ODD LOT PERMANENT TOTAL DISABILITY

INTRODUCTION

Section 8(f) of the Workers' Compensation Act provides in part:

> In case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of total permanent disability as provided in subparagraph 18 of paragraph (e) of this Section, compensation shall be payable at the rate provided in paragraph 2 of paragraph (b) of this Section for life. (820 ILCS 305/8(f))

According to this Section, permanent total disability benefits are due in two distinct kinds of cases. One kind are statutory permanent total disability cases under Section 8(e)18 of the Act. Under that Section, permanent and complete loss of two specifically designated body parts (for example both hands, a hand and a foot, both eyes, etc.) entitles the worker to permanent total disability benefits for life.

The other cases in which permanent total disability benefits are payable for life are cases of "complete disability, which renders the employee wholly and permanently incapable of work." These kinds of PTD cases fall into one of two categories: Medical and Odd Lot.

PTD BASED ON MEDICAL DISABILITY

The clearest and most obvious way to establish permanent total disability as a result of an injury is through direct medical evidence. A Petitioner is entitled to permanent total disability benefits if there is medical proof to establish that he cannot work (Continental Drilling Co. v. Industrial Commission of Illinois, 155 Ill.App.3d 1031, 508 N.E.2d 1246 (5th Dist. 1987)). Additionally, a Petitioner is entitled to permanent total disability benefits if evidence of his injury and condition show that he is "obviously unemployable" (Courier v. Industrial Commission, 282 Ill.App.3d 1, 668 N.E.2d 28 (5th Dist. 1996)). Under these circumstances a disability finding will depend on strictly medical evidence. Opinions or testimony from treating physicians or competent evidence that the Petitioner is medically disabled from employment is sufficient to establish PTD.

ODD LOT DISABILITY

Significantly, both the Statute and precedent clearly establish that PTD benefits are not wholly dependent on medical evidence alone. The Statute provides those benefits when there has been an injury which renders a Petitioner "wholly and permanently incapable of work." This provision of Section (f), and the cases that have interpreted it, were recently summarized in Ameritech Services, Inc. v. Illinois Workers' Compensation Commission, 389 Ill.App.3d 191, 203, 904 N.E.2d 1122 (1st Dist. 2009):

> "In Ceco Corp. v. Industrial Commission, 95 Ill.2d 278, 286-87, 447 N.E.2d 842 (1983), the Supreme Court held that:
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> > 'An employee is totally and permanently disabled when he 'is unable to make some contribution to the work force sufficient to justify the payment of wages' [citations]. The claimant need not, however, be reduced to total physical incapacity before a permanent total disability award may be granted [citations]. Whether a person is totally disabled when he is incapable of performing services except those for which there is no reasonable stable market [citation].'
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> If, as in this case, a claimant's disability is not so limited in nature that he is not obviously unemployable, or if there is no medical evidence to support a claim of total disability, to be entitled to PTD benefits under the Act, the claimant has the burden of establishing the unavailability of employment to a person in his circumstances; that is to say he falls into the 'odd-lot' category. Valley Mould & Iron Company v. Industrial Commission, 84 Ill.2d 538, 546-47, 419 N.E.2d 1159 (1981); AMTC of Illinois, Inc. v. Industrial Commission, 77 Ill.2d 482, 490, 397 N.E.2d 804 (1979). The claimant can satisfy his burden of proving that he falls into the odd lot category by showing diligent but unsuccessful attempts to find work or by showing that he will not be regularly employed in a well-known branch of the labor market. (Westin Hotel v. Industrial Commission, 272 Ill.App.3d 325, 865 N.E.2d 342 (2007).

There are two ways of proving this kind of odd lot permanent total disability. The first is by introducing evidence that the Petitioner cannot be regularly employed in a well-known or stable branch of the labor market. The second way is to show a diligent but unsuccessful job search. (Economy Packing Company v. Workers' Compensation Commission, 387 N.E.2d 283, 901 N.E.2d 915 (1st Dist. 2008)).

