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### **The Difference Between Medical Impairment and Occupational Disability: Still Misunderstood**

On September 16, 2018, writing to plaintiff’s counsel in an expert medical report, Dr. John Smith, a specialist in physical medicine and rehabilitation, offered a vocational conclusion, one generally considered outside the scope of medical training and physician practice. He stated, “Ms. Johnson’s ability to obtain and maintain employment in today’s competitive job market has been severely compromised by the injuries she sustained in the motor vehicle crash of September 23, 2016, and she is permanently and totally disabled and will remain so for the rest of her life.”

As commentary, Ms. Johnson fractured her right ankle on September 23, 2016. She underwent open reduction and internal fixation of her fracture, and she had a functional capacity evaluation (FCE) after an appropriate period of healing and physical therapy. The FCE found her capable of activities commensurate with the U.S. Department of Labor’s formal definitions of sedentary and light work with standing and walking limitations of no more than three hours in an eight-hour day. Ms. Johnson manifested no limitations in her upper extremity capabilities. She possessed the measured capacity to occasionally lift 20 pounds and carry 10 pounds. From these data, a vocational expert found Ms. Johnson employable given her age, education, work experiences, standardized test performances, and transferable skills.

This excerpt, from actual documentation in a personal injury lawsuit, and the associated commentary reflects the confusion that still exists when healthcare professionals confound medical impairment and vocational disability. How could the vocational expert find Ms. Johnson employable when the physician declared her “totally disabled”?

This confusion of terminology and expertise can result in flawed adjudication in matters of personal injury and economic loss. In essence, from a vocational perspective, the physician was not only speaking outside of his expertise, he was simply wrong when he concluded that Ms. Johnson was totally disabled occupationally. He further confounded the issue of her residual employability by concluding that she would remain “disabled” for the rest of her life.

In reality, Ms. Johnson was a measurably (through relevant assessment) good candidate for select forms of sedentary and light work, with or without job accommodation. Nonetheless, the

physician's mistaken use of the terms "impaired" and "disabled" as well as his associated declaration that Ms. Johnson (age 47) would be "permanently and totally disabled" for the rest of her life reflects how the seemingly unresolved professional confusion of medical impairment with vocational disability continues to obfuscate important decisions and adjudications in legal and administrative matters, including workers' compensation cases, personal injury litigations, and short- and long-term disability claims.

In another personal injury matter, a 60-year-old UPS driver claimed that from a work-related left shoulder injury, he could no longer perform his heavy work because of an irreparable rotator cuff tear; however, a careful review of his historical medical records revealed that he had chronic low back impairment (spinal stenosis) and severe left ankle osteoarthritis that both a podiatrist and orthopedic surgeon opined would require ankle fusion or ankle replacement. The plaintiff's vocational expert declared that absent the left shoulder injury, the UPS driver would have worked until age 66; in contrast, the defense vocational expert reported that independent of the left shoulder injury, chronic low back impairment and pre-existing, unrelated ankle arthritis disabled him from his customary work.

Impairment is a medical term, and disability is a non-medical concept. The American Medical Association's *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed.) recognizes that impairment is any loss or abnormality of psychological, physiological, or anatomical structure or function, and disability is any limitation in the ability to carry out activity as a result of an impairment. Occupational disability is defined as the inability to carry out job requirements as a result of exertional and/or non-exertional (e.g., sensory or emotional) limitations secondary to medical impairment. Unfortunately, the distinction between medical impairment and vocational disability and the application of this difference are not yet universal.

The reality is that a professional quarterback who sustains an above-the-knee amputation (AKA) during the off-season in an automobile accident will never return to playing football. He is physically impaired and disabled from playing that sport, even with a state-of-the-art prosthesis. However, even without the benefit of a functional prosthesis and absent social and psychological problems associated with that devastating injury, a professional football player theoretically could function again as a television sports commentator.

The confusion of "impaired" with "disabled" represents a continuing issue in occupational disability assessment and adjudication despite advancements in the understanding that biopsychosocial variables constitute both employability and disability and that many functional limitations can be accommodated with or without assistive devices. The International Classification of Functioning (ICF) and the World Health Organization's (WHO) Model of Health and Disability continue to refine the distinction between impairment and disability. The WHO (2001) notes that disability constitutes a contextualized "outcome or result of a complex relationship between an individual's health condition and personal factors, and the external factors that represent the circumstances in which the individual lives."

