

## V. Permanent Total Disability in Florida Before and After the 1993 Reforms

Among nonfatal workplace injuries, Permanent Total disability occupies, at least in principle, the pinnacle of severity: an extreme and enduring physical incapacitation that precludes gainful employment. Corresponding to this severity is the per-case cost of Permanent Total disabilities: Division data have shown, almost without exception, that Permanent Total cases incur the highest average and median cost among all workers' compensation disabilities at every phase of case maturity. For injury years 1990 through 1999, the average cost of combined indemnity and medical benefits plus amounts awarded in settlements was \$20,390 for all lost-time cases and over ten times that amount—\$208,179—for Permanent Total cases.<sup>1</sup> For indemnity and medical benefits considered individually, Permanent Total cases retained an approximate ten-to-one ratio in average cost to the average cost for all lost-time cases, and in those two cost categories as well as in settlement awards average costs for Permanent Total cases easily ranked most expensive.

Though Permanent Total cases are relatively infrequent, never accounting for more than 2% of lost-time cases in any single injury year from 1990 through 1999,<sup>2</sup> their high cost per case gives them a disproportionate impact on aggregate total benefit costs. Representing just 1.3% of all lost-time cases for combined injury years 1990-1999, Permanent Total cases accounted for 15.1% of all benefits paid, or \$2.2 billion out of \$14.6 billion.<sup>3</sup> This substantial expense makes Permanent Total disability a salient cost factor for workers' compensation as a whole.

Further analysis of costs associated with Permanent Total disability brings the issue into sharper focus. Medical costs, including lump-sum settlement of medical benefits, are not contingent on assignment of a particular disability classification: All workplace injuries covered under workers' compensation are entitled to appropriate medical treatment. It is unclear whether settlements of medical benefits are impacted by disability classification used as inducement or leverage in the negotiation between the carrier and the injured worker, such that, for example, Permanent Total status may prompt greater concessions from the carrier. More clear is the relationship between disability classification and *indemnity* benefits, both those paid weekly through the duration of eligibility and those paid as lump-sum settlements. In the instance of weekly payment, statutory formulas associated with particular disability types directly govern benefit amounts, while those formulas may influence lump-sum settlements by permitting calculable estimates of benefits for use as specific points of reference in the negotiation of an agreement between the carrier and the injured worker.

Indemnity benefit costs can be broken down into three component factors: the statutory benefit formula, the duration of eligibility, and the number of injured workers receiving benefits. As mandated in s. 440.15(1)(a), F. S., injured workers with Permanent Total disabilities are entitled to 66-2/3% of pre-injury average weekly wages. In cases with injuries occurring subsequent to June 30, 1955, the injured worker is entitled to an additional weekly amount equal to five percent of his or her weekly compensation amount

multiplied by the number of calendar years since the date of injury (s. 440.15(1)(f)(1), F. S.). The combined benefit amounts cannot exceed the maximum compensation rate in effect at the time of payment, and benefits are subject to an offset for Social Security disability benefits.

The high per-case cost of indemnity benefits paid for Permanent Total disabilities is chiefly due to the protracted duration of eligibility for benefits. Permanent Total disability, alone among benefit types for nonfatal injuries, has no statutory time limit.<sup>4</sup> This is in sharp contrast to the current 104-week limit for temporary benefits and even the 401-week combined limit for the next most severe disability type, Supplemental Income. It is instructive to note that even a decade after their injuries, about 27% of injured workers with Permanent Total disabilities stemming from 1990 injuries were still receiving indemnity benefits as of March 20, 2000.<sup>5</sup> Once begun, these benefits may continue for many years.

From a cost perspective, both the benefit for-

mula and the term of benefits might seem open to reduction for the purpose of containing system costs. Yet cost containment must always be weighed against the needs of injured workers, and it is arguable that any reduction in the amount or duration of Permanent Total benefits would adversely impact injured workers whose extremity of incapacitation places them in greatest need. If fairness warrants the present benefit allowances, the one remaining area for expression of cost concern is in the number of injured workers receiving Permanent Total benefits.

Table B5.1 provides rates of Permanent Total cases per 100,000 workers for Florida and combined U. S. jurisdictions. For the policy years listed, Florida has never ranked lower than fifth, and in five of the eight policy years Florida ranked first or second nationally in its rate of Permanent Total cases. With the exception of policy year 10/92 - 9/93, rates of Permanent Total cases in Florida were three to four times the national rate. This directs attention to the eligibility requirements and practices that result in such a large number of Permanent Total disabilities.

**Table B5.1**

***National and Florida Rates of Permanent Total (PT) Disability***

Policy Period	Florida's PT Rate per 100,000 Workers	National PT Rate per 100,000 Workers*	Florida's Ranking**
10/88-9/89	67	N/A	1
10/89-9/90	52	N/A	1
10/90-9/91	22	7	5
10/91-9/92	18	5	3
10/92-9/93	9	4	4
10/93-9/94	16	5	2
10/94-9/95	23	7	1
10/95-9/96	27	7	2

\*Excludes California, Delaware, Massachusetts, Minnesota, New York, Pennsylvania, and Texas

\*\*Includes all states.

Source: National Council on Compensation Insurance's *Annual Statistical Bulletins*, 1993-2000

While it may be true that Florida's rate of severe workplace injury is consistently higher than rates in other U. S. jurisdictions, that possibility, *prima facie*, seems unlikely. Employment in the goods-producing industries, which tend to have greater risk of serious injury, is proportionally lower in Florida than nationally.<sup>6</sup> More plausible is the suspicion that Florida is accepting cases as Permanent Total that would be classified as less severe disabilities in other jurisdictions. If so, Florida may be diluting its Permanent Total classification with cases that were never intended to qualify for such extensive benefits. The resulting mismatch of need and benefit in these cases would undermine the argument for Permanent Total benefits whose very premise is the congruence of the two. In this aspect, eligibility considerations give expression to cost concerns without challenging the appropriateness of the statutory provision for "permanent" and "total" disabilities and thereby jeopardizing any semblance of balance between employer and worker interests. This alone makes eligibility for Permanent Total benefits a prime candidate for policy consideration and reconsideration. Adding further impetus is the inherent difficulty of specifying exactly which thresholds of incapacitation appropriately qualify. Consensus is much easier to reach in the abstract discussion of need than in the specifics of qualification. Unavoidably, eligibility is a major policy issue surrounding Permanent Total benefits, perhaps *the* major issue.

This chapter addresses eligibility for Permanent Total benefits at a specific historical juncture. In 1993, policymakers in Florida, alarmed over the number of Permanent Total disabilities, amended the law to tighten eligibility and reduce the number of qualifying cases. The new law became effective for injuries sustained on or after January 1, 1994, and remains in effect. This chapter focuses on that law, first placing it in historical context and contrasting its provisions with those of the preceding law, then critically examining its content and implications, and subsequently presenting data that help to depict its impact. The final section attempts to move beyond the present law with some critical reflections on Permanent Total disability that

suggest specific ways for improving the statute.

### ***Historical Sketch of Permanent Total Benefits in Florida***

A brief historical overview of law governing Permanent Total disability in Florida will help to show the evolution of issues still important in current discussion.

In May of 1935 Governor David Sholtz signed into law House Bill 29, creating the Florida Industrial Commission and providing Florida with its first workman's (*sic*) compensation law. This marked the beginning of workers' compensation in Florida. Today, that law is known as Chapter 440 of the Florida Statutes.

