by Rule (N.J.A.C. 12:235-5.3) is now joined in an action by the filing of a Verified Petition, without Motion, served upon the "Commissioner of Labor". (Actually, in 2019, the Commissioner of Labor and Workforce Development). That Petition should be served within two years of the last payment of compensation by the Respondent. Whether this two year "Statute of Limitations" is jurisdictional, or even mandatory, is open to question, and lately the Fund has resurrected this statute and sought to use it to avoid payment. No reported case has decided this issue. If the Fund takes the position that this time limitations is jurisdictional like the Section 51 SOL on accidents, then it must contend with the fact that Section 51 is only jurisdictional because Section 41 makes it so, and Section 41 does not implicate or refer to the filing of a Verified Petition to join the Second Injury fund, only a Claim Petition. The 95.1 "limitation" carries with it no suggested remedy. It is entirely possible that a Court might simply find that the Fund need not pay benefits prior to the filing of the Verified Petition, under this provision, which is already the law. Moreover, there is no Commissioner of Labor strictly speaking, to whom the Statute refers, any longer, and the Commissioner of Labor and Workforce Development would not be the efficient or proper recipient of service of process for a pleading. Other open questions revolve around whether the time limitation is a feature and reflection of the long-ago discarded practice of bifurcation of Fund cases, and of Motions to Join the Fund, to prevent parties from partially adjudicating a case in which the Fund is expected to participate, thus disadvantaging the Fund in defense of the case. The word "shall" in Section 95.1 in

connection with joinder is ambiguous as to mandate. The Fund is certainly not prejudiced by joinder after two years, particularly if the Petitioner was not medically determined to be permanently, totally disabled prior to that time. Further, the old statute of limitations cases on "revival" of the case after further extra-statutory payments by Respondents, which disapprove of it, came in the context of a truly jurisdictional statute of limitations under N.J.S.A. 34:15-41 and 51. Thus, a voluntary tender or payment of medical benefits after the two years, but while the case is active and formally filed, may defeat the Fund's statute of limitations defense to the extent it actually exists. While no dispositive Administrative or Judicial authority guides us, it can be said that the Fund's position on Statute of Limitations is problematic, at best.

IV. Proving the Fund Case: As to substantive proof of permanent total disability, counsel is well-advised to secure reports which incorporate a complete and accurate medical and vocational history, and to provide medical experts with all prior evaluations, treating records, and personal medical records, vocational history, and to ask evaluating experts to address the anticipated Second Injury Fund defenses:

1. Is the last compensable accident solely responsible for the inability to work;
2. Is there a progressive or degenerative condition which, by its own progress subsequent to the last compensable injury, would account for the Petitioner's inability to work;
3. That the Petitioner did not retire of his/her own design or volition, as opposed to the last compensable accident. (What the Fund calls a "retirement case.")

Meeting the first Fund defense is a matter of preparing your case. A time line of your client's life is the first tool in proving Fund totality. Try to chart a downward course in activities, both

vocational and personal, over a period of time. Render graphically your client's downhill slide, from the ten-year old fractured ankle that ended his skating, to his cardiac surgery which ended boating or running, to the last compensable accident. Visit your client's home on a total disability case, and do your House, M.D. impression: Investigate the mantle for vacation pictures, trophies, and mementos of more active days. Visit the garage or basement, to see an abandoned workshop or landscaping equipment, abandoned after a prior illness or injury. Ask questions of family, because often, the injured Petitioner is proud or forgetful of pre-illness, pre-injury history.

If the Respondent is in a position to concede totality, and rely upon the Fund, the Respondent's forensic defenses, as in personnel file, performance evaluations, and medical reports may be persuasive in convincing the Fund of prior functional loss. Ask the Respondent if their records reflect time lost for non-compensable conditions, accommodations to the Petitioner, or medical discovery which can be used against the Fund.

Overcoming the Fund's second defense may be as simple as acquiring a narrative report from a personal physician, an internist, or an endocrinologist as to the stability of Petitioner's underlying medical conditions, and their lack of effect on the ability to work. Often, diabetes, hypertension, apnea, and psychiatric conditions are alleged as subsequent progressions by the Fund. Remember that the Fund does not retain their own experts. They must either rely upon Respondent's experts, or cross-examination of your own, in order to defend their cases. Once again, coordination with Respondent's counsel on the clear permanent total case can be rewarding for both sides.

The final Fund defense, not enumerated in the Statute, but nonetheless daunting, is the "retirement" defense. Challenging this defense will require a thorough familiarity with your

client's pension, social security status, financial status, liabilities, and aspirations. Prepare a financial statement for your older client, particularly one with a vested pension. Be prepared to elicit a portrait of a worker who has not met his retirement preparation goals, secondary to the last compensable injury or condition. Identify the "steps" in the pension, and whether there was an additional, beneficial step that the premature retirement cost the worker. Did they lose lifetime medical coverage because of the interruption of their tenure? Did they have a financial plan, prior to the injury? Have they had to divest IRA, SEP, Pension, or property, secondary to their untimely departure from the labor market? What was their PLAN, prior to injury? Objective evidence of accelerated and involuntary retirement is the best parry for the Fund's retirement defense.

V. Respondent's Defenses to Permanent Total Disability.

It is far more difficult for a Respondent to defend a Second Injury Fund permanent total disability case than a straight total disability case. The reason is not, ironically, the size of the case. The arithmetic of permanent total disability, including the reverse-offset, life expectancy, existence of dependents to receive vested and unvested benefits, issues of rate, and the dynamics of minimizing exposure by conceding totality and implicating the Second Injury Fund---all of these variables present a challenge for the practitioner.