The process of disability determination is not a static declaration ending in a categorical conclusion of employability but rather a dynamic, reciprocal, and temporal process evolving over time with changes in personal, health, and environmental factors (Schultz, 2009). Functionality

is essential to bridging the gap between impairment and disability. Suffice it to say, disability assessment is a multifactorial process of vocational evaluation well beyond the scope of medical examination, which is focused on psychological, physiological, and/or anatomical changes following the onset of disease, trauma, and/or injury. Physicians are not trained to assess occupational disability even though they are invited to do so on a regular basis either by patient inquiry, legal interrogatory, or insurance classification.

## **IMPAIRMENT**

The WHO defines impairment as “any loss or abnormality of psychological, physiological, or anatomical structure or function.” Impairment may be considered what is wrong or abnormal with an organ or body part. Impairments can be temporary or permanent. Permanent impairments often stem from diagnoses that include alterations in anatomy and/or physiology that cannot be ameliorated, corrected, or “cured.” For example, an AKA, as referenced above, is a permanent impairment.

Functional limitations can be ameliorated with assistive devices, but the impairment can only worsen with time. Whether the AKA causes total vocational disability depends on a variety of factors outside the scope of traditional medical training and practice. Other professionals trained in vocational assessment and occupational rehabilitation can speak to whether the AKA causes disability. But first, one must consider the concepts of functionality and functional demands.

## **FUNCTIONALITY AND FUNCTIONAL DEMANDS**

In the assessment of occupational disability, functionality or residual functional capacity (RFC) bridges the gap between medical impairment and occupational disability. Following the onset of permanent impairment, one may be described as having RFC. Functional demands are what is expected of an individual in a particular task or job. They can be physical or non-exertional and can be changed to match a person’s RFC. Functionality, of course, is how well an individual can perform in relation to expectations.

Since the Americans with Disabilities Act of 1990 introduced the concept of job accommodation into the mainstream United States labor market, essential function job descriptions have become practical tools to change functional demands to match an individual person’s residual functional capabilities. There are objective ways to measure functionality.

## **MEASURING FUNCTIONALITY**

Depending on the type of impairment, RFC can be measured in a laboratory setting or on-the-job. During neuropsychological assessment, brain behavior is measured with standardized testing. Both quantitative (tested) and qualitative (observed) data can make predictions regarding an individual’s functionality, although there is always the issue of ecological validity. That is, can the standardized test results predict a person’s performance in the real world?

RFC that reflects employability can be measured during vocational assessment. If the vocational evaluator knows from reliable data that a person has the capacity to carry out sedentary work, the

evaluator can, in a laboratory setting or in an on-the-job situation, assess the impaired individual's capabilities to satisfy job demands.

## **OCCUPATIONAL DISABILITY**

According to Schultz (2009), assessment of occupational disability is “not a static determination ending in a categorical conclusion of employability but rather a dynamic, reciprocal and temporal process evolving over time with changes in personal, health, and environmental factors” (page 200). Additionally, individuals can be disability prone. A host of biopsychosocial factors can cause work dysfunction (Lowman, 1993).

Disability determination is a function of appreciating the occupational implications of biological, psychological, and social variables best understood by a thorough assessment that often includes reviewing health records, performing a structured diagnostic interview, and administering standardized vocational tests. Walker and Krauss (2009) have thoroughly discussed the differences among trauma, impairment, and disability. They explain in detail that these concepts are interrelated but not the same, and their individual evaluations generally require different methods of assessment and determination.

Disability is sometimes an administrative term that refers to a partial or total inability to perform essential job functions. When the gap between functionality and work functions can be reduced with job reengineering, assistive devices, and/or other forms of accommodation, occupational disability can be ameliorated or even eliminated. Individuals with upper extremity limitations may have disability in operating traditional computer equipment and keyboards; however, voice activation, foot mice, and modified keyboards are devices that can make a one-handed individual functional at a computer station.

Determining the source of medical impairment, its effects on functionality, and ultimately its impact on an individual's employability continue to challenge various healthcare professionals, insurance administrators, legal professionals, and public policymakers. Until we recognize differences in impairment and disability and validate methods in measurement of these variably dependent phenomena, we will not execute fairness, justice, and equal opportunity to individuals who have experienced changes in their health secondary to developmental disorders, illness, trauma, and/or aging.

Lowman, R. *Counseling and Psychotherapy of Work Dysfunctions*. Washington, DC.: American Psychological Association, 1993.

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Schultz, I. “[Determining Disability: New Advances in Conceptualization and Research.](#)” *Psychological Injury and Law*. 2.3(2009): 199-204.

Walker, J., and Krauss, S. “Assessing Occupational Disability Following Trauma and Impairment.” [\*Assessing Impairment – From Theory to Practice\*](#). New York: Springer Science+Business Media, 2009.

