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Louisiana Workers Compensation

Chapter 3

Injury

La. R.S. 23:1021(8)(a):

> "Injury" and "personal injuries" include only injuries by violence to the physical structure of the body and such disease or infections as naturally result therefrom. These terms shall in no case be construed to include any other form of disease or derangement, however caused or contracted.

The definition contains the restrictive language "only injuries by violence" and emphasizes that no other conditions are included, regardless of whether those conditions are related to employment. That restrictive language, passed down from early workers' compensation statutes, is generally ignored. Any condition that harms or restricts the functioning of the body qualifies as an injury. It does not matter that the employee is abnormally susceptible to the injury or that the job injury is an aggravation of a pre-existing condition. With two exceptions discussed below[1], any medical condition that follows a job accident is presumed to be caused by the accident and, unless that presumption is overcome, is a compensable injury under the Louisiana Workers' Compensation Act.

[1] The Louisiana Workers' Compensation Act applies a stricter burden of proof for heart related or perivascular injuries and mental injuries.

Abnormally Susceptible Employees and the Presumption of Causation

The employer takes the employee as he finds him. The fact that an employee is predisposed to be injured is not a defense to a workers' compensation claim. An "eggshell employee," as they are often called, may be so fragile that any trauma, no matter how slight, can cause a physical breakdown. If that trauma is brought on by a job accident, the resulting injury is compensable. Similarly, an employee with a specific pre-existing condition is entitled to compensation if a job accident aggravates that pre-existing condition.

This standard has been stretched to incredible limits by the courts. If an employee has degenerative disc disease in his low back and this degenerative disc disease has been present for many years, but the employee claims that he was asymptomatic up to the time that he has a very minor accident at work, the employer is liable for the aggravation of the degenerative disc disease. For example, suppose a 55-year-old man with severe degenerative disc disease in his low back picks up a 5-pound box of paper and alleges that he feels a pop in his back with the onset of debilitating pain from that point forward. The courts have routinely found that this type of accident places liability on the employer for the entire treatment and disability associated with the obviously preexisting degenerative disc disease because the disc disease was aggravated by an "accident."

Employees that are not predisposed to injury are entitled to a presumption of causation. Under the presumption of causation rule, if an otherwise healthy employee has an onset of symptoms and disability following a job accident, regardless of how minor the accident appears to be, there is presumption that those symptoms and disability are related to the job accident.

The presumption of causation has been discussed by the courts as follows:

> "An employee in a worker[s'] compensation action has the burden of establishing a causal link between the work-related accident and the subsequent disabling condition." *Miller v. Roger Miller Sand, Inc.*, 94-1151, p. 6 (La. 11/30/94), 646 So.2d 330, 334. An employee's disability is presumed to have resulted from the accident if before the accident, the injured employee was in good health, but commencing with the accident, symptoms of the disabling condition appeared and continuously manifested themselves afterwards. *Walton v. Normandy Village Homes Ass'n, Inc.*, 475 So.2d 320 (La.1985). However, the presumption requires either that there is sufficient medical evidence to show there to be a reasonable possibility of causal connection between the accident and disabling condition, or that the nature of the accident, when combined with the other facts of the case, raises a natural inference through human experience of such a causal connection. Brown v. Town of Ferriday, 76 So. 3d 155, 157-158 (La. App. 3 Cir. 2011)

An example of the courts stretching the presumption of causation to the limits occurs in the case of *Hammond v. Fidelity & Casualty Co.*, 419 So. 2d 829 (La. 1982). That court found that a preexisting cancerous tumor was aggravated by trauma:

