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TOPIC: “TOTAL INDUSTRIAL DISABILITY”

Medical experts should know that the Guidelines are only just that, they are *not legal mandates*. The Court cases are clear in stating that not all of the criteria within any category need be met in order for a judicial finding to be made within that category (See, e.g. Matter of Barager-Dieter v Kelly Temporary Services, 1 A.D.3d 725, 726 [2003] quoting Matter of Floyd v Millard Fillmore Hosp., 299 AD2d 610, 612 [2002]). Indeed, even subjective complaints by the claimant within an otherwise substantially-supportive medical record, [i.e., a doctor agrees based on the medical evidence], may rise to the level of “substantial evidence” necessary to support a particular finding of disability (See, e.g., Matter of Thomas v City of Albany School District, 307 A.D. 2d 664, 665 [2003] citing to Matter of Floyd v Millard Fillmore Hospital, *supra*, [2002]). Thus, a medical expert should feel free to state any medically reasonable degree of disability which is supportable by [several] Guideline criteria.

However, in some claims, the Guideline criteria may be insufficient to accurately reflect how the particular work injury or occupational disease has impacted the earnings capacity of a particular individual. This is especially true where collateral medical or vocational impairments exist which severely constrain the claimant’s *earnings capacity in addition* to the negative impacts caused by the work-related injury or condition. In such cases, the Workers’ Compensation Law Judge has the discretion to find the affected claimant “Totally Industrially Disabled.”

For instance, where a claimant has a limited education, restricted intelligence, no developed or currently applicable vocational skills, a history of failed attempts at diligently seeking employment under the current restrictions **and/or** other medical impairments upon which the final Workers’ Compensation injury or occupational disease acted in such fashion as to completely eliminate the worker’s practical earning capacity, a finding of “Total Industrial Disability” may be available. This is true even though the finding of “Total Disability” may not be available based purely upon the Guidelines’ criteria applicable to the final injury or condition. Therefore, where a medical expert believes this type of situation

exists, the expert can give an opinion in the following suggested fashion (which is only provided as an example):

“I believe this patient suffers a _____ disability under the Workers’ Compensation Guidelines, but I also believe that due to collateral medical and vocational considerations, this patient’s work-related injury is but the final straw which has completely broken the back of my patient’s practical wage-earning capacity. Accordingly, I believe my patient suffers a _____ disability under the Workers’ Compensation Guidelines for the current work injury, but also a *Total Industrial Disability* in fact.”

SPECIFICALLY, THE CASE LAW STATES AS FOLLOWS:

To support a finding of *total industrial disability*, the claimant must make a reasonable attempt to secure employment, without success, outside the scope of his previous employment, **or** the medical evidence must demonstrate that (s)he is completely unable to return to any type of employment. Doberstein v. Marshall, 37 A.D.2d, 1024, 325 N.Y.S.2d 360 (3d Dept. 1971); Parrilla v. Leemar Knitting Mills Inc., 27 A.D.2d 965, 279 N.Y.S.2d 266 (3d Dept. 1967). A classification of total disability will be upheld where "that disabling injury has extinguished a workers' wage-earning capacity and substantial evidence demonstrates that any remunerative work is beyond a workers' physical abilities." Spangenberg v. View Point Realty Corporation, 178 A.D.2d 809, 810, 577 N.Y.S.2d 530, 531 (3d Dept. 1991). Factors such as the claimant's age, education, work experience and physical limitations should be considered in determining whether a claimant is totally industrially disabled. Prouty v. Monroe Contractors Equipment, Inc., 178 A.D. 2d 698, 577 N.Y.S.2d 161 (3d Dept. 1991); Kowalchyk v. Wade Lupe Construction Company, 151 A.D.2d 927, 543 N.Y.S.2d 200 (3d Dept. 1989); Grandinetti v. Syracuse University, 134 A.D.2d 683, 521 N.Y.S.2d 343 (3d Dept. 1987).

Finally, the courts and the Workers’ Compensation Board seem to vacillate on the question of whether or not *Total Industrial Disability* is available on a temporary basis. Logically, there is no reason this type of award should not be available on a temporary basis in the right claim, although reserving this type of Classification only for claimants who have reached permanency seems to be the general judicial trend. This trend may likely be explained by the fact that, in many cases, it only becomes evident through the processes of time and a claimant’s diligent but unsuccessful attempts to get back to work that he/she should be found “Totally Industrially Disabled.” Even so, there is no logical reason why a medical expert should not express his or her own opinion and then let the courts work it out, regardless of whether the particular claimant involved has actually reached Maximum Medical Improvement.