The 1935 workers' compensation law made provisions for those injured workers adjudicated to be permanently and totally disabled as a result of a workplace injury. Such injured workers would receive 50% of previous average weekly earnings if there were no dependents, rising to 55% for one dependent and 60% for more than one. While the benefit was called "permanent total," it was not truly permanent but limited to 350 weeks. Conditions that constituted eligibility, absent conclusive proof to the contrary, included loss of both hands, both arms, both feet, both legs, or both eyes, or loss of any one of these body parts in combination with the loss of a different one. The law stated that "in all other cases permanent total disability shall be determined in accordance with the facts."

In 1941, the benefit formula for Permanent Total disability was revised to eliminate the variation based on the injured worker's number of dependents. All cases were to receive 60% of the average weekly wage.

In 1951, there was a substantial change to the

term of benefits. Effective July 1, 1951, the limit on Permanent Total benefits was raised from 350 to 700 weeks.

In 1955, the term limit of 700 weeks was removed, and Permanent Total benefits became payable through the continuance of the disability. This change affected only injuries occurring on or after July 1, 1955; all previous injuries remained subject to the limits set forth in the law effective at the time of injury.

Subsequent to 1955 the law evolved to recognize that a worker who was permanently and totally disabled may still reestablish an earning capacity. Benefits for such a worker would be figured at 60% of the difference between the pre-injury wage and the post-disability wage. By 1970, the word "rehabilitation" had been included when referring to an injured worker adjudicated Permanent Total who had regained an earning capacity.

In 1974, Permanent Total benefits were expanded to include payments supplemental to all other benefits. Workers with injuries occurring after June 30, 1955, were eligible, though payments began on October 1, 1974, with no retroactive payments authorized for the period between 1955 and 1974. Supplemental payments were calculated as five percent of the injured worker's compensation rate multiplied by the number of years since the date of injury, subject to the maximum compensation rate. Payments were to be drawn from the Workers' Compensation Trust Fund. A decade later, the obligation to make supplemental payments was shifted to the employer or carrier for injuries on or after July 1, 1984. Supplemental payments for earlier injuries continued to be drawn from the trust fund.

In 1975, there were no changes to the specific sections of the law governing Permanent Total benefits, but changes in other sections impacted these benefits nonetheless. The maximum average weekly wage, previously provided in statute, was henceforth to be set by the Department of Commerce on an an-

nual basis, calculated according to the wages reported by employers subject to the Florida Unemployment Compensation Law during the previous year.

The 1977 law remained unchanged except for a provision for the Division of Workers' Compensation to provide rules for injured workers receiving Permanent Total benefits to report all earnings and Social Security income to the division and to the employer or carrier. The provision allowed for benefit payments to be withheld for any period in which the worker willfully fails or refuses to report, upon request made by the division or employer/carrier, in a manner prescribed by rule.

In 1979, significant changes were made to the law regarding both the benefit formula and eligibility conditions for Permanent Total disability. Benefits were raised from 60% to 66-2/3% of the average weekly wage. Paraplegia and quadriplegia were added as eligibility conditions, as was the provision that these and other conditions would stand in the absence of conclusive proof of a "substantial earning capacity." Language was added to deny Permanent Total benefits to any worker engaged in or capable of engaging in gainful employment. This provision made it the burden of the employee to prove an inability for even uninterrupted light work due to physical limitations. Workers receiving Permanent Total benefits who had rehabilitated to an extent of establishing an earning capacity were henceforth to receive wage-loss benefits pursuant to s. 440.15(3)(b), F. S. The division was also charged with adopting rules to enable an injured worker receiving Permanent Total benefits to undertake a trial period of employment without prejudicing a resumption of those benefits should the earning capacity prove unsustainable.

In 1990, only minor changes were made to the law governing Permanent Total benefits. The responsibility of injured workers to prove an inability to do even light work was qualified to denote work available within a 100-mile radius of the worker's residence. In addition, the entitlement to supplemental

payments was terminated at age 62 if the injured worker was eligible for Social Security benefits. These changes to the law governing Permanent Total benefits were the last to be made until the 1993 reforms.

Florida's statutory provisions for Permanent Total disability from 1935 to 1993 may be viewed as reflecting a learning experience in which several lessons stand out. First, changes to statutory benefit amounts have always been increases, never decreases, signifying an enduring concern on the part of policymakers for the adequacy of benefits. Second, after experimenting with limitations on the term of eligibility for benefits, first 350 weeks and then 700 weeks, policymakers rejected specific time limits in 1955 and have never restored them. This further attests to a concern for the adequacy of benefits. Third, the most significant changes in the conditions of eligibility for benefits stemmed from the growing awareness that disabilities deemed "permanent" and "total" do not inevitably preclude any future earning capability. Policymakers sought to adjust the law to allow for this possibility. These three lessons persist in the provisions of 1993 reforms governing Permanent Total disability. In this area, at least, the reforms were evolutionary rather than disjunctive.

### ***Statutory Eligibility for Permanent Total Disability Before and After the 1993 Reforms***

Table B5.2 summarizes initial eligibility criteria immediately preceding and following the implementation of the 1993 reforms on January 1, 1994. The pre-reform law allowed either of two different sets of criteria to establish Permanent Total disability. The first set comprised specific severe injuries coupled with the absence of proof of any substantial earning capacity on the part of the worker. Severe injuries cited in the statute were double loss involving appendages or eyes, paraplegia, and quadriplegia. The second set of

criteria left unstated the injury, requiring only that determination be made "in accordance with the facts." It was required that the injured worker be physically incapable of gainful employment and submit proof to that effect, establishing an inability for even light work within 100 miles of his or her residence.

The reform law, effective for injuries occurring in 1994 and later, allowed for only one set of eligibility criteria for initial determination of Permanent Total disability. The idea of "catastrophic" injury was central to these criteria, though the law retained the provision of the previous law requiring additionally an absence of conclusive proof of a substantial earning capacity. Eligibility based on the discretionary assessment of an injury in conjunction with proof by the injured worker of a physical inability for work was eliminated. This appeared to make the new law more restrictive than the old. Other notable differences in the new law include the following:

- The list of specific qualifying injuries in the reform legislation reflects greater medical awareness of the range of injuries with severe consequences for physical capabilities. In retrospect, the lack of inclusion in the old law of extensive head and burn injuries appears as a curious omission, if not as an oversight. It is reasonable to expect that advances in occupational medicine would influence legislation pertaining to injuries.

- In one aspect, the reform legislation represents a considerable *easing* of restrictiveness in eligibility requirements. Whereas the old law had required a double loss involving hands, arms, feet, legs, or eyes, the new law provided for eligibility based on single loss of an arm, hand, foot, or leg. Interestingly, these injuries expressly fell under the scheduled benefits for Permanent Partial disability prior to Florida's turn to a wage-loss approach to these benefits in 1979.

