

# NEW JERSEY — WORKERS' COMPENSATION MORE THAN 100% DISABLED? THE NEW JERSEY APPELLATE DIVISION'S LATEST ANALYSIS OF PERMANENT/TOTAL DISABILITY BENEFIT AWARDS

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## KEY POINTS

- A petitioner who cannot return to work may be eligible for permanent/total disability benefits.
- The Second Injury Fund pays benefits when pre-existing conditions partly contribute to a petitioner's permanent/total disability.
- A petitioner cannot receive an award of more than 100% total disability for a single injury.

In the recent decision *Domenick Catrambone v. Bally's Park Place, et al.*, 2015 N.J. Super. Unpub. LEXIS 2601 (App. Div. Nov. 12, 2015), the New Jersey Appellate Division addressed the issue of whether there can be an increase in permanency benefits for a workers' compensation petitioner who has already received an award of permanent/total disability benefits. By way of background, the petitioner initially sustained a low back work injury on March 18, 2006. That claim was settled in 2008 for an award of 27.5 percent permanent partial-total disability (minus an Abdullah credit of 7.5 percent partial-total disability for a pre-existing disability).

On June 14, 2008, the petitioner sustained a second work injury involving his neck, left shoulder and left wrist. The petitioner filed a claim petition and a Second Injury Fund Petition for the 2008 injury and a Re-Opener Petition for the 2006 injury. The second round of petitions were settled in 2010. Specifically, the Re-Opener Petition for the 2006 injury was settled for a new award of 30 percent partial-total disability (minus a credit for the earlier award of 27.5 percent partial-total disability), and the petitioner was then awarded permanent/total disability benefits for the 2008 injury. The award of permanent/total disability required the employer, Bally's, to pay 33.3 percent of the overall award, while the Second Injury Fund paid the remaining 66.6

percent. Thereafter, the Second Injury Fund would pay ongoing disability benefits for the remainder of the petitioner's life. The portion of the award of permanent/total disability benefits paid by the Second Injury Fund specifically referenced the petitioner's award of 30 percent partial-total disability for the 2006 injury.

In 2011, the petitioner filed a new Re-Opener Petition for the 2006 injury, seeking an increase in the award of 30 percent partial-total disability. Bally's opposed the Re-Opener on the basis that the petitioner was already receiving permanent/total disability benefits for the second 2008 injury, which included any disability from the 2006 injury. However, the judge entered a new award of 35 percent partial-total disability, minus a credit of 30 percent partial-total disability for the prior award. Since the petitioner was already receiving permanent/total disability benefits, the order required Bally's to pay an additional \$16,054 to the petitioner on top of the ongoing permanent/total disability benefits. Bally's was also required to reimburse the Second Injury Fund part of the amount of the permanent/total disability benefit contribution.

On appeal, both Bally's and the Second Injury Fund argued that the petitioner was barred from receiving any increase in permanency from the 2006 injury based on the subsequent award of permanent/total disability benefits. Bally's also argued that the doctrines of res judicata and collateral estoppel barred the second Re-Opener Petition for the 2006 injury.

The court first referenced *Taylor v. Engelhard Industries*, 553 A.2d 361 (App. Div. 1989), in which the court determined that an award of 100 percent total permanent disability precluded any further award or increase in permanency for the effects of the same injury. However, the court went further and determined that the increase of permanency was related only to the

2006 low back injury, not to the 2008 shoulder injury. Therefore, the new award was not overlapping. The court noted that there was no case law to the contrary and that, somehow, this did not constitute a windfall or double recovery.

The Catrambone decision is extremely troubling for New Jersey employers. Under an award of permanent/total disability, petitioners are already receiving a full weekly disability benefit for the rest of their lifetime. Under this decision, there would be no limits on permanency benefits until the petitioner receives an award of permanent/total disability benefits for each and every injury he or she has ever had (assuming timely Re-Opener Petitions have been filed). Now a petitioner can receive more than 100 percent of their disability benefit entitlement.

Moreover, since the permanent/total disability award here specifically referenced and included the 30 percent partial-total disability award as part of a finding of 100 percent disability, how is it logical that the 30 percent partial-total disability can now be further increased? An award of permanent/total disability benefits would never really be final and subject to recalculation years or possibly decades after it was approved by the court. It is also important to note that, although the Second Injury Fund financially benefited from the award, they also joined in the appeal, mostly likely due to the uncertainty and lack of finality this decision would create.

At this time, Bally's has proceeded with a request for an appeal to the New Jersey Supreme Court. We will report again once the Supreme Court responds.

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