

Loss of Earning Capacity Claims -Two Perspectives

Legal Perspective

I. Prerequisites for LOEC claim.

A. The employee must have sustained an **Unscheduled Injury** (defined as injuries not listed in Wisconsin Statutes sections 102.52 to 102.555).

1. LOEC cannot be awarded for Scheduled Injury alone.

See, ***Mednicoff v. DIHLR*, 54 Wis. 2d 7 (1972)**

2. A combination of **Unscheduled and Scheduled Injuries** may result in LOEC claim.

The Wisconsin Supreme Court allowed an employee to claim permanent total disability benefits from a combination of unscheduled and a scheduled injuries suffered at the same employer, despite not arising from the same work injury, if the employee could prove an ascertainable portion of the disability was attributable to the unscheduled injury. See ***Mireles v. LIRC*, 2000 WI 96.**

In order to be eligible for loss of earning capacity benefits, the employee must prove that a clear, ascertainable portion of the loss is attributable to an unscheduled injury. See ***Langhus v LIRC*, 206 Wis. 2d 494 (Ct. App. 1996).**

B. 85% Rule.

An employee who returns to work for the same employer for whom he or she worked at the time of the injury, or was offered a job that was refused without good cause, at 85% of his or her date of injury wage, is precluded from pursuing a claim for loss of earning capacity.

II. Significance of Functional Permanency on LOEC

A. LOEC should be based on doctors' opinions of permanent physical limitations, not functional PPD. See ***Kurschner v. Industrial Comm.*, 40 Wis.2d 10 (1968).**

B. Importance of the Vocational Expert:

1. The Wisconsin Supreme Court has recognized the mandatory role for vocational experts in loss of earning capacity cases. See, ***Balczewski v. DILHR*, 76 Wis.2d 487 (1977).**

2. ALJ and LIRC are not bound by the opinions of a vocational expert. See, ***Wisconsin Statute sec. 102.17(7)(a), fn 102 (WKC-1-P).***

- C. The loss of earning capacity is calculated as a percentage and applied to 1000 weeks, then the benefit is paid at the weekly PPD rate. The benefit is the larger of the percentage of Functional PPD or LOEC.

IV. Permanent Total Disability

A. PTD benefits are paid at the weekly TTD rate for the life of the injured employee.

B. An injured worker can be deemed permanently and totally disabled through three routes:

1. Statutory scheduled permanent total disability: loss of both arms (at or near the shoulder), the loss of both legs (at or near the hip), the loss of both eyes, or the loss of one leg and one arm. See Wisconsin Statute sec. 102.44(2). Full paralysis of one of the mentioned body parts is viewed the same as a total loss. See Wisconsin Statute sec. 102.55(2).
2. A doctor can opine that an injured employee is 100% unable to work. However, LIRC generally view such an opinion buy a doctor with skepticism. See, e.g., ***Harris v. American Motors Corp., WC Claim No. 88-27583 (LIRC Nov. 29, 1990).***
3. A vocational expert opines that an injured employee is permanently and totally disabled.

The odd-lot doctrine states that when an employee is so injured that the only duties he can perform are those that are so limited in quality, dependability, or quantity that no reasonable stable job market for them does not exist, the worker will be found permanently and totally disabled.

Balzewski v. ILHR Dept., 76 Wis. 2d 487 (1997), illustrates the odd-lot doctrine and stands for the proposition that vocational, not medical, experts must make an odd-lot determination.

Another Wisconsin Supreme Court case, ***Beecher v. LIRC, 2004 WI 88***, additionally suggests that in order to avoid a finding of permanent and total disability based upon the odd-lot doctrine, employers/insurers must perform a labor market survey to establish jobs actually exist within the employee's alleged permanent physical limitations.