

HOW TO PROVE TOTAL DISABILITY UNDER THE ALABAMA WORKERS' COMPENSATION LAW

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In *Wal-Mart Stores v. Kennedy*, 799 So. 2d 188 (Ala. Civ. App. 2001), the Court of Civil Appeals of Alabama held that “[t]he inability to perform one’s trade and to find gainful employment.” is the test for permanent total disability. In *Michelin N. Am., Inc. v. Hamby*, 722 So. 2d 770 (Ala. Civ. App. 1998) it was held that:

“The court must apply a two-pronged test in determining whether a permanent total disability exists: the employee must be found to be incapable of returning to his trade, as well as incapable of being retrained for gainful employment. Id. Total disability does not mean an entire physical disability or absolute helplessness.” Id, at 773.

...

“[G]ainful employment means employment similar in remuneration to that earned prior to the injury. Implicit in this is that the gainful employment sought to be restored must be ‘suitable.’ By ‘suitable’ we mean employment which is compatible with the employee’s preinjury occupation, age, education, and aptitude.” Trans Mart, Inc. v. Brewer, 630 So. 2d 469, 471 (Ala. Civ. App. 1993), quoting Ex parte Beaver Valley Corp., 477 So. 2d 408, 412 (Ala. 1985).

To determine whether an employee is permanently and totally disabled, the Court of Civil Appeals has stated:

“The test for total and permanent disability is the inability to perform one’s trade and the inability to find gainful employment. Fuqua v. City of Fairhope, 628 So. 2d 758, 759 (Ala. Civ. App. 1993). See also Liberty Trousers v. King, 627 So. 2d 422, 424

(Ala. Civ. App. 1993). *A 'permanent total disability' is defined as including 'any physical injury or mental impairment resulting from an accident, which injury or impairment permanently and totally incapacitates the employee from working at and being re-trained for gainful employment.'* " § 25-5-57(a)(4)d., Ala. Code 1975; *Russell v. Beech Aerospace Services, Inc.*, 598 So. 2d 991, 992 (Ala. Civ. App. 1992).

To assess loss of earning capacity, the Court should only consider the ability of the employee to obtain and perform gainful employment. Gainful employment means employment that will provide the employee with wages at a level sufficient to maintain at least a minimal standard of living. See *Ellenburg v. Jim Walter Resources, Inc.*, 680 So. 2d 282 (Ala. Civ. App. 1996.) Alabama Courts have held that the receipt of wages after an injury does not necessarily prevent an employee from receiving compensation for permanent total disability, even if those wages temporarily equal or exceed the pre-injury wage rate. In *Brunson Mill. Co. Incorporated v. Grimes*, 267 Ala. 395, 103 So. 2d 315 (1958), the Supreme Court of Alabama adopted the general rule.

"An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist, may well be classified as totally disabled."

According to this rule, if an employee returns to work in sheltered employment, temporary and unpredictable employment, or employment without substantial income, the employee may still be classified as permanently and totally disabled. In *Boyd Bros. Transp., Inc. v. Asmus*, 540 So. 2d 757 (Ala. Civ. App. 1988), a truck driver returned to office work for over 1 ½ years on a part-time and sporadic basis. He received permanent total disability when the evidence showed that he had constant pain and had frequent absences from work.

In *Fort James Operating Company v. Kirklewski*, 893 So. 2d 434 (Ala. Civ. App. 2004), the Alabama Court of Civil Appeals held that an employee may be totally disabled even when he is not totally incapacitated for work. Total disability may be found where the employee is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. The Alabama Supreme Court followed Larson's Workers' Compensation Law:

"In their treatise on American workers' compensation law, Professor Arthur Larson and Lex K. Larson discuss what is called the 'odd-lot' doctrine, under which total disability may be found even where an employee is not totally incapacitated for work where that employee is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. 4 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 83.01 (2003). *This principle, although not referred to by that name, is recognized in Alabama in that permanent and total disability 'does not mean absolute*

helplessness or entire physical disability.' *Lewis G. Reed & Sons, Inc. v. Wimbley*, 533 So. 2d 628, 631 (Ala. Civ. App. 1988) (emphasis added). *Rather, '[t]he test for permanent total disability is the inability to perform one's trade and the inability to find gainful employment.'* *TAJ-Rack Div., Inc. v. Harris*, 603 So. 2d 1061, 1064 (Ala. Civ. App. 1992) (citing *Mead Paper Co. v. Brizendine*, 575 So. 2d 571 (Ala. Civ. App. 1990))."

In *Fort James Operating Company v. Kirklewski*, the Court basically held that if an employee proves a permanent physical impairment has combined with his or her age, education, training and mental capacity to limit the employee's ability to find gainful employment in a well-recognized branch of the labor market, the burden is on the employer to show some kind of suitable work is regularly and continuously available. An injured employee may prove a *prima facie* case of total disability by showing that there is not any kind of suitable work regularly and continuously available to him and he cannot find employment that will provide him with wages at a level sufficient to maintain at least a minimal standard of living.

An employee should not be precluded from receiving permanent total disability benefits due to the receipt of post-injury earnings that are so undependable that the employee cannot be reasonably expected to rely on them for support. Based on this reasoning, if an employee is capable of performing hourly employment for only short periods of time before succumbing to the effects of the physical or mental injury, the Court may nevertheless find that he is incapable of performing gainful employment. *National Car Rental/Lend Lease v. Davis*, 628 So. 2d 722 (Ala. Civ. App. 1993). The general test for measuring the loss of earning capacity rests the decision on the amount of earnings an injured employee can depend upon receiving in the open labor market with his or her physical incapacity. *National Car Rental/Lend Lease v. Davis*, at 628 So. 2d 722.

The court must determine whether an injured employee can be gainfully employed in work consistent with his intellectual ability, training, and experience, despite the medical disability. *Asplundh Tree Expert Co., Inc. v. Latham*, 656 So. 2d 839 (Ala. Civ. App. 1995). *Crimson Industries, Inc. v. Eller*, 771 So. 2d 1022 (Ala. Civ. App. 1998). The employee's testimony as to his physical and mental abilities has probative value. His descriptions of his pain are legal evidence which may support a finding of disability. *Yellow Freight Systems, Inc. v. Green*, 612 So. 2d 1209 (Ala. Civ. App. 1992). Evidence that the pain associated with the injury makes exertion difficult or impossible may also be used by the trial court to support its conclusions. *Alabama Power Company v. Wagon*, 627 So. 2d 977 (Ala. Civ. App. 1993).

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