

Changes in Apportionment and Joint and Several Liability In Workers' Compensation

- Newcomb v. Greensboro Pipe Co.

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Introduction

- Definition of Joint and Several Liability – apportionable either among two or more parties or to only one or a few select members of a group, at the adversary’s discretion; together and in separation. Black’s Law Dictionary (8th ed. 2004).
- Newcomb case

Injury by Accident vs. Occupational Disease

- For a Plaintiff to have a right to indemnity benefits under the NC WC Act, one must prove disability. “Disability” as defined by N.C.G.S. 97-2(9) means “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”

- Although disability mentions only an injury, there are 2 types of WC claims one can have, one for an injury by accident or one for an occupational disease.
- 97-2(6) defines a compensable “injury” as an injury by accident arising out of and in the course of the employment.
 - Exception – back injuries.

- 97-53 lists 29 specifically enumerated occupational diseases.
 - Examples: anthrax, lead poisoning, mercury poisoning, bursitis, carbon monoxide poisoning, asbestosis, silicosis, etc.
 - 97-52 states that any of the specifically enumerated OD's of 97-53 shall be treated as compensable as though they were the happening of an injury by accident according to the NC WC Act.

Permanent Disability vs. Temporary Disability

- Once you've determined that an employee is disabled following an injury by accident or OD, there is the determination of whether the employee is permanently disabled, or just temporarily disabled.

- “Total incapacity” is defined by NCGS 97-29, and can be either temporary or permanent in nature.
 - Permanent and Total Disability (P & T) results in lifetime payment of both indemnity benefits (66 2/3% of pre-injury wages) plus medical expenses for the remainder of the employee’s life.
 - Temporary Total Disability (TTD) results in 66 2/3% pre-injury wages throughout the periods of disability (unless otherwise ordered by the IC).

- “Partial incapacity” is defined by NCGS 97-30 and 97-31
 - NCGS 97-31 - PPD.
 - NCGS 97-30 – TPD.

Up to this point, determining which employer is liable for an employee's disability, whether it be temporary or permanent, total or partial, is fairly straightforward. But what about in cases involving more than one injury or OD while working for different employers?

- NCGS 97-33 deals with multiple permanent injuries. It states that where an employee has a permanent disability per NCGS 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.
 - In other words, if an employee begins a job with a 10% disability to the right hand and injures his hand further while on the job, causing a 20% disability, the employee would only be entitled to the value of the additional 10% disability caused by the work-related incident.

- NCGS 97-57 - where compensation is payable for an OD, the employer (and Carrier) in whose employment the employee was last injuriously exposed to the hazards of such disease shall be liable.
 - In other words, if the employee discovers he or she has contracted an OD and later discovers several of his former places of employment could have contributed to the OD, only the last employer that could have contributed to the OD is on the hook.

- Multiple injuries - NCGS 97-34
 - “if an employee receives and injury for which compensation is payable, while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries...”

- In other words, if an employee is receiving TPD benefits while working for an employer following a compensable injury, then later sustains another injury following his return to work while working for the *same* employer, the employee is not entitled to benefits for both TPD, as well as benefits for the 2nd injury, unless the injury sustained while working for the subsequent employer can be paid per a PPD rating.

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675 S.E.2d 718, N.C.App., 2009 (May 05, 2009).

- P sustained a compensable back injury on 6/5/03, while employed as a truck driver for Greensboro Pipe. P treated for a disc herniation at L5-S1, as well as an annular tear at L4-5. P ultimately underwent microdiskectomy and was released with a 15% PPD rating in 11/03.
- P continued to have chronic back pain following his release and began treating again by 6/04 for spondylosis, epidural fibrosis at L5-S1 and a disc protrusion at L4-5.

- P went to work for Mabe Trucking on 7/26/04, in a desk job requiring no heavy lifting. He continued to have back pain. Treating physician offered to perform either decompression or fusion surgery, though P declined.
- P testified he returned to work on 6/12/05, because he could not afford to be out of work, though he continued to experience back pain, for which he was treating. Plaintiff received a series of injections, for which he reported relief, though he declined surgery. He instructed his supervisors at Mabe of his intermittent pain.

- On 1/23/06 P slipped and fell on a wet floor while leaving for work at Mabe, resulting in a microdiskectomy at L4-5 and L5-S1 on the left side.
- P was released with light duty restrictions on 12/29/06, which were essentially the same restrictions P was issued following his release after the first accident. Treating physician reported P returned to his pre-January 2006 baseline.
- MD testified P's 2nd accident aggravated his underlying condition and precipitated his need for surgery. The Full Commission found the need for P's surgery was due to a combination of the accidents P sustained for both Greensboro Pipe and Mabe, but that the disc herniations at L4-5 and L5-S1 were proximately caused by the 6/5/03 accident only.

- The FC determined P was unable to work, despite his release, based on the combination of his vocational background and his work restrictions. The FC found P was totally disabled from any employment from 2/6/06, to 2/19/06, and from 2/22/06, and continuing “as a proximate result of a combination of the injuries suffered in the accident with Greensboro Pipe on 6/5/03 *and* the accident with Mabe Trucking on 1/23/06.” Further, the FC determined the medical evidence did not show the relative contribution of each accident.
- “Apportionment is not possible and both carriers shall be jointly and severally liable for payment of plaintiff’s compensation.”

- The FC apportioned the amount of TTD benefits between each carrier based on the amount P was earning for each Insured, amounting to his total possible compensation rate of \$389.75 based on P's AWW at the time of the 2nd injury.
- The FC determined the defendants to be jointly and severally responsible for payment of medical expenses incurred by P from 1/23/06, and ongoing, as such medical treatment is related to P's compensable back injuries.

- On appeal, Greensboro Pipe's sole argument was findings of fact didn't support conclusions of law. They argued the "last injurious exposure" rule should have applied, making Mabe Trucking solely responsible for any disability or treatment incurred since 1/23/06.
 - "Last Injurious Exposure" – defendant on the risk at the time of the last injury is fully liable for any disability following the last date of injury, and is applied even if the last injury would have been significantly less severe but for the presence of the pre-existing injury.

- The Court rejected the argument, as the rule applies to occupational diseases, not to injuries by accident. The Court stated that although there was no similar rule regarding TTD, 97-33 is instructive.
- The Court stated apportionment is not permitted when an employee becomes permanently and totally disabled due to a compensable injury's aggravation or acceleration of the employee's non-disabling, pre-existing disease or infirmity.

- The Court found the IC should not adopt a different apportionment standard to cases of temporary disability than it does to cases of permanent disability. The FC was unable to determine which portion of P's disability derived from which injury based on the medical evidence. As a result, each employer became responsible for the full amount, resulting in joint and several liability.

Effect of Newcomb –
an invitation to litigation.

Moral of the story – Clincher!

Questions?