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Evaluating permanent partial disability in the wake of Section 8.1(b)—Has anything changed?

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As we all know by now, a number of changes were made to the Illinois Workers' Compensation Act by way of the 2011 Workers' Compensation "reform" bill of P.A. 97-18. While the effective date of P.A. 97-18 is generally June 28, 2011, various provisions did not take effect until September 1, 2011. One such provision includes addressing the changes made by P.A. 97-18 with respect to permanent partial disability evaluations.

Workers' compensation practitioners have grappled with trying to understand the §8.1b(a) factor, which, according to the most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment," is one of five factors in determining permanent partial disability. 820 ILCS 305/8.1b(a). Section 8.1(b) applies to accidents that occur on or after September 1, 2011. Thus, when assessing permanent partial disability for accidents occurring on or after September 1, 2011, the Act identifies several criteria the Arbitrator *shall* consider, including:

- (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any

other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

- (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order. 820 ILCS 305/8.1b.

The Act states that no single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained by the Arbitrator in a written order.

When the said Amendments were passed, time would tell how the Arbitrators and Commissioners would apply section 8.1(b) when assigning permanent partial disability. At the time of this writing, we are over two years since the legislative mandate requiring the Commission to incorporate the AMA Ratings when evaluating permanent partial disability. Fortunately, Arbitrators and Commissioners have now issued more than a dozen decisions analyzing the five factors of permanent partial disability under Section 8.1b which has given practitioners some direction on how Section 8.1(b) is being interpreted and applied. The following is a synopsis of the reported cases, broken down by each factor listed in Section 8.1(b).

I. The reported level of impairment pursuant to subsection (a)

Frederick Williams v. Flexible Staffing, Inc., 11 WC 46390: Respondent's IME physician, Dr. Mark Levin provided an AMA disability rating noted to be four percent of the whole person or six percent upper extremity impairment. The arbitrator was critical of Dr. Levin's AMA rating, claiming that he did not include loss of range of motion or any other measurements that establish the nature and extremity of the impairment as required by Section 8.1(b). The arbitrator noted that Dr. Levin did not consider a grade modifier for clinical studies and also failed to include documentation regarding how he determined the functional history modifier.

Rumans v. City of Peoria, 12 WC 000663: The decision by Arbitrator Fratianni specifi-

cally noted that Dr. Nord did not perform his evaluation in accordance with the AMA impairment guidelines as set forth in the Sixth Edition. Arbitrator Fratianni further noted that Dr. Nord did not use a lower limb questionnaire as set forth in Appendix 16A to the Sixth Edition, but rather, used his own intake questionnaire. She also questioned Dr. Nord's finding of petitioner's impairment based on loss of use to the person as a whole (1%), despite that fact that the injury was to the foot. Arbitrator Fratianni noted that under the Illinois Workers' Compensation Act, petitioner's disability should have been based upon the foot and not person as a whole.

Practice Pointers: When analyzing an AMA report, refer to pages 20-30 of the Guides for guidance.

II. The occupation of the injured employee

Shawn M. Dorris v. Continental Tire, 11 WC 46624: The arbitrator noted the petitioner returned to his regular position and also, that he held a "labor intensive job." The arbitrator found "that petitioner's permanent partial disability will be greater based on this regard than an individual who performs lighter work."

Timothy Brown v. Con-Way Freight, 12 WC 4657: The arbitrator noted the petitioner returned to his usual employment.

Rumans v. City of Peoria, 12 WC 000663: The petitioner returned to work as a police officer. Due to the period of temporary total disability, the petitioner was unable to continue working as a part-time security guard for Hy-Vee.

Lena Terry v. Caterpillar, 12 WC 016355: Petitioner changed positions to a lighter duty position as an inventory clerk. The arbitrator also noted that the petitioner chose to change positions and was not restricted.

Fassero v. UPS, 12 WC 17291, No. 13 I.W.C.C. 0858: Petitioner was a UPS delivery driver. Petitioner did not provide evidence of his specific job activities or whether he worked in a light, medium or heavy physical demand level. Therefore, arbitrator only gave some weight to this factor.

Practice Pointers: As evidenced by the above cases, Arbitrators generally assess whether: (1) petitioner has returned to

pre-injury position (i.e. change in position or job duties) and/or (2) the physical demand level of petitioner's position with Respondent. Cases are consistent in that the greater the physical demand level, the greater the weight when assessing permanent partial disability.

III. The age of the employee at the time of the injury

Frederick Williams v. Flexible Staffing, Inc., 11 WC 46390: The petitioner was 44 years old at the time of the accident. Since the arbitrator concluded that he was somewhat younger, she felt that his disability would be more extensive than that of an older individual because petitioner would have to live with his condition longer.

Michael W. Manion v. Old National Bank: At the time of the accident, the Petitioner was 61 years old. The arbitrator noted that at age 61, the Petitioner may take longer to fully recover than a younger worker.

Martha Mansfield v. Ball Chatham Community School District #5, 12 WC 14648: The arbitrator referenced that the petitioner was 58 years old at the time of her injury. The arbitrator's decision specifically noted that there was "no testimony concerning how long she expected to continue to work."

