

Postscript: Head Injuries, Workers' Compensation Law After 'Rubeis'

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In our article entitled "Head Injuries and Workers' Compensation Law," which appeared in The New York Law Journal on Sept. 24, 2004 (Outside Counsel, at p. 4), we discussed the difficulty that the courts have faced in interpreting the scope of a brain injury under the "grave injury" definition in Workers' Compensation Law §11. The "grave injury" at issue was "an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Our article noted that there were differences in the way that the appellate division departments defined the phrase "permanent total disability." The Second Department, in grappling with this term, had focused on the injured party's "ability to engage in day-to-day functions" and perform basic self-care.¹ However, the Third Department had found that total disability "relates to the injured party's employability and not his or her ability to otherwise care for himself and function in a modern society."²

We noted that in deciding future cases, "the Court of Appeals may adopt either the 'employability' or 'self-care' standard, or better yet, the Legislature may refine the definition."

On Nov. 23, 2004, the Court of Appeals, in the case of *Rubeis v. The Aqua Club Inc.*³ and two companion cases, addressed the "permanent total disability" language of the brain injury under the Workers' Compensation Law. The Court adopted the "employability" standard rather than the "self-care" standard and defined permanent total disability "when the evidence establishes that the injured worker is no longer employable in any capacity."⁴



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employment and should also consider his ability to perform the usual and customary tasks of ordinary day-to-day living ..."⁵

The jury found that the plaintiff sustained a grave injury, however, the Appellate Division, Second Department reversed, holding that "brain injury does not result in permanent and total disability where the employee is able to perform day-to-day functions."⁶

'Largo-Chicaiza'

Plaintiff Largo-Chicaiza, a day laborer, sustained a brain injury when he fell from the roof of a six-story house. Plaintiff's employer sought to dismiss the impleader claiming that the plaintiff did not suffer a grave injury.

The trial court denied the motion finding that while permanent total disability relates to the injured party's employability and not to the ability to function in society, there was a question of fact as to the plaintiff's employability. The Appellate Division, Second Department reversed and concluded that the plaintiff's injuries were not a grave injury.

'Knauer v. Anderson'

Plaintiff Knauer sustained a brain injury when he fell 17 feet from a ladder and crashed headfirst onto a gravel floor.

At trial, the court charged the jury that "permanent total disability means permanent total disability from employment and does not require that plaintiff lack all capacity to perform personal or household activities."⁷ The jury found in plaintiff's favor and the Appellate Division affirmed. The Fourth Department reasoned that permanent total disability "relates to his or her permanent total disability from employment, not to his or her ability to otherwise care for himself or herself and function in modern society."⁸

Court of Appeals

The Court of Appeals granted leave to address the split among the departments on the meaning of "permanent total disability" under Workers' Compensation Law §11.

As is well-known by now, the Workers' Compensation Law was amended in 1996 to bar common-law action against employers except when employees suffer a grave injury as defined in §11. There are 10 enumerated grave injuries and the one that has generated the most case law and the one that has been the most difficult to define is the last one, that is, "an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

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'Rubeis v. The Aqua Club'

Plaintiff Rubeis, an ironworker, sustained a brain injury when he fell 19 feet from a ladder while installing a steel cupola at The Aqua Club. Mr. Rubeis commenced a personal injury action against The Aqua Club which then impleaded Mr. Rubeis' employer, Venezia Iron Works Inc., Workers' Compensation Law §11.

At trial, the court granted The Aqua Club judgment on its claim against Venezia subject to whether a jury determined the plaintiff sustained a grave injury.

The court instructed the jury that in order to prove a grave injury the medical evidence must demonstrate that the plaintiff "is unable to return to any employment. You may consider plaintiff's ability to obtain other

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The key words in this definition are "permanent total disability." The appellate divisions had wrestled over the interpretation of these three words. Did disability mean a disability from work and therefore unemployability? Or was permanent disability more far-reaching than that and not limited to a person's employability? Did disability refer to activities of daily living and self-help issues? Further, the statute already listed paraplegia and quadriplegia as grave injuries. If someone had a brain injury, did that person, in essence, have to be classified as a paraplegic or quadriplegic in order to be considered to have sustained a permanent total disability or was it something less?

The Court of Appeals has now quantified the threshold of permanent total disability with its decision in *Rubens*. The Court of Appeals in *Rubens* noted that the injuries enumerated as grave were "deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action."⁹

The Court noted that although it has strictly construed the grave injury statute, it was easier to do so when the terms in question were "loss of multiple fingers" or a "permanent and total loss of the use" of a hand. The words of the statute had answered the questions put before them. However, the Court noted that the term "permanent total disability" did not answer the question of whether a particular injury was a grave injury and the phrase required interpretation.

The Court noted the split in the appellate divisions concerning the definition of this term and that the breakdown was whether or not permanent total disability meant whether a person is employable as opposed to the stricter definition of whether or not a person is able to care for himself or herself and function in a modern society. Also, if the first definition of employability was adopted, did that mean that a person would satisfy this definition if he was disabled from "competitive" employment or all employment.

The Court indicated that there were two possible definitions of permanent disability, that is, the Second Department standard "essentially requiring a vegetative state" and the Third and Fourth department standard essentially requiring unemployability. The Court, in deciding between these alternatives, stated that its guiding principle was to implement the intent of the Legislature, that is, to narrow tort exposure for employers while also protecting the interests of injured workers and to consider both the language used and the objects to be accomplished.