- The extension of eligibility to include injuries qualifying for Social Security disability or supplemental income benefits adds an indefiniteness to the

**Table B5.2**

***Initial Eligibility Conditions for Permanent Total Disability  
Pre- and Post-Reform***

Law in Effect for Injuries 1990* - 1993	Law in Effect for Injuries 1994 and After
<p><b>Condition 1: Specific Severe Injury</b></p> <p>A. One of the following conditions of physical injury:</p> <ol style="list-style-type: none"> <li>1. Loss of both hands, arms, feet, legs, or eyes, or any individual combination of two of those body parts</li> <li>2. Paraplegia</li> <li>3. Quadriplegia</li> </ol> <p>B. Absence of conclusive proof of substantial earning capacity</p> <p><b>Condition 2: Discretionary Injury</b></p> <p>A. Discretionary determination by an adjuster or JCC "in accordance with the facts"</p> <p>B. Absence of any actual employment for the injured worker</p> <p>C. Absence of any physical capability for employment</p> <p>D. Proof by the worker of inability for even light work within 100 miles of residence</p>	<p><b>"Catastrophic" Injury</b></p> <p>A. One of the following conditions of physical injury:</p> <ol style="list-style-type: none"> <li>1. Spinal cord injury involving severe paralysis of an arm, a leg, or the trunk</li> <li>2. Amputation of an arm, hand, foot, or leg involving loss of use</li> <li>3. Severe brain or closed-head injury leading to:               <ol style="list-style-type: none"> <li>(a) Severe sensory or motor disturbances</li> <li>(b) Severe communication disturbances</li> <li>(c) Severe complex disturbances of cerebral function</li> <li>(d) Severe episodic neurological disorders</li> <li>(e) Other brain or closed-head injuries or equal severity to the above</li> </ol> </li> <li>4. Second- or third-degree burns of 25% of the body surface or third-degree burns of 5% or more to the face and hands</li> <li>5. Total industrial blindness</li> <li>6. Any other injury qualifying for disability or supplemental income benefits under the July 1, 1992, Social Security Act</li> </ol> <p>B. Absence of conclusive proof of substantial earning capacity</p>

\*Eligibility criteria in the 1979 law were the same except for the 100-mile limit in condition 2D.  
Source: S. 440.15(1)(b), Florida Statutes (1993), s. 440.15(1)(b), Florida Statutes (1994) and s. 440.02(34), Florida Statutes (1994)

reform legislation, raising the suspicion of an oblique return of the previous law's discretionary determination of eligibility. In any case, eligibility under the current statute is inherently unclear without consideration of related Social Security benefits.

The Social Security Administration of the federal government administers two programs designed to provide benefits based on disability: the Social Security disability insurance program, Title II of the Social Security Act, and the Social Security supplemental security income program, Title XVI of the act. Title II disability benefits are available to individuals who are "insured" under the Social Security Act by virtue of their having contributed to the Social Security trust fund through payroll tax withholdings. This program also covers certain disabled dependents of insured individuals. Title XVI provides Social Security income to "uninsured" individuals, including children under age 18, who are disabled and have limited income and resources. Except for minors, the definition of disability under the Social Security Act is the same in each program: "the inability to engage in any substantial gainful activity due to a medically determinable physical or mental impairment which is expected to result in death or which has lasted or can be expected to last for at least twelve months."

For each body system, the Social Security Act lists the impairments that are considered severe enough to prevent a person from performing any gainful activity. Many of the listed impairments are permanent in nature; others are conditions that are expected to result in a person's death. For all other impairments, it must be shown by evidence that the impairment has lasted or is expected to last longer than twelve months. Bodily systems and functions subject to assessment of impairment are the musculoskeletal system, special senses and speech, the respiratory system, the cardiovascular system, the genito-urinary system, the hemic and lymphatic system, the skin, the endocrine system and obesity, the neurological system, mental disorders, neoplastic diseases, and the immune system.

As attested by the above list, impairments under the scope of Social Security disability are much wider reaching than those cited in Chapter 440 as specific "catastrophic" injuries. It is generally accepted that the level of impairment needed to qualify for Social Security disability is lower than that needed to qualify for disability under workers' compensation. Note particularly that for Social Security disability the claimant must show that the disability has lasted or is expected to last more than twelve months, a requirement hardly implying permanence. Another distinguishing feature of Social Security disability is the non-combative hearing process for determining whether a person is to be accepted as disabled. This means that only evidence presented by one side, the claimant, is considered; no party is present to make a case for denying disability benefits. Such one-sidedness runs directly counter to the intent of eligibility requirements for Permanent Total disability outlined in s. 440.15(1)(b), F. S., where catastrophic injury *plus* absence of a conclusive proof of any substantial earning capacity constitute eligibility. The absence of such proof implies at least the opportunity to present it.

Overall, it is unclear whether the statutory requirements governing eligibility for Permanent Total disability are, even in principle, more or less restrictive under current law than under the previous statute. The elimination of eligibility based, in part, on uncited, discretionary injuries would seem to imply greater restrictiveness, while the lessening of some cited injuries from double to single loss combined with reliance on the less stringent requirements of Social Security disability would seem to imply reduced restrictiveness.

More clear in direction of intent is the statutory change in the qualifications for remaining in Permanent Total status. The pre-reform law allowed that injured workers initially classified as Permanent Total would be modified to wage-loss benefits upon recovery of an earning capacity. A trial period of employment was allowed without prejudicing the worker's return to Permanent Total disability should the capacity for work prove unsustainable. The Division of

Workers' Compensation was required to monitor workers' earnings by setting rules for the reporting of such by the worker and the employer or carrier. Failure by the worker to report earnings would result in forfeiture of benefits.

The reform legislation retained these provisions, modifying only the specific Permanent Partial benefits due to Permanent Total cases upon reestablishment of an earning capability. New in the reforms was the carrier's or employer's express right to conduct vocational evaluation or testing of the injured worker on an annual basis. Failure of the worker to cooperate could result in forfeiture of benefits. The reform legislation clearly intended to toughen the requirements for ongoing eligibility for Permanent Total benefits by supplementing a passive monitoring of wages with active yearly measurement of work capability. This provision clearly had the potential to reduce the duration of these disabilities, if not the overall frequency of Permanent Total cases.

### ***Data and Analysis***

The passage of a law does not entail its automatic efficacy; implementation is the critical link between desired and real effects. This implies that determining the impact of a law requires study of both implementation and outcomes. In the instance of eligibility requirements for Permanent Total disability, the central issue of implementation is the manner in which insurance carriers and judges interpret and apply the law. Questions readily follow: Under the pre-reform statute how was discretionary eligibility used? How many Permanent Total cases did it generate compared to other eligibility conditions? To what standards of proof was the injured worker held in demonstrating incapacitation for work? And so on. Considerations of this sort attempt to capture the real practices that underlie and explicate statistical outcomes, such as the

prevalence of Permanent Total cases. Unfortunately, the division does not collect information on the implementation of the law governing eligibility for Permanent Total disability, so analysis in this section will focus on outcomes alone. The admitted caveat is that outcomes may have only an ambiguous relationship to the statute supposedly prompting them when actual implementation of the statute is not apprehended.

All data used in this section pertain to Permanent Total cases whose injuries were sustained in 1993, the last injury year under the pre-reform law, and 1994, the first post-reform injury year. To control for differences of vintage, data for 1993 injuries were frozen on June 30, 1998, while data for 1994 injuries were frozen on June 30, 1999. This allows comparison of the data at an equivalent maturity of 54 months post-injury year. In the topical areas that follow, data are used to evaluate intended outcomes of the 1993 reforms.

