

**OPINION
64-484**

October 1, 1964 (OPINION)

Mr. Owen T. Owen

Chairman

Workmen's Compensation Bureau

RE: Workmen's Compensation - Disability - Definition

This is in response to your request for an opinion as to what is meant by the term "disability" as found in section 65-05-12 of the North Dakota Century Code. This section provides as follows:

PERMANENT PARTIAL DISABILITY - WEEKLY COMPENSATION - TIME PAID. If the injury causes permanent partial disability, the percentage which such disability bears to total disability shall be determined, and the fund shall pay to the disabled employee a weekly compensation in the sum of thirty-one dollars and fifty cents per week for the following periods:

For a one percent disability	5 weeks;
For a ten percent disability	50 weeks;
For a twenty percent disability	100 weeks;
For a thirty percent disability	150 weeks;
For a forty percent disability	200 weeks;
For a fifty percent disability	250 weeks;
For a sixty percent disability	300 weeks;
For a seventy percent disability	350 weeks;
For a eighty percent disability	400 weeks;
For a ninety percent disability	450 weeks;

However, where an injured employee is earning a salary which at sixty-six and two-thirds percent of said salary did not produce an award of thirty-one dollars and fifty cents per week the difference between thirty-one dollars and fifty cents per week and sixty-six and two-thirds percent of the actual salary be charged to the general fund, and not to the risk of the employer. This proviso shall also apply to payments made under 65-05-13."

While the Act defines various terms used therein, the term "disability" is not defined. By judicial process the term

"disability" for compensation purposes has been construed to mean a combination of partial or total physical incapacity and of inability to work, or inability to work with the same ease and competency as before the injury. (99 C.J.S. Section 296, page 1034.) This same authority also states that the indemnity under the Workmen's Compensation Act is based on disability to work rather than physical impairment as such. However, physical impairment has been considered by some to be a "disability", particularly under some acts where disfigurement has been included within such term.

In this respect it is noted that the Legislature defined permanent partial disability in section 65-01-02(11) of the North Dakota Century Code by stating that the term "permanent partial disability" shall include disfigurement resulting from an injury if such disfigurement diminishes the ability of the employee to obtain employment. It is further noted that here the definition is predicated on the proposition of whether or not it interferes with the employee's ability to obtain employment. It should also be noted that the definition in this particular instance is not one which narrows the meaning of the term but extends the meaning.

The statutory definition of the term "permanent partial disability" is in harmony with the declared purpose of the Workmen's Compensation Act as found in Chapter 162 of the 1919 Session Laws, which states as follows:

The State of North Dakota, exercising herein its police and sovereign powers, hereby declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, therefore, for workmen injured in hazardous employments, and their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this Act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this Act provided."

The well-being of wage workers, their families and dependents was the major concern of the Legislature in enacting the Workmen's Compensation Act. To that extent it provided workmen compensation benefits to persons injured in course of employment regardless of fault and to the exclusion of other remedies.

The term "disability" as used in Title 65 of the North Dakota Century Code, presupposes that an injury has been sustained in course of employment. We find that the Legislature also provided that compensation benefits shall not be available where the disability is less than five days. Quite obviously the disability referred to here and in other provisions necessarily refers to the injured employee's inability to perform work. In the Act we find expressions such as "temporary disability, permanent total disability, temporary partial disability, permanent and permanent partial disability." In each of these instances the term "disability" must refer to the employee's inability to work or to work with the same ease and competency as before the injury and as such directly reducing or eliminating his

earning capacity as an employee.

All competent authorities state that the "disability" must be established by the injured employee and must be based on competent evidence. Invariably competent evidence includes and requires medical evidence or testimony. In a number of instances the term "disability" has been loosely used in expressing a physical impairment or functional loss of certain members of the body and as such the term has erroneously been applied to denote physical impairment. As a result of such misuse the term "disability" has also been understood to mean physical and functional impairment or anatomic impairment. This practice has brought about an erroneous concept of the term "disability."

Basically, the medical evidence or testimony establishes the physical impairment of the body, i.e., the functional impairment. The determination whether or not a person has any physical or functional impairment of the body is one which invariably must be established by and through medical evidence and testimony. The determination of the disability resulting from such physical or functional or anatomic impairment is a function and duty of the Workmen's Compensation Commissioners. While the percentage of functional impairments or physical impairments or anatomic impairments may frequently parallel the percentage of disability they are still two separate and distinct items. The former are medical facts, whereas the latter is a conclusion as to the employee's earning capacity.

The determination whether or not a person has a permanent partial disability is, under the Workmen's Compensation Act, a quasi-judicial function which must be exercised in the first instance by the Workmen's Compensation Bureau. This determination is subject to review by the courts. However, in nearly every instance the disability must be supported by medical testimony or evidence. The term "disability" actually applies to the conclusion reached after considering all of the factors whereas the term "impairment", whether it be temporary or permanent, expresses the medical condition of the person involved - a factor to be considered. Invariably it is necessary to establish the physical impairment before the disability can be determined. It could well be that as a result of this, the term "disability" has been confused to mean the same as physical impairment. We could go into a lengthy treatise on this particular topic to further illustrate how these terms have been misapplied and misconstrued, particularly the term "disability", but we do not believe that is necessary.

If these terms were to be considered to mean the same, it would to a great degree simplify the duty of the quasi-judicial body to determine an injured employee's disability. Nevertheless, we cannot merely for the sake of simplifying the function of the commissioners determine that the two terms are synonymous.

The term "impairment" pertains to the loss or partial loss of the use of the body, such as an anatomic functional impairment, whereas the term "disability" is the combined result of such impairment and other factors which prevent the employee from pursuing gainful employment. The impairment constitutes part of the evidence, whereas the disability is the conclusion.

it should be noted that section 65-05-13 of the North Dakota Century Code provides for certain specific benefits for loss of a member of the body. It should be noted that this particular schedule of benefits is not dependent upon any disability existing or following such loss of the member. For example, for a loss of the fourth finger the injured employee will receive compensation for sixteen weeks without regard to any loss in his earning capacity. Disability is no criteria under the scheduled injuries, whereas disability is very definitely a criteria in section 65-05-12.

It is therefore our opinion that the term "disability" as found in section 65-05-12 of the North Dakota Century Code embraces more than the mere physical impairment. The disability can parallel the physical impairment in some instances but it is not necessary that it do so in every instance. In determining disability it is proper to take into consideration the injured employee's ability to engage in gainful employment. In arriving at the ability of an injured employee to engage to gainful employment the commissioners are not limited to the medical percentages of physical impairment. The commission may take into consideration additional factors which are considered in pursuing gainful employment. The additional factors must, however, be considered only in relation to and in conjunction with the physical, anatomical or functional impairment cause by an injury sustained in course of employment.

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