World Health Organization (WHO). [\*International Classification of Functioning, Disability and Health\*](#). Geneva: World Health Organization, 2001.

### **Paying People with Disabilities Less Than Minimum Wage Is Legal** **Contributor: Renee Woodward**

Yes, you read that title correctly. It is currently legal in most of the U.S. to pay workers with disabilities less than the standard minimum wage. This year marks the 80<sup>th</sup> anniversary of the Fair Labor Standards Act (FLSA). After 80 years, many people feel it is about time for fair labor laws to meet up with the Americans with Disabilities Act. While the FLSA instituted the minimum wage and banned child labor, Section 14(c) of that Act presented a loophole allowing employers to pay subminimum wages to Americans with disabilities. According to Representative Gregg Harper (R-Miss.), writing in [\*The Hill\*](#), “This section of the law assumes that an individual’s productivity is impaired due to their disability and allows an employer to obtain a 14(c) certificate from the Department of Labor. Once granted, these employers become exempt from federal minimum wage requirements, enabling them to vastly underpay 160,000 workers with disabilities living in the United States.”

On March 3, 2017, Harper introduced the Transitioning to Integrated and Meaningful Employment (TIME) Act of 2017 ([H.R. 1377](#)). While previous versions of TIME have been introduced, as of yet, none have been made into law. The goal of this Act is to [“amend the Fair Labor Standards Act of 1938 to better align certain provisions of such Act with Federal disability laws and policies intended to remove societal and institutional barriers to employment opportunities for people with disabilities.”](#)

In 2013, [NBC News](#) reported that records from the Department of Labor showed that some Goodwill workers in Pennsylvania earned wages as low as \$0.22, \$0.38, and \$0.41 per hour in 2009. In her recent petition, [Kayla McKeon](#), Manager of Grassroots Advocacy for the National Down Syndrome Society, claims that disabled workers are still receiving as little as \$0.30 per hour in wages.

Besides the substandard minimum wage, some proponents of TIME are against the placement of workers [“in ‘sheltered workshops’ where they do not have able-bodied colleagues.”](#) It is argued that workforce segregation and subminimum pay keep individuals with disabilities from being fully inclusive members of the workforce. In [\*The Nation\*](#), Michelle Chen argued that segregated workshops cause workers “to languish indefinitely in jobs with virtually no redeeming educational value.” She reported that such programs move only a small percentage of workers into mainstream community-based work settings over time. To quote Ms. Chen, “The challenge is not one of disability rights but of human rights, and should prompt a national conversation about a question that concerns workers of every ability: What’s the real meaning of a job?”

**Cool Effect: The Go-To Place for Finding Carbon Emissions Programs**  
**Contributor: Renee Woodward**

Cool Effect is a crowdfunded, non-profit platform that provides individuals with opportunities to support carbon emissions programs worldwide. Their website states: “Combining science, expertise, and transparency, we are creating a community built around one simple vision: give people the power and confidence to band together and reduce the carbon pollution that causes climate change.” Current [projects](#) include ranch grassland protection in the U.S.; biogas digesters in China and Vietnam; renewable energy wind turbines in Costa Rica; rainforest conservation in Madagascar; and clean cookstoves in Malawi, China, Peru, Uganda, and Honduras.

**New Zealand Company Experiments with a Four-day Workweek**  
**Contributor: Sarah Sutton**

This year, a firm in New Zealand conducted a two-month study allowing its staff to work a reduced workweek of 32 hours/four days versus the typical workweek of 40 hours/five days, while analyzing the effects this change had on the workplace and its employees. *The New York Times* discusses the study in an article titled, [“A 4-Day Workweek? A Test Run Shows a Surprising Result.”](#)

**Disrupting the Balance: The Acceleration of the Arctic’s Carbon Cycle**  
**Contributor: Erica Rankin**

[Research](#) suggests that the Arctic’s carbon cycle is accelerating – and re-shaping the tundra ecosystem as we know it.

As noted by Esprit Smith, “The Arctic carbon cycle is a delicate balance of carbon being released into the atmosphere and carbon being removed from the atmosphere.” When the upper layer of permafrost is thawed during warmer temperatures, carbon gets released into the atmosphere as previously-frozen organic material is broken down. This process encourages foliage growth, which facilitates removal of carbon dioxide. However, the time in which carbon is stored in the soil decreases as temperatures rise. Researchers anticipate this will lead to faster, more pronounced seasonal and long-term changes in global atmospheric carbon dioxide.