#### *Frequency, Development, and Costs of Permanent Total Cases*

Table B5.3 displays the frequency of Permanent Total disabilities versus all other lost-time cases for 1993 and 1994 injury years at 54-month maturity. Though the rate of Permanent Total cases is slightly higher for 1994, the difference between the two years is not statistically significant ( $\chi^2 = 2.107$ ,  $p > .10$ ). *Thus, the data provide no evidence of any change in the frequency of Permanent Total disabilities in the first year of the reforms.*

Over the course of their development, disabilities that eventually qualify as Permanent Total often undergo prolonged tenure in other, less serious disability categories. It might be hypothesized that greater restrictiveness in eligibility requirements for Permanent Total benefits would result in a different aggregate profile of case development—specifically, there would be proportionally fewer cases in the less severe disability categories during early phases of data maturity due to

**Table B5.3**

**Frequency of Permanent Total Cases:  
1993 versus 1994 Injury Years at 54-Month Maturity**

	1993		1994	
PT Cases	1,159	1.38%	1,207	1.46%
All Other Disabilities*	83,073	98.62%	81,466	98.54%
Total	84,232	100.00%	82,673	100.00%

\*Lost-time cases only

Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999

the exclusion of less serious injuries. Table B5.4 provides the distribution of disabilities at six, 18, 30, 42, and 54 months post-injury year for 1993 and 1994 lost-time injuries that would become Permanent Total at 54-months maturity. Note that most of the Permanent Total cases for both 1993 and 1994—52.6% and 54.2%, respectively—were Temporary Total at six months after the year of injury; only a small minority (5.9% and 5.4%) were Permanent Total. Importantly, the early vintages of case development for 1994 injuries show no clear trend for proportionally fewer cases in less severe disability categories than the 1993 injury cases. Moreover, the gradual increase in Permanent Total disability, rising to 100% of the cases at 54-month maturity, is little different for 1993 compared to 1994 cases over the different vintages. In all, the data show no real dissimilarities in aggregate developmental profiles for the two injury years. It might be added that the difference between the average time from injury to acceptance for Permanent Total benefits is not statistically significant for 1993 versus 1994 cases.<sup>7</sup>

The hypothesized impact of the 1993 law on the duration of eligibility for Permanent Total benefits might contain contrary tendencies. On the one hand, an increase in restrictiveness of eligibility might suggest an increased prevalence of more severe injuries, implying greater duration of benefit payments. On the other hand, the right of carriers to conduct an annual

vocational evaluation might result in hastened case closure. Data presented in Table B5.5 show virtually indistinguishable distributions of open and closed cases at 54-month maturity for 1993 and 1994 Permanent Total cases. Differences are not statistically significant ( $\chi^2 = .1254, p > .10$ ). While this may suggest the effective impact of two mutually nullifying tendencies, consistency with other findings would suggest the greater likelihood that the populations compared are without difference in severity of injury, and thus without difference in closure rates.

Further support for a lack of difference between severity characteristics of 1993 and 1994 Permanent Total cases can be found by comparing average and median benefit payments per case. It is arguable that greater restrictiveness of eligibility would lead to exclusion of less serious injuries and higher costs per case for the remaining cases, particularly with regard to medical benefits. Table B5.6 shows that average and median benefit costs for Permanent Total cases at 54-month maturity have generally declined, with the exception of median medical benefits. It should be noted, however, that differences between means for 1993 and 1994 cases in all three benefit categories are not statistically significant ( $p > .10$ ). Thus, the analysis of benefit costs per case fails to support the hypothesis that 1993 and 1994 Permanent Total populations represent different overall levels of severity of injury.

**Table B5.4**

**1993 and 1994 Permanent Total Cases at 54-Month Maturity:  
Prior Disability Types at Different Vintages Post-Injury Year**

Disability Type	Six-Month Maturity				18-Month Maturity				30-Month Maturity			
	1993		1994		1993		1994		1993		1994	
	#	%	#	%	#	%	#	%	#	%	#	%
Temporary Partial	8	0.7%	14	1.2%	6	0.5%	6	0.5%	5	0.4%	2	0.2%
Temporary Total	610	52.6%	654	54.2%	532	45.9%	570	47.2%	272	23.5%	259	21.5%
Permanent Impairment Only	0	0.0%	N/A	N/A	8	0.7%	N/A	N/A	4	0.3%	N/A	N/A
Wage Loss Only	49	4.2%	N/A	N/A	144	12.4%	N/A	N/A	159	13.7%	N/A	N/A
Wage Loss & Perm. Impair.	0	0.0%	N/A	N/A	5	0.4%	N/A	N/A	4	0.3%	N/A	N/A
Impairment Income	N/A	N/A	64	5.3%	N/A	N/A	167	13.8%	N/A	N/A	190	15.7%
Supplemental Income	N/A	N/A	6	0.5%	N/A	N/A	1	0.1%	N/A	N/A	2	0.2%
<b>Permanent Total</b>	<b>68</b>	<b>5.9%</b>	<b>65</b>	<b>5.4%</b>	<b>305</b>	<b>26.3%</b>	<b>292</b>	<b>24.2%</b>	<b>635</b>	<b>54.8%</b>	<b>684</b>	<b>56.7%</b>
Settled, No Indemnity Reported	0	0.0%	4	0.3%	6	0.5%	5	0.4%	7	0.6%	4	0.3%
Lost-time, No Indemnity Reported	299	25.8%	271	22.5%	108	9.3%	109	9.0%	51	4.4%	53	4.4%
No First Report Filed	122	10.5%	129	10.7%	44	3.8%	56	4.6%	21	1.8%	12	1.0%
Data Coding Error	3	0.3%	0	0.0%	1	0.1%	1	0.1%	1	0.1%	1	0.1%
<b>Total</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>

Disability Type	42-Month Maturity				54-Month Maturity			
	1993		1994		1993		1994	
	#	%	#	%	#	%	#	%
Temporary Partial	1	0.1%	1	0.1%	0	0.0%	0	0.0%
Temporary Total	82	7.1%	84	7.0%	0	0.0%	0	0.0%
Permanent Impairment Only	3	0.3%	N/A	N/A	0	0.0%	N/A	N/A
Wage Loss Only	71	6.1%	N/A	N/A	0	0.0%	N/A	N/A
Wage Loss & Perm. Impair.	3	0.3%	N/A	N/A	0	0.0%	N/A	N/A
Impairment Income	N/A	N/A	103	8.5%	N/A	N/A	0	0.0%
Supplemental Income	N/A	N/A	0	0.0%	N/A	N/A	0	0.0%
<b>Permanent Total</b>	<b>970</b>	<b>83.7%</b>	<b>986</b>	<b>81.7%</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>
Settled, No Indemnity Reported	1	0.1%	3	0.2%	0	0.0%	0	0.0%
Lost-time, No Indemnity Reported	23	2.0%	25	2.1%	0	0.0%	0	0.0%
No First Report Filed	4	0.3%	4	0.3%	0	0.0%	0	0.0%
Data Coding Error	1	0.1%	1	0.1%	0	0.0%	0	0.0%
<b>Total</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>	<b>1,159</b>	<b>100.0%</b>	<b>1,207</b>	<b>100.0%</b>

Source: Division of Workers' Compensation Claims Files as of June 30, 1994, 1995, 1996, 1997, 1998, and 1999, and Judges' Orders File as of March 20, 2000

**Table B5.5**

**Open and Closed Permanent Total Cases:  
1993 versus 1994 Injury Years at 54-Month Maturity**

Case Status	1993		1994	
Open	414	38.9%	452	39.7%
Closed	649	61.1%	687	60.3%
Not Current in Reporting	96		68	
Total	1,159	100.0%	1,207	100.00%

Note: All cases with settlement orders are assumed to be closed regardless of current carrier reporting.  
Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999

