2018 Breakout Session

Last Injurious Exposure in Occupational Disease Cases and traumatic injury claims

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Traumatic injury claims: The basics:

To recover for an injury that arises out of employment, a claimant gets the benefit of Section 20(a) of the LHWCA-- "in the absence of substantial evidence to the contrary, it is presumed that the claim comes within the provisions of this Act."

To trigger the Section 20(a) presumption that "links" his/her injuries to employment, claimant must(ONLY) prove both: 1) that he sustained harm; and 2) that the alleged accident occurred or working conditions existed which could have caused or aggravated the condition. *Port Cooper/T. Smith Stevedoring Co. v. Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); Brown v. I.T.T/Continental Baking Co., 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990);*

Once claimant makes his/her Section 20(a) case, E\C must rebut the presumption with substantial evidence that the worker's symptoms were NOT caused by work. If E/C does that? Claimant can win if he/she shows entitlement by the greater weight of credible evidence. *Island Operating Co. v. Director, OWCP, 2012 U.S. App. Lexis 3714(5th Cir. 2012).Bath Iron Works Corp. v. Preston, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004);*

Credible complaints of subjective symptoms and pain(ALONE) can be enough to prove physical harm. *Volpe v. Northeast Marine Terminals, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982);*

A psychological impairment can be an injury under the Act. *Brannon v. Potomac Electric Power Co., 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (*work injury resulted in psychological problems, leading to suicide*); Butler v. District Parking Management, 363 F.2d 682 (D.C. Cir. 1966) (*employment caused mental breakdown);

THE AGGRAVATION RULE

Indemnity benefits can be awarded if the employment, "aggravates, accelerates or combines with a prior disease or infirmity to result in disability."

Under the aggravation rule, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash, 8 BRBS 45(CRT) (5th Cir. 1986) (en banc); Hensley v. Washington Metropolitan Area Transit Authority, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981).*

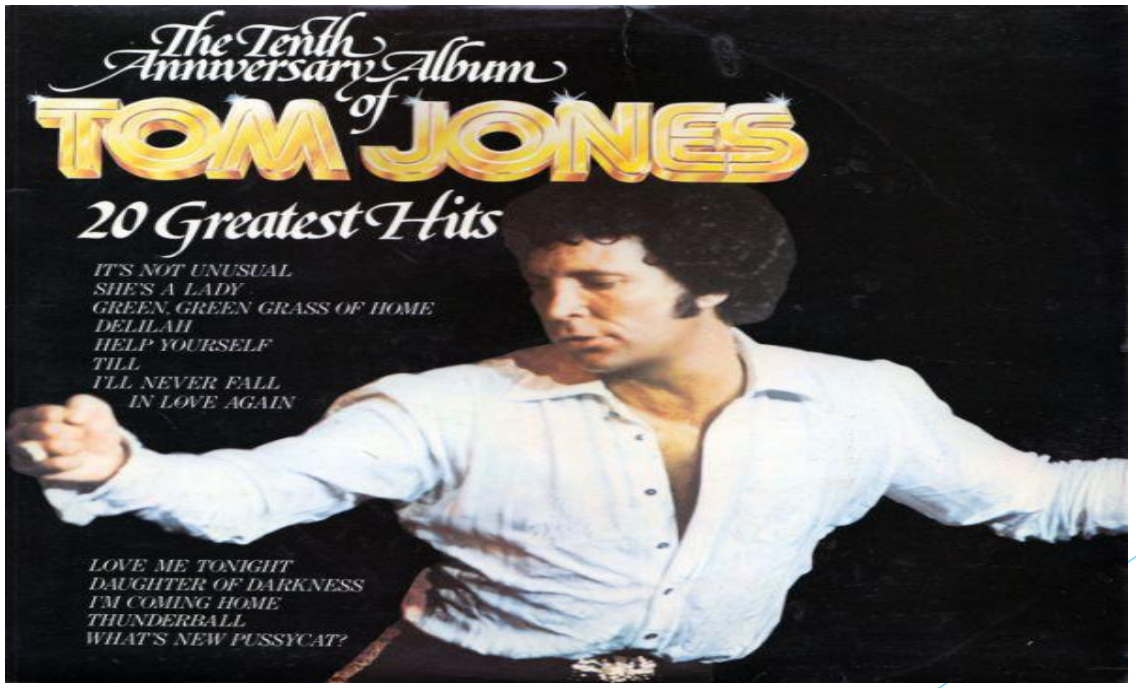
DULLING THE PAIN (SOMEWHAT)

While the aggravation rule requires an E/C to compensate for the full extent of the disability, the burden is softened somewhat by the credit doctrine under which the E/C may receive a credit for any portion of a scheduled disability for which the employee has already actually received compensation under the Act.

As well, E/C can get some (incomplete) relief via Section 8(f).