In considering odd lot cases, Courts often discuss the kind of evidence that must be considered. According to Keystone Steel & Wire Rope v. Industrial Commission, 85 Ill.2d 178, 421 N.E.2d 918, the Petitioner is entitled to permanent and total disability benefits if he can "perform no services except those which are so limited in quantity, dependability, or quality that there is no reasonable stable labor market for them." In determining whether a claimant falls within an odd lot category for purposes of an award of PTD benefits, the Commission will consider the extent of the claimant's injury, the nature of his employment, his age, experience, training, and capabilities (AMTC of Illinois, Inc., 77 Ill.2d 482, 489, 397 N.E.2d 804 (1979), Keystone Steel & Wire Rope v. Industrial Commission, 85 Ill.2d 178, 421 N.E.2d 918).

PROVING ODD LOT WITH MEDICAL EVIDENCE

Because odd lot cases are based on evidence of unemployability, evidence should address both the medical condition at issue and the labor market in question. In Ameritech Services, Inc. v. Illinois Workers' Compensation Commission, 389 Ill.App.3d 191, 904 N.E.2d 1122 (1st Dist. 2009), the treating physician opined that the Petitioner could no longer perform his previous job as a result of restrictions. The Petitioner introduced evidence from a vocational rehabilitation expert who opined that because of the medical restrictions placed upon the claimant, the constant pain that the claimant experienced, and the increase in his pain level when he performed activities, the claimant would not be a candidate for any of the jobs which were identified in a labor market survey. The vocational expert testified that it was unlikely that an employer would hire the claimant over an able-bodied candidate, and if he was hired the claimant would not be able to continue working. In this case, the Petitioner offered both medical evidence and labor market evidence.

The Court noted that once a Petitioner initially establishes that he falls into the odd lot category, the burden shifts to the Respondent to show that some kind of suitable work is regularly and continuously available to the claimant. In the Ameritech Services case, the employer offered no such evidence and did not introduce the testimony of vocational rehabilitation experts. The Respondent claimed to have offered the Petitioner employment within his restrictions, but the Commission concluded that the job offer made by the Respondent to the Petitioner was actually not within his restrictions. This demonstrates the importance of medical evidence which defines the injury, condition, and restrictions at issue.

Medical evidence about the nature of a workers' condition such as pneumoconiosis is alone not sufficient to support an award of permanent total disability benefits absent testimony that the condition at issue is disabling (Old Ben Coal v. Industrial Commission, 361 Ill.App.3d 812, 634 N.E.2d 285 (5th Dist. 1994)).

The importance of evidence of impairment is again demonstrated by South Import Motors, Inc. v. Industrial Commission. The Petitioner had suffered a closed head injury. Testimony from a number of doctors established that Petitioner suffered from cognitive and memory deficits. Some doctors opined that the Petitioner could perform some kinds of work. Other doctors testified that the Petitioner was mentally unable to perform steady work. The Supreme Court affirmed an award of permanent total disability benefits, noting the weight of some of the lay testimony introduced into evidence: "The claimant and his wife testified to his inability to work after the accident because his mental ability was impaired." (South Import Motors, Inc. v. Industrial Commission, 52 Ill.2d 485, 490, 288 N.E.2d 373 (Ill. 1972)). In this case, lay testimony helped establish the Petitioner's restrictions.

In Nex Separate, Inc. v. Industrial Commission, 348 Ill.App.3d 893, 810 N.E.2d 54 (1st Dist. 2004), the Petitioner was 85 years old, had a high school education, and had worked in a delicatessen from 1947 until the day of his injury. He could stand for five to ten minutes without using a walker and 15 to 20 minutes with a walker. The treating physician testified that while the Petitioner might be able to do sedentary work, transporting the Petitioner to and from work would present a problem and that Petitioner was not a good candidate for vocational rehabilitation. The Appellate Court's decision points out the importance of age, education, and experience:

"Taking into account the claimant's injury, his age, education, work history, and the opinions of the treating physician, we believe that there is sufficient evidence in the record to support a conclusion that the claimant is incapable of performing any services for which a stable labor market exists. Further, (Respondent) failed to introduce any evidence to show that the claimant was capable of engaging in some type of regular and continuous employment" (348 Ill.App.3d at 409).

A different result obtained in Schmidgall v. Industrial Commission, 268 Ill.App.3d 845, 644 N.E.2d 1206 (4th Dist. 1994), noting that an employee is totally and permanently disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages (368 Ill.App.3d at 850). While the employee need not be reduced to a state of total physical or mental incapacity or helplessness, the Court noted that the inability to do strenuous manual labor also does not necessarily make one permanently and totally disabled. The ability to perform sedentary work is a factor mitigating against the finding that one is permanently and totally disabled.