**Table B5.6**

**Average and Median Benefit Amounts Paid for Permanent Total  
Cases: 1993 versus 1994 Injury Years at 54-Month Maturity**

Benefit	1993	1994
Indemnity		
Average	\$46,514	\$44,584
Median	\$41,194	\$38,559
Medical		
Average	\$74,021	\$73,399
Median	\$39,064	\$40,920
Settlement Awards		
Average	\$123,852	\$115,224
Median	\$100,206	\$85,000

Note: No differences between means are statistically significant ( $p > .10$ ).  
Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999 and Judges' Orders File as of March 20, 2000

*Litigation Activity*

It might be supposed that elimination of the discretionary condition of eligibility for Permanent Total disability in favor of the seemingly more definite criteria of the reform statute would help to mitigate litigation over benefits. Table B5.7, however, provides data to the contrary: The rate of lost-time cases litigating for Permanent Total benefits was well under one per cent for both 1993 and 1994 injuries, with the difference between those years minute and lacking in statistical significance ( $\chi^2 = .0749, p > .10$ ). Among

cases that were litigated, however, data suggest an increased likelihood for Judges of Compensation Claims to award rather than deny Permanent Total benefits for 1994 injuries compared to 1993 injuries. Table B5.8 shows that 80% of the litigated 1994 cases, and only 59.3% of the 1993 cases, were awarded rather than denied Permanent Total benefits. The difference is statistically significant ( $\chi^2 = 11.5808, p < .01$ ). Whether the greater likelihood for award of benefits among litigated 1994 cases is due to the inclusion in the statute of eligibility criteria associated with Social Security disability benefits is unclear.

**Table B5.7**

**Cases Litigated for Permanent Total Benefits: 1993 versus 1994 Injury Years at 54-Month Maturity**

	1993		1994	
	Litigated for PT Benefits	113	0.13%	115
Non-Litigated for PT Benefits	84,119	99.87%	82,558	99.86%
Total Lost-Time Cases	84,232	100.00%	82,673	100.00%

Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999 and Judges' Orders File as of March 20, 2000

**Table B5.8**

**Cases Litigated for Permanent Total Benefits: Awards versus Denials in Orders Signed by Judges of Compensation Claims (1993 versus 1994 Injury Years at 54-Month Maturity)**

	1993		1994	
	PT Benefits Awarded	67	59.3%	92
PT Benefits Denied*	46	40.7%	23	20.0%
Total	113	100.0%	115	100.0%

\*Among lost-time cases only

Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999, and Judges' Orders File as of March 20, 2000

One final thought related to litigation concerns the settlement of Permanent Total cases. Although the eligibility criteria for Permanent Total benefits introduced in the reforms have no clear implications for settlement of cases, it might be instructive to ascertain whether settlements among Permanent Total disabilities have changed under the reform statute. Table B5.9 provides frequencies of settled and non-settled cases at 54-month maturity for 1993 and 1994 Permanent Total injuries. Settlements seem to show a slight increase among 1994 injuries, but the difference between the 1993 and 1994 injury years is not statistically significant ( $\chi^2 = 2.2656, p > .10$ ). This attests, once again, to the underlying similarity between the Permanent Total populations of injury years 1993 and 1994.

*Re-employment*

Any differences between the 1993 and 1994 Permanent Total populations might be manifested in differing patterns of return to work. Figure B5.1 illustrates the rates in which 1993 and 1994 Permanent Total cases had any earnings in quarters following acceptance for Permanent Total benefits. In quarters one through eight, 1993 and 1994 injury year cases show little difference. Subsequently, differences appear, but do not reflect any consistent trend that might indicate underlying differences in the populations compared.

**Table B5.9**

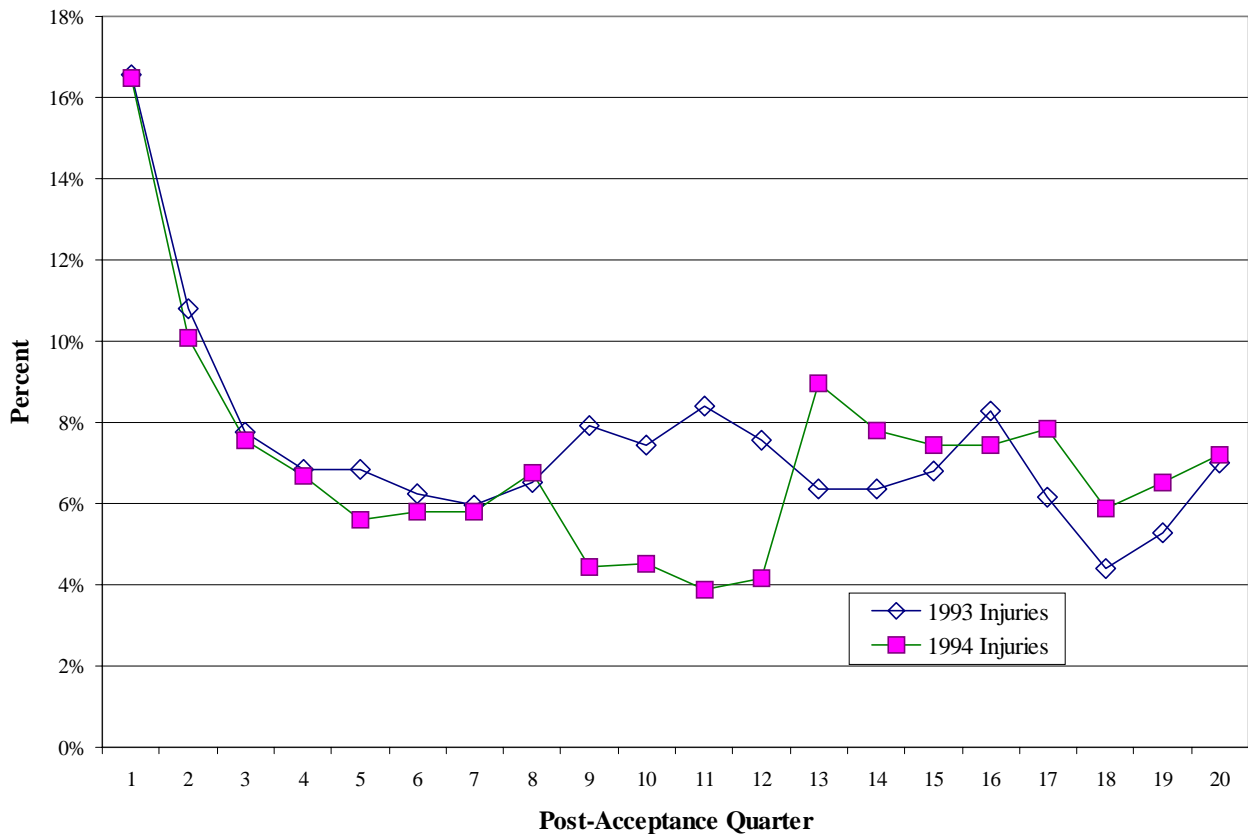
**Settlements Among Permanent Total Cases:  
1993 versus 1994 Injury Years at 54-Month Maturity**

	1993		1994	
	Not Settled	588	50.7%	575
Settled	571	49.3%	632	52.4%
Total	1,159	100.0%	1,207	100.0%

Source: Division of Workers' Compensation Claims Files as of June 30, 1998 and 1999, and Judges' Orders File as of March 20, 2000

**Figure B5.1**

**Percent of Permanent Total Cases Earning Wages  
by Quarter Following Acceptance for Benefits**



Source: Division of Workers' Compensation Claims File as of June 30, 1998 and 1999, and Division of Unemployment Wage File.