THE NATURAL PROGRESSION OF THINGS- or, it's not unusual…

In traumatic injury cases, the determination of the responsible E/C turns on whether the claimant's condition is, "the result of the natural progression of an initial injury" or an aggravation due to the later injury/working conditions. *Employers National Ins. Co. v. Equitable Shipyards, Inc., 640 F.2d 383(5th Cir. 1981); Buchanan v. Int'l Transp. Servs., 31 BRBS 81 (1997)*



CASE EXAMPLE:

Claimant injured his knee on June 27, 2015 while working at the U.S. Embassy in Baghdad with a security detail. He timely reported the injury. On July 1, 2015, while loading heavy boxes before he left for R&R he felt his lower back go out on him. He returned home to the 'States.

Medical care: The knee injury was accepted; the lower back injury was disputed. Since claimant couldn't get medical care for the low back he went to the VA. An MRI showed degenerative changes throughout the lower spine. An MRI of the knee revealed a torn meniscus. The dispute concerning lower back care continued.

In October of 2016 claimant accepted a new job with a different employer working as a security manager in Afghanistan. Claimant later described his new work a "no physical requirement" job. This very light duty job continued for six months until claimant sought medical care while on leave. He filed a DBA claim against the first E/C.

After learning of the second employment, the first E/C advised the ALJ that an “indispensable party” was missing. Claimant then filed his LS-203 and in it said, “ E/C number one insists I aggravated myself, so I’m making this DBA claim.”

Deposition: Claimant testified that the second employment was a non-physical requirement job, like a lawyer. He testified he stayed in his quarters during the one and only “all hands-on deck” event because he did not want to put – on his PPE, knowing it would aggravate his condition. He denied any specific events occurred during his second employment and denied his physical condition had worsened due to the lighter employment he enjoyed.

Occupational Disease – Last responsible employer

The last responsible employer rule is the counterpoint to the aggravation doctrine in traumatic injury cases.

The last responsible employer rule was originally announced in 1955 and still lives today, *Travelers Insurance* Co. *v. Cardillo* 225 F.2d 137, 145; (2d Cir. 1955); *Norfolk Shipbuilding and Drydock Corporation v. Theodore Faulk,* 228 F.3d 378(4th Cir. 2000); It basically instructs:

The employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, ***should be liable for the full amount of the award***.

An injurious exposure is one which had the potential to cause the disease or harm at issue. *Avondale Indus., Inc. v. Director, OWCP (Cuevas),* 977 F.2d 186, 190 (5th Cir. 1992).

BLS, Bureau of Labor Statistics:

Occupational illnesses:

Skin diseases or disorders - illnesses involving skin that are caused by work exposure to chemicals, plants or other substances. *Examples*: Contact dermatitis, eczema, or rash caused by primary irritants and sensitizers or poisonous plants;

Respiratory conditions -- illnesses associated with breathing hazardous biological agents, chemicals, dust, gases, vapors, or fumes at work. *Examples:* Silicosis, asbestosis, rhinitis or acute congestion; tuberculosis, occupational asthma, reactive airways dysfunction syndrome (RADS), chronic obstructive pulmonary disease (COPD);

Poisoning includes disorders evidenced by abnormal concentrations of toxic substances in blood, other tissues and other bodily fluids that are caused by the ingestion or absorption of toxic substances into the body. *Examples*: Poisoning by lead, mercury, cadmium, arsenic, or other metals; poisoning by carbon monoxide, hydrogen sulfide, or other gases; poisoning by benzene or other organic solvents;

Hearing loss Noise-induced hearing loss for is a change in hearing threshold relative to the baseline audiogram of an average of 10 dB or more in either ear at 2000, 3000, and 4000 hertz and the employee's total hearing level is 25 decibels (dB) or more above the audiometric zero (also averaged at 2000, 3000, and 4000 hertz) in the same ear(s).

Musculoskeletal disorders (MSDs) include cases where the *injury or illness* is pinched nerve; herniated disc; meniscus tear; sprains, strains, tears; hernia (traumatic and nontraumatic); pain, swelling, and numbness; *carpal tunnel syndrome*; musculoskeletal system and connective tissue diseases and disorders, when the event or exposure leading to the injury or illness is overexertion and bodily reaction, unspecified; overexertion involving outside sources; *repetitive motion involving microtasks; other and multiple exertions or bodily reactions; and rubbed, abraded, or jarred by vibration*.

Occupational Diseases – Psychological Claims

Psychological conditions, including PTSD, anxiety and depression also can be occupational diseases. A DBA claimant exposed to IED attacks, a claimant who works at FOB (Forward Operating Base) for nine months who regularly runs to the bomb shelter for protection also could suffer from an occupational disease - psychological disability.

Separating out the exposure for a psychological/occupational disease claim with various coverage dates has the same twists and turns as a traumatic injury claim without the aggravation theory...

Recap - Traumatic injury -- occupational disease claims

The aggravation rule applies to traumatic injury cases. If there is an aggravation, acceleration or contribution to an existing impairment, this constitutes a "new injury." However, unlike occupational disease cases exposure alone is not enough for liability to be assessed against the last E/C. Causation – natural progression is the line of battle.

Occupational disease cases utilize the "last responsible employer" rule - or that recent movie, "*Tag you're it*"

Case Study – Traumatic Injury

DBA claimant is lead driver of a fuel supply convoy. The convoy is attacked and claimant is the only survivor. He is captured and while being captured injures his/her lower back when being thrown to the ground.