The first decision for any Respondent faced with a palpable claim for permanent total disability is whether to defend the claim of totality, or to divert attention to the Second Injury Fund. This can be accomplished through discovery, investigation, or the thorough preparation of evaluating medical experts. Special attention should be paid to the queries addressed to DME's, and whether pre-existing non-compensable conditions, if serious and non-overlapping, are to be addressed in the report.

Investigation also presents a dilemma. As we know, not every *sub rosa* surveillance reveals helpful material. Quite often, the portrait is of a sedentary Petitioner, even one with significant difficulties in ambulating or self-care. If totality is a foregone conclusion for Respondent, but the Second Injury Fund is resistant to that conclusion, unreasonably, it may be beneficial to reveal video which cuts against the Fund's view of the case. This is a case-by-case consideration, guided by whether the video proves pre-existing functional losses.

VI. The Total Disability Hypothetical

John Smith is a 58 year old laborer, who has worked at a union job, loading and unloading freight on a dock in Newark. He has an eleventh grade education. He is 6'2 and weighs 370 pounds.

He has worked for the company for twenty-nine years, one year short of full vesting of his maximum pension. For twenty-five of the twenty-nine years, he also drove a bread truck on an independent route, sharing the job with his three sons as they came of age. His sons had the ability to drive, but had no business sense, and they could not continue the route after John had heart surgery five years earlier. He sold the route at a loss.

Five years before the last compensable accident in 2016, John became short of breath, and finally saw a doctor. He missed no time from work during his illness, until he underwent an angioplasty for 93% blockages in two major coronary arteries. Pulmonary function studies done in 2016, in connection with his cardiac care, showed that his predicted FVC was 74%, his FEV1 was 65% of predicted, and his FEV1/FVC ration was 69%.

John has a significant orthopedic history. In 2009, he underwent an L5-S1 fusion after a work injury, and received an award of 35% of partial total, orthopedic and neurological. He reopened the case in 2013, and raised the award to 40%. He had a non-compensable hip injury, resulting in a total hip replacement on the left side in 2013. He had left shoulder rotator cuff surgery in 2014, with an award of 22.5% of partial total. He had unrelated right shoulder rotator cuff surgery in 2015, with the addition of a proximal biceps tendon repair on the right. He missed four months from work on the second surgery, and only three months on the first shoulder surgery. He has a remote history of open left medial and lateral meniscus surgery in 1984, after a sports injury. This proceeded to osteoarthritis, controlled by frequent viscosupplementation injections in his left knee.

Despite these significant problems, John continued to work on the loading dock, eating over the counter anti-inflammatories like candy, which caused chronic stomach problems, treated with over-the-counter medications like Mylanta. On June 16, 2016, John picked up a large drum on the loading dock, and balanced it poorly, causing a pop and a burning sensation on the inside of his elbow. He reported it to his foreman, who knew John was a tough customer, and both shrugged it off. The next day and the day after, he worked virtually with one arm. He went to his family doctor, who refused to treat him. His employer sent him to Doc-in-a-Box, where he was x-rayed and diagnosed with a biceps strain. After three weeks, he was sent to an orthopedist, who

clinically diagnosed a distal biceps rupture, and advised he was too late for a conventional repair. After review by a Medical Director for the carrier, which took a month, he was finally approved to undergo a rather heroic procedure of grafting cadaver tissue. Unfortunately, the procedure did not go well, and Mr. Smith suffered a neuropraxia, with permanent weakness of grip and loss of dexterity to his non-dominant hand.

Mr. Smith, as a staunch union employee, returned to his position, although he was only cleared by his surgeon to lift 10 pounds with his non-dominant hand. The employer sent him for an FCE, which cleared him to lift 35 pounds with the injured arm and hand, but a careful reading of the conclusion shows that the test had to be terminated because of breathing difficulty and back pain, before it was complete. Moreover, no job description was ever provided the FCE examiner. Curiously, the FCE was never sent to the treating doctor, and none of the evaluating physicians commented or relied upon it.

Mr. Smith showed up for work after the FCE, but sat in a chair for about six months, doing no work, because of his restrictions. This was destructive to the morale of other workers, and his boss told him to punch in, and then sit in his car in the parking lot until the end of shift for the next five months. He was then terminated, having fully vested his pension. He applied for and received Social Security Disability on his first application, without reconsideration or appeal.

Mr. Smith was examined by Dr. Becanweis for Petitioner. He was estimated at 45% of the hand, and 40% of the arm, but total overall. Dr. Walrus, an internist, correlated all of the internal and pulmonary conditions, and estimated an unrelated 50% of total for pulmonary and 40% for cardiac, and total overall. The Respondent ordered an exam from Dr. Freddy Mercury, who estimated 7.5% of the arm and 2.5% of the hand and admitted that medicine is both an art and a science. The Petitioner received SSD, and no offset is possible.

A Second Injury Fund Petition was filed by the Petitioner's counsel. You appear at a conference. What are the issues? What is the Petitioner's Trial Strategy? What is the Respondent's Trial Strategy? What is the position of the Fund? Is the FCE useful? For whom? How will it be introduced? What are the objections? What should be the outcome? What are the issues the Fund will raise? How should Respondent address them? How should Petitioner address them?