*Conclusions*

Analysis of data comparable in maturity fail to disclose any significant differences between 1993 and 1994 Permanent Total cases with regard to relative frequency, aggregate development, cost of indemnity and medical benefits, litigation for Permanent Total benefits, frequency and amount of settlements, case closure, or post-disability employment. The one difference found to be statistically significant was the increased likelihood for award of Permanent Total benefits by a Judge of Compensation Claims once a case had been litigated. This may suggest that the reform law resulted in some easing of eligibility requirements for award of Permanent Total disability, at least when determined by a judge rather than an insurance adjuster. However, it must be strongly emphasized that other factors not considered, such as implementation of the law and differing injury or other characteristics of 1993 and 1994 cases may partly or fully account for any differences or lack of differences described above. Further study of alternative explanations would be required before reaching more definite conclusions. In the next section, broader theoretical assessment of Permanent Total disability will attempt to support the data suggesting little effectiveness of the 1993 reform law by disclosing what is missing in that law.

### ***Rethinking Permanent Total Disability***

Throughout its history, Florida's workers' compensation law has based eligibility for Permanent Total disability on specific qualifying injuries supplemented with an "*et cetera*" clause comprising other, unspecified injuries. For law prior to the 1993 reforms, no restrictions were placed on qualifying injuries provided the injured worker could demonstrate physical incapability for employment as their consequence. Policymakers who drafted the 1993 reforms regarded this *et cetera* clause as too accepting and replaced it with one presumed to be more restrictive, based on

the qualifying requirements for Social Security disability benefits. Data reviewed in the prior section do not show any greater restrictiveness resulting from the reform legislation. In this section, an argument will be made that the reform legislation actually misjudged the real problem, and consideration of that problem will lead to new policy options for Permanent Total disability that fully respect the needs of seriously injured workers while avoiding overuse of costly and inappropriate benefits.

A distinction made in Florida's impairment rating schedule can help to pinpoint the fundamental oversight common to much discussion of Permanent Total disability. An evaluation of permanent *impairment* is not equivalent to an evaluation of permanent *disability*. The former is

...a function that physicians alone are competent to perform...Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficacy in one or more of the activities of daily living. These activities are self-care, communication, normal living postures, ambulation, elevation, traveling and nonspecialized hand activities.<sup>8</sup>

By contrast, the evaluation of a permanent disability is

...an administrative and not solely a medical responsibility and function. Evaluation of permanent disability is an appraisal of the patient's present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment, in addition to the definite medical factor—permanent impairment.<sup>9</sup>

The guide goes on to note that the factors involved in evaluation of a disability are extremely difficult to measure, which results in the use of the permanent impairment as the "sole or real criterion of disability far more often than is readily acknowledged." That notwithstanding, "the final determination of permanent disability is an administrative decision as to the patient's

entitlement.”<sup>10</sup>

These passages very aptly indicate the real problem with eligibility determination for Permanent Total disability: *considerations of injuries have obscured and eclipsed the administrative determination of disability*. The statute does suggest the distinction between the two: Under the current law a catastrophic injury is *not* the sole qualifying basis for Permanent Total disability; there must also be “the absence of conclusive proof of a substantial earning capacity” (s. 440.15(1)(b), F. S.). Furthermore, eligibility under Social Security for disability or supplemental income benefits is a sufficient qualifying condition for a catastrophic injury, *not* a Permanent Total disability. But the statute does not systematically distinguish between evaluation of an impairment and determination of a disability, nor does it provide for the effective administrative determination of disability. These shortcomings stem from absences in the statute of clear standards, viable options, and systemic constraints for the effective determination of Permanent Total disability. It is the purpose of this section to delineate specific deficiencies in each of these three areas and to offer suggestions for making suitable corrections.

### *1. Improving the Clarity of the Statute*

One of the most conspicuous absences in the statute is a statement of legislative intent regarding Permanent Total benefits. Such a statement is essential for effective guidance of administrative decisions. S. 440.15(1), F. S., would be strengthened by inclusion of language such as the following:

It is the intent of the Legislature that Permanent Total disability shall be awarded only when permanent consequences of a catastrophic workplace injury as defined in s. 440.02 preclude satisfactory performance of duties associated with any available, gainful employment for which the injured worker would otherwise qualify upon completion of rehabilitation or retraining

provided under this chapter. Employment shall be considered available when employment opportunities are shown to exist within a 60-mile radius of the injured worker’s residence.

The gist of this statement is to emphasize the mutual exclusivity of Permanent Total disability and the capability for work. Note that such capability need not be initially present based on the worker’s specific education, training, or prior work experience; it may result from completion of rehabilitation or retraining provided under the workers’ compensation statute. By implication, the injured worker is expected to participate in such rehabilitation and retraining as his or her capability permits. The limitation of employment opportunities to a specific area is necessary to protect the worker from unreasonable expectations of relocation.

Once a statement of legislative intent is added to the statute, a second concern regarding clarity is the specification of injuries considered to qualify for Permanent Total disability. Is such a specification an effective way to complement a statement of statutory intent, or is another way preferable?

One alternative to the specification of qualifying injuries is the use of an impairment rating such that some determined percentage of whole-person impairment would constitute a threshold for award of Permanent Total disability. Many states use this approach. What makes it problematic is the ambiguous relationship between an impairment rating and a disability determination. While specific catastrophic injuries (e. g., paralysis or blindness) have an intuitively clear connection to the award of Permanent Total disability, the same cannot be said for an impairment percentage. By according every qualitatively different injury a rank on a quantitative scale, the specific impact of the injury on the capability for work will vary considerably even within the same impairment rating. This may allow inappropriate injuries to qualify for Permanent Total benefits; at the least, it may increase the difficulty involved in the administrative determination of disability while inviting confusion and increasing litigation. The

method of scheduled injuries that Florida has always used as part of its qualification for Permanent Total disability is preferable to an impairment-rating approach as a means for helping to convey legislative intent regarding the severity of qualifying injuries.

The specification of qualifying injuries, however, raises two problems of its own. First, the list of such injuries included in the statute will, almost inevitably, remain incomplete. The list of specific catastrophic injuries in the current statute (subsections (34)(a)-(34)(e)) is not plausible even intuitively as comprehensive; severe respiratory injuries and illnesses, for example, are not included, though these may have debilitating consequences equal to some of the listed injuries. Any attempt at comprehensive specificity would overwhelm the statute with medical detail while risking the denial of benefits in cases of overlooked, infrequent injuries. This suggests the second problem for a scheduled-injuries approach to eligibility: the inescapable *et cetera* clause that closes the list. The challenge is to develop a clause that complements rather than thwarts statutory intent. In this regard, the *et cetera* clause in Florida's current law defining catastrophic injury, i. e., its inclusion of injuries qualifying for disability benefits or supplemental income under Social Security, is a matter of some contention. While proponents of this provision laud its deference to federal standards of disability, opponents aver that it transfers considerable authority out of the workers' compensation system and into another administrative realm having different priorities and procedures, as well as lower standards for defining disability. The net effect, opponents argue, is to dilute the statute and undermine effective determination of disability.

The resolution of this debate hinges on clarification of the intent of the statute. If policymakers intend that the standards for award of Social Security disability benefits are consistent with the definition of "catastrophic" injury central to the qualification for Permanent Total disability, then the linkage of state and federal law in this matter is appropriate; if not, Florida's statutory provision should be revised. What is clear is

that review of Social Security disability standards is warranted to ensure that the legislative intent of Permanent Total disability is not being undermined.