Claimant is hidden at a remote location and tortured during the last two weeks of isolation. When claimant was tortured his left knee was seriously injured which resulted in an "altered gait syndrome". Later in the claim, the altered gait syndrome aggravated his original lower back injury sustained on the date of the attack.

Miraculously, claimant escapes and is picked up by "friendly" combatants.

DBA cover for Employer changed the day after the convoy attack.

Hybrid claims – a challenge…

Traumatic Injury or Occupational Disease?

PTSD suffered as a result of one RPG attack is a traumatic injury, right?

What if the same worker also seems to recover but eventually broke down after a number of later attacks?

What about a DBA Claimant who is exposed to one very loud event and is also regularly exposed to jet engine noise over the course of eighteen months?

Kellison vs Dutra Group and Seabright Insurance Company

Claimant sought benefits for cumulative orthopedic, respiratory and hearing loss from his last employer. Claimant's last day of work was November 19, 2010 and he was released as part of a RIF. In February of 2011 he applied for union retirement. He filed his LHWCA claim on July 26, 2011.

He had a number of previous work injuries (9) and a number of non-work injuries including a car accident – fractured nose and a second car accident – fractured ribs. He also had a criminal history. Claimant also filed LWCHA claims against two earlier LHWCA employers and settled both of those claims.

The trial ALJ issued her Order, over 90 pages long, finding: 1)claimant was entitled to the Section 20(a) presumption; 2) that Employer rebutted the Section 20 presumption; and 3) the evidence on a whole instructed that Claimant did not meet his burden showing his work with Employer caused, aggravated, accelerated or contributed to any overall orthopedic and/or respiratory conditions. The ALJ awarded benefits for the hearing loss only.

In ruling against claimant, the ALJ relied upon Dr. Greenfield's opinions and did not give much weight to the contrary opinion of Dr. Stark.

BRB

Kellison vs Dutra Group and Seabright Insurance Company BRB No 16-0242 (February 22, 2017)

In affirming the ALJ the BRB rejected Claimant's theory of causation which was – Claimant need only show that his work for employer *could* have caused or aggravated his orthopedic conditions.

The BRB also noted – the ALJ analyzed the relevant evidence as a whole to determine whether claimant met his burden of establishing that his orthopedic injuries are, in fact, work-related by presenting "some evidence that actually shows that the activity had some effect on the current injury."

Credibility

The ALJ gave diminished weight to claimant's testimony because claimant "has poor historical memory and lied or omitted things on occasion in the course of the medical evaluations." Claimant behaved dishonestly in collecting public benefits. Claimant at hearing, "admitted that he had lied in depositions" [conducted in this case about his criminal past].

In ruling against Claimant the ALJ found and the BRB agreed that Dr. Greenfield's testimony "was on better footing because he was more skeptical of claimant's reports. . . . there is no evidence of medical treatment or restrictions for any orthopedic condition or any evidence of progressive pain reported to any physicians during claimant's work for employer . . . and he did not exhibit any orthopedic symptoms until May 11, six months after he stopped working."

COPD

The BRB confirmed that Employer rebutted the presumption with substantial evidence that the employee's injury was not caused, aggravated or accelerated by the conditions of his employment. *See Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT*); Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT) (9th Cir. 1998). The testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption.

The cases cited by claimant in support of his position that employer, as the last covered employer to expose him to disease-causing conditions, is liable for the entirety of his benefits, e.g., *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5TH Cir. 2003). *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9TH Cir. 1989) and *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied are responsible employer cases, not causation cases, and thus, are not relevant.

Kellison – 9th Circuit

June 11, 2018 --the Ninth Circuit issued its decision affirming the BRB. The Ninth Circuit ruled that once Dutra rebutted the § 920(a) presumption, the burden shifted to Kellison to prove entitlement to benefits by a preponderance of the evidence. . .

The ALJ correctly found that Claimant's COPD was not an occupational disease because Kellison failed to show the work environment had a peculiar degree of exposure as supported by substantial evidence. *Port of Portland v. Director, OWCP*, 192 F.3d 933, 939 (9th Cir. 1999). The Ninth Circuit also commented that as determined by the ALJ, there are no records of Kellison having respiratory problems between February 2009 and 2011. And, by the time he left Dutra, Kellison's respiratory symptoms had actually improved.

Last, in footnote 1 the Ninth Circuit noted, even if Kellison's COPD was an occupational disease, he would not be entitled to relief against Dutra under an occupational disease theory because he was diagnosed with COPD prior to working for Dutra. The responsible employer is the one last exposing the worker to injurious stimuli *prior to the date the worker became aware of suffering from the occupational disease*. Thus, any alleged error on the part of the ALJ is analyzing his COPD as cumulative trauma, as opposed to an occupational disease, would be harmless.

In other words, claimant had the disease and was none the worse as a result of his last work environment.

In Kellison, the BRB and the Ninth Circuit highlight the difference between "making" causation and tag you're it under the last responsible employer theory.


"That's all Folks!"