Practice Pointers: There seems to be two views of interpreting the impact of the worker's age on permanent partial disability: (1) the younger the worker, the longer the work life, the longer the worker will have to live with the condition, and therefore, a higher permanent partial disability award; and (2) the older the worker, the slower the healing process, higher permanent partial disability. Using this approach, one could also argue that the younger the worker, the better chances of making a successful medical recovery, the lower the permanent partial disability. CAUTION: Arbitrator(s) may require more evidence than merely stating Petitioner's age in proving impact of the same on permanent partial disability.

IV. The employee's future earning capacity

Cheryl Sprague v. Dickey John Corporation, 12 WC 030146: The arbitrator found that there was a limitation to her future earnings capacity. Petitioner returned to her regular job for 14 months and then proceeded to

retire. Petitioner testified that her decision to retire was based on both her new hand symptoms and spinal stenosis.

Michael Harrison v. Village of Forest Park, 11 WC 048412: Prior to the injury, petitioner worked 12-22 hours of overtime each pay period. He was paid \$57.00 per hour for each hour of overtime. After the work injury, petitioner only worked approximately six hours of overtime each pay period. Petitioner testified that he no longer volunteered for additional overtime. Based on his hourly rate, the arbitrator found that the petitioner suffered lost earnings in the range of \$600-\$1,800 per month and would continue to experience this diminution in his earning capacity into the future.

Robert Griffin v. Caterpillar, 11 WC 040321 (P. 27): Future earning capacity was limited. Petitioner, a machinist, chose not to bid for more physically demanding or higher paying positions because of his knee injury and did not volunteer for overtime.

Heath Gutzler v. Continental Tire, 11 WC 046999 (P. 27): The arbitrator held that petitioner experienced a diminished earning capacity as prior to the accident, he worked 4-12 hours of overtime per week, but now only takes overtime when scheduled or required to do so.

Practice Pointers: The central inquiry is whether petitioner sustained a diminishment in his earning capacity due to the work injury.

V. Evidence of disability corroborated by the treating medical records.

Michael Arscott v. Con-Way Freight, Inc., 12 WC 3876: The petitioner was placed at MMI and released for regular duty work on August 7, 2012. At arbitration, the Petitioner testified that he was able to return to all his regular job duties and continued to perform a home exercise program. The Petitioner testified that he occasionally had to take over-the-counter pain medication, but did not need a knee brace. The arbitrator noted that petitioner "describes some residual symptoms in the knee, which are generally consistent with the surgery performed."

Timothy Brown v. Con-Way Freight, 12 WC 4657: The surgeon released petitioner to return to work at full duty on April 11, 2012,

noting only minor ache, excellent range of motion, and strength against resistance. At arbitration, the Petitioner testified that he had some concerns about the strength and endurance of his shoulder, but acknowledged that he was able to do his regular job. The arbitrator indicated the petitioner continued to complain of weakness and fatigue in the shoulder, with occasional swelling and pain. According to the arbitrator, "While the weakness is not well borne out in the records, the occasional discomfort described is consistent with the undisputed surgery."

Robert Todd Riley v. Con-Way Freight, Inc. 12 WC 11083: Petitioner's surgeon released him to full duty on July 9, 2012. On August 7, 2012, petitioner was placed at maximum medical improvement, with full range of motion. The arbitrator noted that the petitioner claimed some stiffness and achiness in his right knee, along with some weather sensitivity and difficulty climbing ladders. According to the arbitrator, "These complaints are generally consistent with the surgery reflected in the medical records of Dr. McIntosh."

Shawn M. Dorris v. Continental Tire, 11 WC 46624: Petitioner was released by his surgeon on May 7, 2012. At that time, petitioner claimed that he was only 80 percent better, but he exhibited good range of motion and grip strength. At arbitration, petitioner testified that he continued to have left wrist and forearm pain. Further, petitioner explained that he had lost strength and range of motion in his hand and wrist. Petitioner acknowledged that he was able to return to his regular position, but claimed he had to alter his work activities to compensate for his left hand. The arbitrator noted the Petitioner's medical records established a loss of grip strength and limited range of motion. Further, the Petitioner testified that he continued to have left wrist and forearm pain.

Curtis Oltmann v. Continental Tire of the Americas, LLC, 12 WC 11777: On February 29, 2012, the Petitioner reported to his treating physician that he was feeling "a lot better" and he was released to return to full duty at maximum medical improvement. At that time, the treating physician indicated the Petitioner had good range of motion, and suggested that any residual symptoms

would improve over time. At arbitration, the Petitioner testified that he had returned to his regular position, but still had some discomfort in his left wrist. *The arbitrator noted the Petitioner continued to complain of "minor residual symptoms in the wrist." There is no indication these complaints were substantiated by medical records.*

Practice Pointers: Under this factor, an objective standard was typically applied and petitioner's subjective complaints should be corroborated by the medical records. However, the application of the same varied. Some cases corroborated petitioner's subjective complaints with the type of condition and nature of treatment, while other cases strictly analyzed physical findings based upon the treating records.

In sum, it is clear that while the factors as set forth in section 8.1(b) of the Act provide uniformity when assessing permanent partial disability, the interpretation and the application of these factors varies. Practitioners must be aware of the same when preparing for hearing and/or assessing settlement. Time will tell whether the interpretation and application of these factors will also provide uniformity going forward. ■

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