If policymakers should determine that the use of Social Security disability standards is inappropriate for identification of catastrophic injuries not expressly cited in the statute (s. 440.02(34), F. S.), an alternative formulation of the *et cetera* clause becomes necessary. The following language may be considered as a substitute for s. 440.02(34)(f), F. S., the final qualifying condition for catastrophic injury that supplements the specific injuries listed in (a) through (e):

(f) Any other injury whose permanent physical consequence on self-care, communication, normal living postures, ambulation, elevation, or nonspecialized hand activities is equivalent in severity to an injury cited in (a) through (e) having incapacitating consequences for the same function or functions.

The idea behind this language is that gainful employment almost invariably rests on certain basic physical capabilities whose absence typically signals a functional inability to perform any significant work. The reworked subsection (f) would bring to closure the injuries cited in (a) through (e) in a way that uses those injuries to establish impairment standards for other, non-cited injuries allowed under discretionary application of the law. Clarity of legislative intent would be decidedly enhanced, and determination of catastrophic injury would remain solely within the workers' compensation system under standards mandated by Florida law.

## 2. Effective Administrative Options for Determining Disability

Once the difference between evaluation of an impairment and determination of a disability is grasped, the latter still needs to be developed and articulated as an administrative function with specific tools and op-

tions at its disposal. The current statute governing Permanent Total disability all but surrenders the determination of disability to the designation of an injury as catastrophic. Once these functions are properly differentiated, the specific conditions and requirements of disability determination become more evident. Some possibilities for policy are delineated below.

First, the section of the statute establishing the requirements for Permanent Total disability (s. 440.15(1)) should be amended to include a provision that no Permanent Total disability shall be awarded until the injured worker has reached maximum medical improvement or has exhausted all temporary benefits. This would help to prevent determination of disability before a case has stabilized and allow more time to obtain the facts regarding rehabilitative and reemployment prospects of the injured worker, which are critical to effective evaluation of a case.<sup>11</sup>

Second, the qualifying requirements for Permanent Total disability (s. 440.15(1)(b)) should be amended to require an objective, professional evaluation of the injured worker's prospects for rehabilitation, retraining, and reemployment and to use that evaluation as a qualifying condition for Permanent Total disability. The current law, in *assuming* qualification where "conclusive proof" of work capacity is not provided, biases the determination of disability by allowing the administrative process to forego full evaluation of each case and proceed by default to the award of benefits based only on the identification of an injury as catastrophic. This may result in the award of Permanent Total benefits where no lasting incapacitation for work occurs.

A full evaluation of the injured worker would consider the medical aspects of the case, particularly long-term physical impairment, in the context of the worker's age, gender, education, work history, and potential for rehabilitation and retraining under opportunities mandated in the workers' compensation statute. Where appropriate, the evaluation would comprise a plan identifying resources necessary to help

the worker regain the capacity for employment and a schedule for participation in specific rehabilitation and retraining programs. Medical, rehabilitative, and reemployment assistance could then be arranged to support implementation of the plan. Even with catastrophic injuries, workers determined to have real rehabilitative and reemployment prospects should *not* qualify for Permanent Total benefits. Catastrophic injuries as cited in s. 440.02(34), F. S., do not necessarily result in disability permanent and total in nature. For example, loss of an arm, though certainly a devastating injury, need not signal the end of all gainful employment. In most states, injuries of this kind would qualify the injured worker for permanent partial benefits.<sup>12</sup> An objective rehabilitative/vocational assessment is necessary for putting catastrophic injuries of this sort in the proper context for determining the appropriate disability award.

Beyond the assessment used for establishing initial eligibility, there is a need for annual follow-up to certify continued qualification for Permanent Total benefits. Under current law (s. 440.15(1)(e)), employers and carriers have a right to require annual vocational evaluations or testing for recipients of Permanent Total benefits. Discretion is left entirely to the employers and carriers. To better ensure the payment of appropriate benefits over the life-span of each case, it is desirable that the statute be changed to make annual vocational evaluation mandatory for continued eligibility for Permanent Total benefits. In injuries of greatest severity, the annual evaluation may involve no more than brief contact with the worker or the worker's caretakers.

One of the problems hampering the administrative determination of initial disability in instances of catastrophic injury is the limited range of options offered by current Florida law. Significant, too, is the fact that statutory permanent partial benefits in Florida are unusually low in comparison with benefits in other jurisdictions.<sup>13</sup> What results is an impetus to overuse Permanent Total benefits for lack of suitable alternatives. It would be worthwhile to consider revision of

the statute to provide new benefit options for cases of unusually severe injury.

The proposal offered here is to create two tracks for disability determination based on the classification of the injury as catastrophic or non-catastrophic according to the definitions of s. 440.02(34), F. S. All lost-time injuries would receive temporary benefits until maximum medical improvement or expiration of eligibility for temporary benefits, whichever occurs first. All workers with catastrophic injuries would be eligible for temporary benefits paid at 80% rather than the more typical 66-2/3%. Prior to termination of temporary benefits, workers with catastrophic injuries would undergo a thorough, objective evaluation of rehabilitation and reemployment prospects. Where results of the evaluation suggested no reasonable likelihood of re-establishing an earning capacity, the worker would be deemed eligible for Permanent Total benefits. Alternately, if the evaluation determined that a worker with a catastrophic injury could regain an earning capacity subsequent to rehabilitation and re-training such as might be provided under s. 440.491(6), F. S., said worker would be eligible for appropriate services as well as an extension of eligibility for temporary benefits for a period up to 26 weeks. Upon expiration of all temporary benefits, the worker would be eligible for payment of *Supplemental Income* benefits according to the provisions of s. 440.15(3)(b), F. S., except that no impairment rating would be required. Eligibility for these benefits, which are calculated using a wage-loss formula<sup>14</sup>, would continue, as allowed under the current law, until 401 weeks after the date of injury have lapsed.

This proposal would offer real disability alternatives for administrators evaluating workers with catastrophic injuries. It would help to ensure the appropriate use of Permanent Total disability while allowing workers whose catastrophic injuries have left them the potential for regaining a capability for work to obtain rehabilitation and wage-loss benefits suited to those specific needs. Disability types mandated under current law would largely be preserved, with only minor

modifications. Importantly, only workers with non-catastrophic injuries could qualify for Impairment Income benefits, but the meagerness of those benefits—generally amounting to one-third of pre-injury weekly wages—suggests their inappropriateness for workers with truly severe injuries.

The suggestions offered in this section are not advanced as specific recommendations for revising the statute, but as examples of ways to handle cases of severe workplace injury as *disabilities* rather than injuries. These examples are obviously not exhaustive. Policymakers need to determine which options best serve to further the realization of statutory intent and make revisions to the statute accordingly.

### 3. Systemic Constraints on Administrative Decisions

Regardless of how the law is written, its effectiveness rests in the last instance on *decisions* made by persons charged with its implementation. In the administrative determination of disability, decisions are most typically made by insurance adjusters, with Judges of Compensation Claims intervening to resolve disputed cases. Clarity of the law is essential for shaping decision-making according to statutory intent, so the inclusion of an express statement of intent in the statute and clarification of catastrophic injuries will, in themselves, help to strengthen systemic constraints. But other measures are also needed.