Another factor considered by Courts is whether or not the Petitioner can work without endangering himself or others. In Yeager v. Industrial Commission, 232 Ill.App.3d 936, 598 N.E.2d 263, (4th Dist. 1992), the Court noted that medical evidence was conflicting, but evidence regarding the Petitioner's work capacity was consistent. The Petitioner worked construction and as a result of his injuries, suffered from tremors and vertigo. Witnesses testified that those conditions prevented him from working on scaffolding or at any height, and his tremors kept him from safely using tools. In reinstating an award for permanent total disability, the Appellate Court stated "The Circuit Court erred in substituting its judgment for that of the Commission" (232 Ill.App.3d 42).

In Old Ben Coal Company v. Industrial Commission, 261 Ill.App.3d 812, 634 N.E.2d 285 (5th Dist. 1994), the Court noted that while there is no per se rule that retired workers are not entitled to permanent total disability benefits, the fact that a worker is retired or has withdrawn from the work force is a factor to be considered when medical evidence does not establish that the Petitioner is permanently and totally disabled.

Physician testimony that a Petitioner is unable to function in a work environment, or cannot sustain employment as a result of a medical condition, or has a disabling condition that responds poorly to treatment, all can be sufficient to support

odd lot permanent total disability (BMS Catastrophe v. Industrial Commission, 245 Ill.App.3d 359, 614 N.E.2d 473 (4th Dist. 1993). Testimony from a credible claimant, physician, and medical examiner that the condition causes severe workplace impairment and consequent disability can also be sufficient to meet the burden of proof (Old Ben Coal Company v. Industrial Commission, 217 Ill.App.3d 70, 576 N.E.2d 890 (5th Dist. 1991).

PROOF WITH VOCATIONAL AND REHABILITATION EVIDENCE

As noted above, in addition to medical evidence, odd lot cases also require labor placement evidence. There are several means of presenting evidence that as a result of an injury a worker is unable to maintain steady employment in a specific labor market. With sufficient and adequate foundation, a physician can testify that the Petitioner's injury and subsequent disability are such that he is prevented from engaging in work or in meaningful vocational rehabilitation (Illinois-Iowa Blacktop, Inc. v. Industrial Commission, 180 Ill.App.3d 885, 536 N.E.2d 1008 (3rd Dist. 2007). One can offer testimony from a rehabilitation counselor that the claimant is not a candidate for vocational rehabilitation, or that no stable labor market existed for him. Additionally, a physician can offer opinions based on a functional capacity evaluation (ADD C-E Services v. Industrial Commission, 316 Ill.App.3d 745, 737 N.E.2d 682 (5th Dist. 2000). Similarly, a claim that Petitioner is permanently and totally disabled can be rebutted with evidence from a treating physician that the Plaintiff can work at light-duty work, or from a rehabilitation or vocational specialist that the claimant is qualified to do some types of work (Courier v. Industrial Commission, 282 Ill.App.3d 1, 668 N.E.2d 28 (5th Dist. 1996).

A rehabilitation service provider, vocational rehab. vendor, or rehabilitation counselor all can offer testimony that a claimant is not placeable in the labor market (Reliance Elevator Company v. Industrial Commission, 309 Ill.App.3d 387, 723 N.E.2d 326 (1st Dist. 1999). In some cases, a physician can offer an opinion that a Petitioner is disabled from reasonably stable work under Social Security standards and that appropriate sedentary work is unavailable (City of Waukegan v. Industrial Commission, 298 Ill.App.3d 1086, 700 N.E.2d 687, Ill.App.2d 1998).

Once a Petitioner meets the burden of proving that there is no reasonably stable job for him in the applicable labor market, and the burden is shifted to the Respondent to prove that work

is available, it may not be sufficient for the Respondent to offer proof that they made a job offer to the claimant. A sham job offer designed to circumvent workers' compensation liability is not sufficient (Reliance Elevator Company v. Industrial Commission, 309 Ill.App.3d 987, 723 N.E.2d 326 (1st Dist. 1999).

