

Odd-Lot Doctrine: Total Disability May be Based Upon Inability to Understand English

In the recent unpublished decision by the Appellate Division in *Avendano v. Target Corporation*, the lack of proficiency in English was reviewed in the context of the odd-lot doctrine. The Workers' Compensation Judge dismissed the claim under the odd-lot doctrine. The Appellate Division affirmed.

The Petitioner sustained a compensable work-related low back injury in 2006 at the age of 51. She received an award for permanency of 55% of permanent partial disability with a credit of 15% for prior functional loss. She reopened the case after additional treatment and received a second award for 75% with credit for 55%. Six months after the second award, and without any further authorized treatment, she reopened the case for a second time claiming total disability under the odd-lot doctrine. She claimed her injuries, age, limited English and limited job skills made her unemployable.

The odd-lot doctrine, outlined in N.J.S.A. 34:15-36 allows a Judge to consider factors other than physical and neuropsychiatric impairments, to determine if an individual is totally and permanently disabled where such impairments are at 75% or more. The factors to be considered include advanced age, education, limited job skills, inability to understand English and the unlikelihood the individual will find a "charitable employer" who will hire them with their impairments. The Appellate Court in *Avendano* specifically noted, "inability to understand the English language can provide the basis for the application of the odd-lot doctrine."

The Petitioner's testimony during the trial, with the aid of an interpreter, was that she did not speak or understand English. The Petitioner also had difficulty reading and writing English. The Petitioner claimed to have enrolled in community college to learn English but did not finish the course, despite informing the evaluating experts that she had attained a "level two proficiency" in her English as a Second Language class. However, the Judge found the Petitioner not to be a credible witness as the Respondent's doctor evaluated her without the aid of an interpreter, she passed the citizenship test in English nine years prior and received an accounting degree at a university in Columbia before immigrating to the United States. The Judge also noted that during testimony, the Petitioner answered a number of questions before the interpreter finished translating. Therefore, the Judge did not find the Petitioner's assertion of a lack of English proficiency credible.

In addition to not finding the Petitioner credible, the Judge was unimpressed with Petitioner's vocational expert. The Judge noted the Petitioner's expert had to refresh his recollection immediately at the start of testimony, did not consider the Respondent's medical experts and failed to review the transcript of the Petitioner's testimony. The Petitioner's expert also refused to change his position on total disability even after being confronted with evidence that the Petitioner had an intermediate proficiency in English.

The Appellate Court found the decision of the Workers' Compensation Judge to be supported by sufficient credible evidence on the record.

Comment: There are not many Appellate decisions on workers' compensation odd-lot doctrine. *Avendano* recognizes a lack of proficiency in English as a basis for an award of total disability where the injured worker already has an award of 75% or more.

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