

Credit for Pre-Existing Injuries - What to Take or if to Take, That is the Question

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If an employee suffers a previous loss of function to the body, or a specific body part and the loss is established by competent evidence, if there is a subsequent injury or occupational disease affecting the same part of the body, then the employer or carrier at the time of the injury or disease shall be given a credit for the previous loss of function (NJSA 34:15-12(d)). But the burden of proof rests on the employer.

What does this mean? The employer has the responsibility to investigate if the employee has suffered a prior loss of function to the affected body part and to assert that if a determination of partial or total disability is made, then the employer should receive the appropriate credit due to the prior loss of function. This is commonly referred to as asserting an Abdullah credit.

The Appellate court in *Abdullah v SB Thomas*, (1983 claim) noted that when a compensable injury increases a pre-existing disability, the employee is entitled to the entire award and the employer is entitled to a credit for the pre-existing disability whether compensated or not. The employer does have the right to assert an Abdullah credit for a prior worker's compensation claim that was resolved via Section 20 as long as competent evidence exists showing there was a functional loss. You must, however, be able to prove a prior functional loss and a simple finding of degenerative conditions may not meet the burden of proof necessary if the employee had no prior treatment or claims to have been asymptomatic.

We typically run into problems when the employee fails to give accurate information regarding prior injuries or claims. While it is the employer's responsibility to assert this defense, many times we are forced to rely upon the representations of the employee regarding her or his prior injuries or accidents. The employees' counsels have vigorously defended against what they refer to as a "fishing expedition" or blanket requests for all prior records of employee. Without some reasonable basis for a request for prior treatment records, the Court will usually deny any motion to compel same. (As noted above, updated MRI finding of degenerative disease without prior complaints may not be enough.) This is where an ISO claim search report, hospital canvas investigation or internet search of the petitioner becomes extremely important and relevant to the defense of the claim. To seek a credit, you must fully investigate the petitioner and the allegations of the claim. To do less could expose the carrier to greater liability.

The carrier and defense counsel must also decide if they want to assert a credit. If the pre-existing treatment or complaint information is limited and receiving a credit will significantly increase the carrier's financial exposure, then efforts should be made to reduce the credit thereby reducing the overall exposure or eliminate the credit all together. It is also possible to use the inclusion or exclusion of the credit as a tool in negotiating resolution of the claim.