Significantly, the Industrial Commission is entitled to rely largely on the Petitioner's own testimony in determining if he is permanently and totally disabled. In Heritage House v. Industrial Commission, 219 Ill.App.3d 19, 578 N.E.2d 1016 (4th Dist. 1991), the Appellate Court affirmed a finding of permanent total disability based in large part on the Petitioner's own testimony as to the nature and extent of the pain that she experienced while performing her job as a waitress. The Court specifically noted that continuing pain due to an injury and the inability to obtain employment justifies a finding of permanent and total disability (Goldblat Brothers v. Industrial Commission, 78 Ill.2d 62, 67-68, 397 N.E.2d 1387 (1979)).

> Under the evidence introduced, the Commission could find that the claimant was incapacitated to the point that she was totally unable to secure permanent employment (219 Ill.App.3d at 24).

Again, once a Petitioner makes a prima facie case of odd lot total disability, the burden shifts to the Defendant to prove that work is available. It would serve an employer well to introduce evidence that a job is available to the Petitioner that she can perform without endangering her health (Kropp Ford v. Industrial Commission, 85 Ill.2d 226, 422 N.E.2d 613, Ill. 1981)).

JOB SEARCH

A Petitioner can establish permanent total disability by offering evidence that he is conducting a reasonable and thorough job search and has been unable to secure employment. A claimant ordinarily satisfies his burden of proving he is not capable of obtaining gainful employment by showing that work is not available. This is done with evidence of a diligent but unsuccessful attempt to find work, or that based upon his age, experience, training, and education he is unable to perform any but the most unproductive tasks for which no stable market exists. Once the claimant presents job search evidence, the burden shifts to the employer to present evidence that some kind of work is regularly and continuously available to that person.

In Shelton v. Industrial Commission, 267 Ill.App.3d 211, 641 N.E.2d 1216 (5th Dist. 1994), another pneumoconiosis case, the Court addressed the proof necessary to establish a diligent but unsuccessful job search. Although the Petitioner stated that he retired because he could no longer perform the work, he offered no evidence that he conducted a search for employment following his retirement or that he was turned down for employment or employment opportunities as a result of his disability.

In Alano v. Industrial Commission, 282 Ill.App.3d 531, 668 N.E.2d 21 (1st Dist. 1996), the Court addressed the question of when a claimant meets his burden of proof and when the burden shifts to the Respondent. In that case, the claimant argued that merely proffering medical evidence of permanent disability was sufficient to shift the burden to the employer. The Petitioner argued that because his doctor testified that he was totally disabled, that was sufficient to shift the burden to the employer to present evidence that some kind of work was regularly and continuously available. After reviewing the applicable facts and case law, the Court concluded "that merely proffering medical evidence of permanency is insufficient to shift the burden. The Commission must make a finding of permanent and total disability based upon the proffered evidence. In each case cited by the claimant, unlike in the matter sub judice, the Commission made a finding that the claimant was permanently and totally disabled based upon the proffered medical evidence of permanency which the Commission specifically found credible. Electro-Motive Division GMC v. Industrial Commission, 1992, 240 Ill.App.3d 768, 608 N.E.2d 162."

In Keystone Steel & Wire Company v. Industrial Commission, 85 Ill.2d 178, 421 N.E.2d 918 (Ill. 1981), a Respondent who has previously been ordered to pay permanent total disability benefits filed an 8(f) Petition to modify the earlier award. The Petitioner, acting as an independent contractor, was paid by another company for work including painting, replacing floor tile, moving steel lockers, and putting sealant on the roof of an office building. The Respondent challenged the Commission's decision that in order for an award of permanent and total disability to be modified it was necessary to prove that the employee had engaged in regular or steady employment involving physical labor over an extended period of time for a particular number of hours each day. The Respondent also objected to the Commission's finding that further proceedings could be had when it was established that the Petitioner had been offered steady

employment within his physical and mental capabilities, skills and training or has been offered and rejected an appropriate program of vocational rehabilitation. The Commission found that "evidence which shows that an employee has been able to earn occasional wages or to perform certain useful services neither precludes a finding of total disability nor requires a finding of only partial disability. A person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists." In an informative but summary opinion, the Supreme Court concluded that the Industrial Commission correctly construed the law of total disability.

STRATEGY FOR APPROACHING THE PERMANENT TOTAL CASE SECTION

The best strategy for approaching non-statutory permanent total disability cases is to cast a broad net. Start by assembling medical evidence. Get all the records. Take a deposition of a knowledgeable treating physician who by experience and expertise is competent to offer disability or work capacity opinions. Remember that in some cases it may be sufficient for a treating physician to testify that the Petitioner cannot return to his previous job, and that as a result of other limitations he is not a candidate for vocational rehabilitation (Nex Separate, Inc. v. Industrial Commission, 248 Ill.App.3d 893, 810 N.E.2d 54 (1st Dist. 2004)). In other cases, physician testimony alone may not be enough (Alano v. Industrial Commission, 282 Ill.App.3d 531, 668 N.E.2d 21 (1st D. 1996)).