In determining that the test for total permanent disability was unemployability, the Court first considered the choices within the context of §11 of the Workers' Compensation Law. In §11, the Legislature defined as grave injury to include "loss of multiple fingers," "loss of multiple toes," "loss of nose," and that none of these enumerated grave injuries "has the effect of preventing an employee

from performing daily life activities. Limitation of permanent total disability to a vegetative state thus is too harsh a test, out of step with the balance of the section."¹⁰

Additionally, the Court looked at the definition of disability in the larger context of Workers' Compensation Law. Although that definition seemed to define disability when a person is not able to be competitively employed, the Court noted that the test that it was going to adopt for permanent total disability "is one of employability in any capacity. In any capacity is in keeping with the legislative intent and sets a more objectively ascertainable test and equivalent, or competitive, employment."¹¹

All three cases were decided by a vote of 6 to 1. Judge Susan P. Read dissented in all three decisions holding that the narrower definition of permanent total disability was "more faithful to legislative intent."

Judge Read noted that the grave injury exceptions were "heavily negotiated" before the statute's enactment in 1996. While the judge found that some of the results on the list were "downright peculiar" and that the particular compromises struck to develop the list of grave injuries were unknowable, the Legislature's intent was clearly known, which was "to curtail third-party actions against the employer of an injured worker sharply and to do so, in large part, by designating grave injuries that were 'deliberately both narrowly and completely described.'" "exhaustive, not illustrative" and "not intended to be extended further absent legislative intent."¹² Despite the Legislature's "best efforts to insulate the grave injuries in §11 from judicial interpretation (and the perceived attendant risk of judicial expansion), the definition of an acquired injury to the brain resulting in permanent and total disability is not self-explanatory."¹³

Judge Read found that in adopting a standard for permanent total disability which essentially requires unemployability, rather than the inability to perform the usual activities of daily living, the majority "deploys tools of statutory interpretation that are tried and true, but unsuited to the particular task."¹⁴

'Vegetative State Too Harsh'

Specifically, Judge Read noted, since many, but not all, of the grave injuries listed in §11 do not prevent an employee from performing daily life activities, the majority reasoned that "limitation of permanent total disability to a vegetative state ... is too harsh a test, out of step with the balance of the section." However, this "kind of text base analysis ill fits §11 since the list of grave injuries is, as previously noted, the singular product of legislative compromise, and is exhaustive, not illustrative. It is difficult to reason by analogy to the other grave injuries on the list when these

are as various as the loss of a finger and quadriplegia."¹⁵

Further, Judge Read found that the majority's observations of the word "disability" as it refers to employment within the larger context of the Workers' Compensation Law is also flawed. The employment-related definitions of "disability" appear in provisions of the statute "relating to payment of compensation ... these provisions bear no relationship to §11's very different and overriding goal ... to safeguard employers from impleader except in rare circumstances."¹⁶

Since many grave injuries don't prevent an employee from daily life's acts, the majority said limitation of permanent total disability to a "vegetative state" is too harsh a test.

Finally, Judge Read noted that the Legislature intended to "retrench an employer's exposure to costly third-party actions, and thereby reduce the employer's insurance premiums and out-of-pocket payments."¹⁷ The Legislature did this by barring third-party actions against employers except in limited circumstances of grave injury. Judge Read noted that the 1996 amendment of §11 to accomplish this goal was "at best indifferent to the employee, its aim being to protect the employer."¹⁸

In light of this goal and the legislative intent for the Court of Appeals to exercise its interpretative function sparingly and narrowly with respect to grave injuries, Judge Read voted to adopt the "more restrictive of the two plausible and equally workable definitions for a permanent total disability" with respect to an acquired brain injury means the inability to perform the usual activities of daily living, essentially requiring a vegetative state."¹⁹

To Judge Read's chagrin, and to the chagrin of workers' compensation insurance carriers, the Court of Appeals has spoken and has defined the mercurial phrase "permanent total disability" to relate to employability and to hold that an employee has sustained an acquired injury to the brain resulting in permanent total disability when the injured worker is no longer employable in any capacity. The Court has hopefully resolved the split in the appellate divisions on this issue, however, the phrase "employable" in any "capacity" will probably lead to further litigation with the plaintiff and, at times, defendants in an attempt to mine the limitless IB coverage, arguing that the plaintiff is unemployable in any capacity and with the third-party defendant employer claiming that the injured plaintiff is capable of being employed even if that employment involves very menial tasks.

The problem, as noted in our original article and today, is that this category of grave injury resists easy description and can reflect a broad spectrum of severity and incorporate a range of symptoms.

In adopting the employability-in-any-capacity test, the Court of Appeals has resolved the type of test to be used in determining whether or not someone is permanently and totally disabled. Now, the parties

involved in these type of suits will litigate the issue of "in any capacity."

In any event, the issue has been made clear and the playing field has been defined. Unless the Legislature wades into the fray, permanent total disability is now an employability test. However, it appears that in some cases there will be questions of fact as to whether or not a person is capable of being employed in any capacity which will result in trials on this issue rather than summary judgment awards, another result which the Legislature probably never intended either.

1. *Rubens v. Aqua Club Inc.*, 305 AD2d 656, 658, 761 N.Y.S.2d 659 (2nd Dept. 2003).

2. *Koy v. Granding*, 289 AD2d, 790, 792, 736 N.Y.S.2d 424 (3rd Dept. 2001).

3. *Rubens v. Aqua Club, Inc.*, 2004 WL 2720271, 2004 N.Y. Slip Op 08595, N.Y., Nov. 23, 2004.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*, citing Omnibus Workers' Compensation Reform Act of 1996, L 1996, Ch 635 Governor's Mem approving L 1996, Ch 635, Bill Jacket at 54, 55.

10. *Id.*

11. *Id.*

12. *Id.*, citing *Castro v. United Container Machinery Group, Inc.*, 96 NY2d 398, 402 (2001), quoting Governor's Mem approving L 1996, Ch 635, 1996 NY Legis Ann., at 460.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*