Consider the fact that insurance adjusters are employees of private industry (insurance carriers or employers) with an indirect authority over public finances. Since coverage under workers' compensation is statutorily mandated in Florida for employers having four or more employees (one employee in the construction industry), the insurance companies essentially have a captive market for their services. Few employers have the resources for self-insurance, so employers required to provide coverage must generally purchase insurance from private carriers or funds.

These carriers and funds, in turn, sometimes contract with third-party administrators to service their workers' compensation claims. Either way, employees of private industry make most of the decisions pertaining to claims, and they bill their captive market for the expenses that result. Employers pay these charges and, in turn, pass them on to consumers through an increase in the cost of products and services. Viewed in this light, workers' compensation is a hidden consumption tax levied on the public in considerable part by agents not accountable to the public. If it is the role of government to protect and promote the public interest, the unconstrained levying of taxes by private entities is a policy issue. Who protects the public from potential overcharging on the part of insurers, and what forms should such protection take?

Other than elimination of the mandatory workers' compensation coverage requirement, three options are available, at least in principle. One is to have a monopolistic state fund in which assessments are levied and benefits are determined by a government agency. Several states have such a fund, and its advantage from the perspective of public accountability is that it places taxing authority directly under elected officials. A second option leaves the private insurance market intact but subjects it to government regulation of premium rates. This option is currently used in Florida. A third option is to pursue public policies that disallow monopolistic or oligopolistic domination of the market and encourage price competition for customers.

It is not the intention of this chapter to make specific recommendations regarding government's most effective role in managing workers' compensation insurance. The point is only to suggest that the administrative determination of disability occurs in the context of a system which may or may not adequately include cost considerations as an element in decision-making. From this perspective, the excessive award of Permanent Total benefits may be only one expression of a systemic deficiency in cost constraints. It is recommended that policymakers fund a thorough study

of the existence and effectiveness of cost constraints in Florida's workers' compensation system and use the results of the study to modify or craft policies having promise to improve administrative cost control. In particular, the study should investigate the effectiveness of current regulation of the insurance market and the extent to which competition exists, or could be better facilitated. To assist policymakers in monitoring the administrative determination of disability, it is further recommended that the reporting requirements of the Division of Workers' Compensation, as delineated in s. 440.59, F. S., be expanded to include an annual summary and evaluation of Permanent Total cases accepted within the prior calendar year. Such a report should describe the injuries and vocational evaluation outcomes used to establish eligibility for Permanent Total disability (as recommended in this chapter), and it should summarize the extent to which compliance with statutory eligibility requirements occurs. The division would be expected to alter or expand carrier reporting requirements to provide pertinent information not currently submitted.

Since Judges of Compensation Claims also have a role in the administrative determination of disability, aspects of their job performance reflecting the award of Permanent Total benefits should be monitored and reported to government officials responsible for appointing and reappointing judges. Accordingly, it is recommended that the joint reporting requirements of the Division of Workers' Compensation and the Office of Judges of Compensation Claims outlined in s. 440.45(6) be expanded to include a summary by individual judge of the number of cases during the prior calendar year in which Permanent Total benefits were awarded, the number of cases in which those benefits were denied, and the extent of compliance with statutory eligibility requirements. Since Judges of Compensation Claims are government employees, ensuring their compliance with the intent of the statute is a management responsibility ultimately falling to elected officials. If judges are not judicious stewards of the public interest, it is incumbent upon those officials to ascertain why and to take appropri-

ate remedial action. Such action might include strengthening the statute to allow judges to enforce the public interest even where carriers and injured workers enter into agreements running contrary to that interest.

***Summary***

The thrust of this chapter has been to suggest that the current law governing Permanent Total disability may not be working as desired, and that there are specific areas of apparent weakness where correction may be advisable. Major options offered are these:

- Add a statement of intent to the statute that clearly conveys the appropriate use of Permanent Total disability.

- Consider whether the statutory reference to Social Security disability as a qualifying condition for some catastrophic injuries appropriately reflects legislative intent regarding Permanent Total disability. If it does not, consider revising the statute by eliminating the reference to Social Security disability and substituting language emphasizing impairment of basic, essential physical capabilities.

- Disallow award of Permanent Total disability prior to maximum medical improvement or the termination of temporary benefits, whichever occurs first.

- Add as an initial condition of eligibility for Permanent Total disability an objective, thorough vocational evaluation showing a physical inability of the injured worker to regain employment, even subsequent to rehabilitation and retraining offered under provisions of workers' compensation.

- Require annual vocational reassessments for continuation of Permanent Total benefits.

- Modify the current benefit structure to provide more adequate benefits to workers with catastrophic injuries not eligible for Permanent Total benefits under proposed revisions.

- Fund a study of the constraints at work in Florida's insurance market serving to control costs and

use results of the study to develop policies better facilitating systemic cost constraints.

- Mandate that the Division of Workers' Compensation report annually on carrier compliance with the statute in regard to the award of Permanent Total disability.

- Mandate that the Office of Judges of Compensation Claims, in cooperation with the Division of Workers' Compensation, annually report for each individual judge the factual and legal conditions warranting the award of Permanent Total benefits for each case in which such benefits are awarded.

These recommendations are offered with a twofold intent: first—and foremost—to continue to support the genuine needs of workers who sustain life-altering injuries, which has always been the intent of Permanent Total disability, and, second, to ensure that other cases of serious injury are handled with alternative, less costly options that nonetheless provide the appropriate level of support while encouraging reemployment where capability for such exists.

***Footnotes***

<sup>1</sup> *Statistical Supplement to the 2000 Annual Report*, p. 55.

<sup>2</sup> *Ibid.*, p. 5.

<sup>3</sup> *Ibid.*, p. 53.

<sup>4</sup> This assumes an injury after June 30, 1955.

<sup>5</sup> Division of Workers' Compensation Claims File. The percentage is calculated for cases current in reporting of benefits. All settled cases are considered to be closed.

<sup>6</sup> The distribution of 1999 average annual employment in non-agricultural industries showed that 12.5% of Florida's labor force was employed in goods-producing industries (mining, construction, manufacturing), compared to 19.8% nationally. Source: Current Employment Statistics Program, Office of Labor Market Statistics and Bureau of Labor Statistics, U. S.

Department of Labor, 2000.

<sup>7</sup> In days, the average time between injury and Permanent Total acceptance was 663.9 for 1993 cases, 632.2 for 1994 cases.  $p > .10$ . Source: Division of Workers' Compensation Claims File as of June 30, 1998 and 1999.

<sup>8</sup> *1996 Florida Uniform Permanent Impairment Rating Schedule* (Tallahassee: Florida Workers' Compensation Institute, Inc., 1996), p. 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> It would also allow an increase in benefit payments for some seriously injured workers in that s. 440.15(2)(b) provides for payment of Temporary Total benefits at an increased compensation rate (80%) for many of the injuries defined as catastrophic. In the interest of consistency and fairness, policymakers should consider revising this section to include all injuries specified as catastrophic in s. 440.02(34).

<sup>12</sup> Peter S. Barth, *Workers' Compensation in Florida: Administrative Inventory* (Cambridge, Massachusetts: Workers Compensation Research Institute), p. 36.

<sup>13</sup> Florida Division of Workers' Compensation, *1999 Annual Report*, p. 55.

<sup>14</sup> S. 440.15(3)(b)(8), F. S.: Eighty percent of the difference between 80% of the employee's pre-injury average weekly wage and the current weekly wage.