**RI CLE Workers' Comp s. 6.6**

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# § 6.6 REDUCTION FROM TOTAL TO PARTIAL DISABILITY

An employee may receive weekly benefits for total incapacity (R.I.G.L. § 28-33-17) or partial incapacity (R.I.G.L. § 28-33-18). The difference between the effective compensation rates for each is that an employee who is considered totally incapacitated receives dependency benefits and is also eligible for annual cost-of-living adjustments pursuant to R.I.G.L. § 28-33-17(f). More importantly, a partially incapacitated employee is allowed a maximum of 312 weeks of benefits (this is known as the 312-week gate). R.I.G.L. § 28-33-18(d). After exhausting 312 weeks of partial incapacity benefits, an employee must demonstrate that the partial incapacity poses a material hindrance to obtaining employment suitable to their limitations. R.I.G.L. § 28-33-18.3(a)(1). The import of remaining totally incapacitated is that any weeks paid for total incapacity do not count toward the 312-week limit.

As discussed further in § 6.7, below, to prove that an employee is capable of regular work and suspend benefits, an employer must present competent medical evidence that the employee is capable of the regular work without it being injurious to their health. There is no need to present comparative evidence as to the employee's condition when attempting to suspend benefits on the basis that the employee is capable of their regular work. *C.D. Burns Co. v. Guilbault*, 559 A.2d 637 (R.I. 1989). To reduce weekly benefits from total to partial, expert opinion in the nature of comparative medical evidence must be presented to show a change in the employee's medical condition. *C.D. Burns Co. v. Guilbault*, 559 A.2d 637 (R.I. 1989). The rule requiring opinion evidence to be sufficiently comparative to document a change in the employee's condition is grounded in the principle that an expert witness must have an adequate foundation for the opinion. *Martinez v. Bar-Tan Mfg. Co.*, 521 A.2d 134 (R.I. 1997). To show the change in condition, the expert must be directed to the specific date upon which the employee was last determined to be totally incapacitated and then render an opinion as to the specific medical changes in the employee's condition from that date to the date of the medical expert's examination. *Hart Corp. v. Lomberto*, WCC No. 93-12502 (App. Div. 1994).

To reduce benefits from total to partial, the employer need not point out a specific job that the employee is able to perform, *Soprano Constr. Co. v. Maia*, 431 A.2d 1223 (R.I. 1981), but must present evidence that the employee is able to return to the labor market without undue risk to their physical well-being. *Suffoletta v. Ricci Drain Laying Co.*, 319 A.2d 19 (R.I. 1974).

If the medical expert (e.g., the employee's treating physician) has first-hand knowledge of the condition, comparative evidence is not necessary, as the doctor has the necessary foundation for the opinion. Otherwise, a specific comparison of the employee's condition, by means of examination of the medical records or a hypothetical question, is necessary. *Burnham v. Hasbro, Inc.*, WCC No. 99-06793, 04-01070 (App. Div. 2009).

**Practice Note**

  

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If an employee is deemed to be totally incapacitated on a memorandum of agreement, the comparison must be made with the medical evidence used to place the employee on total. If the employer attempts to reduce to partial and is unsuccessful, any subsequent attempt to do so must be based on a comparison with the medical evidence at the time of the initial designation of total as well as at the time of the last decree that found the employee to be totally disabled. *See, e.g.*, *Turex v. Fallon*, WCC No. 94-10404 (App. Div. 1997).

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