

## Workers' Compensation Benefits: Difficult Medical Issues Abound

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### **Introduction**

Since October 2003, representatives of injured employees and industry have renewed arguments concerning the extent to which Florida's workers' compensation benefits must be provided claimants who have medical conditions preceding an accidental injury occurring at work. These claims raise complex legal issues involving whether a claimed accidental injury is compensable, and if so, the percentage of workers' compensation benefits payable under the workers' compensation statute. The correct answers to these threshold inquiries determine what, if any, benefits are provided a claimant.

### **Major Contributing Cause**

Pursuant to Florida's workers' compensation law in effect since October 2003, an employer must provide statutorily provided benefits where an employee suffers an accidental compensable injury or death that arises out of work performed in the course and scope of employment. Evidence must also establish that the injury, its occupational cause, and any resulting manifestations or disability be proved to a reasonable degree of medical certainty, based on statutorily defined objective relevant medical findings. Further, the accidental compensable injury must be the "major contributing cause of any resulting injuries."

"Major contributing cause" (MCC) is defined as "the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought," except that for mental or nervous injuries to be compensable, "the compensable physical injury need only be "at least 50 percent responsible" for the condition as compared to all other contributing causes combined. As the legislature moves farther away from a simple causation analysis, compensability inquiries focus on whether the accidental injury is at least fifty percent responsible for the claimed condition and benefits, forcing doctors and attorneys to quantify causation mathematically. Claimants' counsel attack medical opinions that fall short of the more than fifty percent standard by addressing a doctor's training on MCC and the lack of an accepted medical consensus and scientific bases for alleged speculative opinions. Industry and the health care professionals need to rebuff accusations of guesswork and demonstrate that the MCC opinion is supported to a reasonable degree of medical certainty. Health care providers can withstand cross-examination by identifying the objective relevant medical findings gained from examinations and diagnostic studies that support their opinions.

### **Apportionment**

Despite the statutory definition of MCC, the workers' compensation statute elsewhere recognizes as compensable "accidents" those involving "a preexisting disease or anomaly that is accelerated or aggravated" by an on the job accident. Benefits provided are limited only

to the extent that the acceleration or aggravation of the preexisting condition is “reasonably attributable” to the compensable accident. The claimant’s attorney, however, seeks payment of all medical and indemnity benefits, arguing that the accident is “one hundred percent” attributable to the claimant’s disability and need for medical care, citing the claimant’s ability to function at work “pain free,” without medical treatment or disability prior to the work accident. The claimant’s inability to do so after the accident, it is argued, cannot be due to the preexisting condition as the only “new” event to give rise to disability and need for medical care is the compensable accidental injury. The counter to this “but for” assertion is that many people experience similar “traumas,” without incurring disability and need for medical care; thus, the legal and medical reason benefits claimed must be due to the preexisting condition. Often, the determination of an award of benefits pivots on the artfulness of the attorney asking a physician questions and the medical responses: the judge can make findings and award benefits only based upon the evidence presented him.

Workers’ compensation benefits for “accidents” involving preexisting diseases or anomalies accelerated or aggravated by a work accident are to be provided subject to the “apportionment statute.” This limits the provision of benefits in claims involving a compensable injury, disability, or need for medical care resulting in an “aggravation or acceleration of a preexisting condition,” or a statutorily defined merger with a preexisting condition, only to that associated with the compensable injury. The workers’ compensation benefits payable are to exclude “the degree of disability or medical conditions existing at the time of the impairment rating or at the time of the accident.” Further, apportionment applies regardless of whether the preexisting condition was disabling at the time of the accident or at the time of the impairment rating and is to occur without considering whether the preexisting condition would be disabling without the compensable accident.

The calculation of the degree of permanent impairment or disability attributable to the accident or injury for compensation under the workers’ compensation statute occurs by “apportioning out the preexisting condition based on an anatomical impairment rating attributable to the preexisting condition.” Medical benefits, however, are paid by “apportioning out the percentage of the need for such care attributable to the preexisting condition.” Thus, in the former, one must become knowledgeable with the 1996 Florida Uniform Permanent Impairment Rating Schedule, the applicable anatomical impairment rating schedule in post-\_\_\_\_ Florida workers’ compensation claims. In the latter, industry representatives must negate “but for” and “speculation” assertions by claimants’ attorneys. Other difficulties arise where a claimant has a recognized objective preexisting condition, but the guides fail to provide a rating for it, or where the guides, in order to rate a condition, require findings of range of motion, which might not exist or be discoverable. It is important that industry identify the preexisting condition, ensure it can be rated, and, if necessary, obtain pre-accident medical records to support the rating of the preexisting condition.

### **Allocation (Controversies Between or Among Carriers)**

Recent case law raises the question of whether industry will be able to rely on apportionment where the preexisting condition is a result of a prior on the job accidental injury. Although currently not prohibited from doing so, claimant's attorneys will seek to extend the reach of these cases by arguing that industry should compensate employees for all industry-related conditions. Such arguments, however, broadly pile all past employers' liability onto one employer, rather than maintain employer responsibility for injuries it alone causes. More recent case law prohibits the application of apportionment to the degradation of an artificial device because, the preexisting condition that is the focus of apportionment, is related to the prosthetic device and not to a medical diagnosis or disease from which the claimant suffers, as opposed to a mere condition describing "a state of fitness or a general state of being." Claimants' attorneys will seek to extend this case law to exclude apportionment from claims involving a degenerative condition, arguing that such is not a disease process, but instead is a "state of fitness or a general state of being," for which apportionment cannot apply. While industry must be prepared to fend off such challenges, by pointing to pre-accident medical diagnoses, it also must be prepared to consider pursuing contribution (allocation) from other carriers whose insureds share fault for the medical condition of an injured claimant.

Allocation, in controversies between or among carriers, where a judge assigns percentages of liability among two or more carriers responsible for the discharge of obligations and duties of one or more employers under the workers' compensation statute, is not available in occupational disease claims, as the last employer/carrier remains wholly responsible for benefits. MCC does not apply in claims between or among carriers. A petitioning employer/carrier need only present evidence of a causal connection between a claimant's employment and the industrial injuries. This can lead to exposure for an employer/carrier, even if no exposure arises toward the claimant, if the contribution is less than fifty percent attributable to the claimant's medical condition.

### **Conclusion**

Representatives of claimants and employers, carriers, and servicing agents, in order to best represent the interests of their clients, must be able to engage in the complete defense of "major contributing cause" and the mitigating defense of apportionment, as well as to consider claims for allocation/contribution against other would be responsible employers and carriers. To do so, counsel must be familiar with the complex legal and medical challenges these concepts present. Early identification of legal and medical issues and a prompt gathering of judicially persuasive evidence will secure the best results in the management of a Florida workers' compensation claim.