

# Defending Repetitive Trauma Injuries

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# What is an Occupational Disease?

- § 287.067.1
  - An identifiable disease arising with or without human fault out of and in the course of the employment.
  - The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

# What is an Occupational Disease?

- § 287.067.3
  - An injury due to *repetitive motion* is recognized as an occupational disease for purposes of this chapter.
  - Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

# What is an Occupational Disease?

- Also includes...
  - Loss of hearing due to industrial noise (§ 287.067.4)
  - Radiation disability (§ 287.067.5)
- Does not include...
  - Ordinary diseases of life to which the general public is exposed outside of the employment (§ 287.067.1)
    - Unless the diseases follow as an incident of an occupational disease

# The Last Exposure Rule

- § 287.063.2
  - The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was ***last exposed to the hazard of the occupational disease prior to evidence of disability***, regardless of the length of time of such last exposure

# Evidence of Disability

- “An occupational disease does not become a compensable injury until the disease causes the employee to become disabled by affecting the employee's ability to perform his ordinary tasks and **harming his earning ability**.”
  - *Garrone v. Treasurer of State of Mo.*, 157 S.W.3d 237, 242 (Mo. Ct. App. 2004)
- “[W]hether or not the employee misses work, if the injury is shown to have **harmed the employee's earning capacity**, it is enough to constitute a disability under the workers' compensation statutes.”
  - *Feltrop v. Eskens Drywall and Insulation*, 957 S.W.2d 408 (Mo. Ct. App. 1997)

# Evidence of Disability

- Best Evidence to Worst Evidence
  - The claimant missed work because of the occupational disease
  - The claimant did not miss work, but his/her output was tangibly affected because of the occupational disease
  - The claimant did not miss work, but he/she was placed on restrictions by a physician, and he/she had to work light duty because of the occupational disease
  - The claimant was placed on restrictions, but didn't actually adhere to the restrictions

# *The Exception to* the Last Exposure Rule

- § 287.067.8
  - With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.



# *The Exception to* the Last Exposure Rule

- Two-Part Test:
  - (1) The exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months; and
  - (2) The evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury.

# Investigating the Claim

- #1 Goal - Identifying the appropriate date of occupational disease
  - Date of injury on the Claim for Compensation is usually completely arbitrary
  - Helps guide the entire defense process

# Investigating the Claim

- #2 Goal – Figuring Out the Strength of a Potential Medical Causation Defense
  - Job duties
    - What does the claimant say about his job duties?
    - What does the employer say about the claimant's job duties?
    - Ergonomic Analysis
  - Alternative Risk Factors
    - Diabetes, rheumatoid arthritis, obesity, sex, age

## ***Prevailing Factor Standard***

§ 287.067.21. An injury or death by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

# Proving “Exposure” in Toxic Exposure Claims v. Occupational Disease Claims ?


- The Courts have not provided clarity on what constitutes exposure and whether the analysis for determining exposure differs in cases for toxic exposure vs. occupational disease claims that do not involve toxic exposure.
- In a case involving C-diff, the Court of Appeals stated that the employee proved exposure by showing a probability that she was exposed to C-diff in the workplace when she did laundry for patients and a number of patients in the facility had C-diff. (***Vickers v. Missouri Dept of Public Safety***)
- Technician collecting blood samples contracts hepatitis C, resulting in death. C had no evidence of treating a hep C patient. Need probability of working condition causing disease even though it may not be the sole cause. C needs to prove a link between disease and some distinctive feature of the job common to all jobs of that sort. Must be evidence of a direct causal connection between the conditions under which the work is performed and the OD. (***Smith v. Capitol Region Medical Center***)
- In a mesothelioma toxic exposure case, the Court of Appeals implied that an employee showing a probability that asbestos existed in the workplace was enough to prove exposure and causation. (***Hayden v. Cut-Zaven***)
- COVID-19: Ordinary disease of life vs. contracted by link to employment

# Which Employer/Insurer is liable?

- What is the date of accident?
  - Non-meso claims: date of diagnosis.
  - Meso claims: date of first significant effects or, date of diagnosis or, date of death or, date the claim is filed.
  - *Casey* decision: date claim filed = triggering event for coverage.
  - Last exposure rule does not apply to carrier liability in ER cases.

# The Spectrum of Exposure

<b>No known exposure but developed disease</b>	<b>Secondhand Exposure</b>	<b>Employment where building employee is working in is allegedly known to contain asbestos</b>	<b>Employment where asbestos fibers may be present in the air</b>	<b>Traditional employment involving asbestos such as floor layers, pipe-fitters, and electricians</b>	<b>Employment working directly with asbestos products such as insulators</b>
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- An employee shall be deemed to have been exposed to the hazards of an occupational disease when he is **employed in an occupation or process in which the hazard of the disease exists**.
  - Claimant must prove that his job duties exposed him to the toxins that allegedly caused his disease.
    - Can be accomplished by analyzing company records, job descriptions, or deposing the claimant regarding products he worked with and jobs he worked on.