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## Reconstruction of the Permanent Disability Rate Revisited

In *Lawson v. New Jersey Sports and Expedition Authority* the Appellate Division (unpublished at Docket#A-405-17T1) was faced with the issue of whether to reconstruct the employee's wages to full time for purposes of her permanent partial disability award. The compensation Judge and the Appellate Division denied the employee's application to have her wages reconstructed in a decision on June 26.

At the time of her August 2009 injury, she was employed as a stadium usher, on a part-time basis by the New Jersey Sports and Expedition Authority. She simultaneously worked full time stocking shelves for Walmart. The employee broke her left femur and bruised her right knee at her stadium job. She underwent surgery to repair the left leg and eventually had the rod removed from the leg. The facts revealed that she was physically active and robust after these procedures. She received unemployment compensation benefits for approximately two and ½ years certifying that she was ready, willing and able to return to full-time work. She testified that she continued to mow the grass on her rural home yard, cut wood using a small electric chainsaw, she walked a mile a day and swam for exercise. She applied for a number of other positions and had been able to return to work on a part-time basis demonstrating products at supermarkets.

The employee's experts were unaware of her recovery and significant physical activity subsequent to the last procedure where the rod was removed. The employer's expert testified that the employee was able to return to work without restrictions and could work on a full-time basis. Based upon the evidence, both the Judge and the Appellate Division felt that the employee's ability to work full time in the future was not effected by the injury. The Court made it clear that in order for her benefits to be reconstructed to full time she must prove that the injury will also permanently affect the ability to perform full time work. Thus, the goal would be to compensate more fully the seriously injured worker who would have diminished future earning capacity.

**Comment:** This decision once again confirms the burden of proof that counsel for the employers have consistently raised. In order for a permanent disability benefit rate to be reconstructed to full time the injured worker must prove that his or her ability to work full time and the worker's future earning capacity has been affected. Frequently, employee's counsel will argue that benefits should be reconstructed to a full-time basis solely on the grounds that the employee worked part time when the injury occurred. This is simply insufficient evidence. Even if the injury appears to be relatively significant, as with this case, the medical evidence must establish the cause and effect with respect to diminished future earning capacity.

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