If medical evidence does not establish that the Petitioner is medically incapable of work, flush out that evidence for details. Obtain detailed medical evidence about the Petitioner's limitations. Determine what physical activities he simply will not be able to perform. Find out how long he can sit or stand. Determine if there are cognitive incapacities. In summary, fully develop the medical testimony and evidence and establish the full nature of his abilities and limitations.

Use and rely on the same kind of information that a physician, vocational therapist, or vocational rehabilitation expert would rely on. If possible, secure a functional capacities evaluation and question the treating doctor about the medical and practical effects of the limitations described therein. By obtaining definitive evidence of what activities the Petitioner can and cannot perform, you actually will be serving all parties. Detailed restrictions and limitations will aid all parties in determining whether the Petitioner can be

placed in a job, and if she can't be, it will help to explain to the Commission why she is unemployable.

Once detailed restrictions are established, encourage the Petitioner to engage in his own job search. Detailed job search evidence is relevant and effective in any kind of PTD case. If the Petitioner finds work that he can perform, that ultimately will be the best result. Work is better than non-work, and if the Petitioner is earning less at a new job, pursue a wage differential award. As always, a good faith and truthful effort usually is reflected by the evidence available at the end of the day. A Petitioner who really isn't trying to find work won't be able to present as compelling and credible a case for a failed job search. Most importantly, the Petitioner should keep detailed records of all of his efforts. He should note what jobs he applied for, what he did to apply for them, and any other efforts that he undertook to follow-up with that job opportunity.

Significantly, the burden to pursue a job search can also be imposed upon the Respondent. If the Petitioner is not working and has restrictions the employer cannot accommodate, demand that the employer provide vocational rehabilitation. Know the Petitioner can never present evidence of a failed job search as compelling as evidence of the Respondent's failed attempt to find the Petitioner a job through a vocational rehabilitation program.

Carefully review Part 7110 of the Rules Governing Practice Before the Industrial Commission (50 Ill. Admin. Code, Section 7110). Under Section 7110.10 of the Rules, an employer "shall prepare a written assessment of the course of medical care, and if appropriate, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which he has engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever occurs first."

If the Petitioner cannot return to work or has been totally incapacitated for more than 120 continuous days, demand a vocational rehabilitation report. Note that the Rules specifically provide for a form, furnished by the Industrial Commission, upon which a rehabilitation plan is to be prepared.

If the Respondent does not provide a rehabilitation plan, or in accordance with that plan does not provide the actual

vocational rehabilitation called for, set the matter for hearing. Present evidence consistent with the provisions of Section 7110.10(a) above and seek a ruling that the Petitioner requires maintenance and vocational rehabilitation. Remember, a Petitioner must ask for vocational rehabilitation before the Commission can award it.

In addition to medical testimony, evidence of functional capacities and limitations, the Petitioner's own job search, and vocational rehabilitation, consider the use of an expert. Confer with a certified vocational rehabilitation consultant, and submit to them the detailed evidence of the Petitioner's limitations as noted above. Outline for that rehabilitation counselor job search efforts that have been undertaken, as well as vocational rehabilitation efforts that are in place. Secure from that expert an admissible, competent opinion that given the Petitioner's age, training, and experience there are no reasonably stable employment opportunities in the Petitioner's labor market.

CONCLUSION

The important thing to remember about odd lot cases is that there is no "magic bullet". There is no one piece of evidence that will entitle an injured worker to odd lot PTD benefits. Strive to introduce the most comprehensive case possible with evidence addressing all of the potential issues. Offer detailed evidence about the Petitioner's age, training, and experience. Offer detailed evidence about his restrictions, limitations and underlying medical issues. Offer proof of a job search. Show that vocational rehabilitation was demanded, and if provided was unsuccessful. Finally, consider expert testimony from a rehabilitation consultant regarding the nature of the labor market and the nature of the Petitioner's qualifications and offer into evidence an opinion from a vocational counselor that there is no stable job in that labor market which the Petitioner can perform.