> As the facts related above illustrate, the plaintiff did not suffer from any apparent disabilities or abnormalities in his upper left arm until he experienced the mechanical trauma to that portion of his left arm. Almost immediately after the trauma the plaintiff began experiencing the symptoms of swelling and pain in the same region of his upper left arm where he had sustained the mechanical trauma. Although the symptom of swelling subsided within the first week, it did not totally disappear and it continuously manifested itself until the swollen mass was removed by the wide excision. The plaintiff continues to suffer from an aching pain in this area. Additionally, the evidence, both medical and non-medical, shows that there is a reasonable possibility of causal connection. Specifically, Dr. Gore, the oncologist, in a letter and in his testimony indicated that there was a possibility that the trauma caused the tumor to hemorrhage internally resulting in a manifestation of the tumor not previously experienced. He felt that the tumor was preexisting, but was sub-clinical (not perceivable by a layman or a doctor upon physical examination) prior to the trauma. The fact that a condition is preexisting does not preclude recovery for the disabled employee; the employer takes the employee as he is, and the fact that the disease alone might have disabled the employee in its ordinary course of progress is not the inquiry. The employee's disability is compensable if a preexisting disease or condition is activated or precipitated into disabling manifestations as a result of a work accident. *Allor v. Belden Corp.*, supra at 1236; *Johnson v. The Travelers Insurance Co.*, 284 So. 2d 888, 891 (La. 1973); *Behan v. John B. Honor Co.*, 143 La. 348, 351, 78 So. 589, 590 (1917). The sequence of events and Dr. Gore's letter and testimony establish a reasonable possibility of causal connection between the accident and the disabling condition.
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> The lower courts based their decisions upon the assertions of Dr. Gunderson, Dr. Gore and Dr. Romsdahl that in their opinion a trauma could not cause a tumor and that trauma would have no effect upon the eventual progression of the disease. The lower courts believed that the medical evidence was sufficient to deny compensation. They failed to distinguish the "medical" meaning of cause from the "legal" meaning of cause. When the doctors speak of because they are essentially speaking of etiology--the origin of disease; what initially causes a disease. When courts and lawyers speak of because they are concerned with the question of whether the incident in question contributed to the plaintiff's disability by making manifest symptoms previously unnoticed. "Causation is not necessarily and exclusively a medical conclusion. It is usually the ultimate fact to be found by the court, based on all the credible evidence." *Haughton v. Fireman's Fund American Insurance Companies*, 355 So. 2d 927, 928 (La.1978).

> As in *Haughton v. Fireman's Fund*, supra, there is no separate, intervening cause of the worker's disability in this case. Haughton stumbled, fell and broke his thigh; it was discovered that his recovery was complicated by the existence of multiple myeloma. Here, Hammond's arm became swollen and painful immediately after the trauma at exactly the location of the tumor, which was surgically removed along with the surrounding muscle tissue. In the three and one-half months following the accident, Hammond's arm became progressively worse. The only "intervention" was the apparent activation, commencing immediately after the trauma, of the preexisting tumor. The accident might not have caused the sarcoma any more than Haughton's fall caused his myeloma, but in neither case did the defendant establish that the accident did not cause the disability. To the contrary, the record in this case is clear that Hammond is entitled to compensation benefits "for injury producing permanent total disability . . ." R.S. 23:1221(2).

Notice that the burden of proof is placed on the employer to show that the accident was not the cause of the injury. This is the common holding of Louisiana courts, despite the Louisiana Supreme Court's claim that the burden of proof in a workers' compensation claim is on the employee and is not relaxed. In truth, the burden of proof shifts and is placed on the employer in many instances.

Idiopathic Falls

Perhaps the best illustration of "you take your employee as you find them" is the epileptic seizure cases. In Fontenot v. Wal-Mart Stores, Inc., 870 So. 2d 540 (La. App. 3 Cir. Apr. 7, 2004) the accident was described as follows:

> She explained that one of her duties each morning was to take bread from the bakery to the deli department for display. Ms. Fontenot testified that the last thing that she remembers from the day of the accident was that shortly before eight o'clock that morning, she said hello to a co-worker while taking a load of bread to the deli. The record indicates that while Ms. Fontenot was in the process of delivering the bread, she fell to the floor and hit her head. One of Ms. Fontenot's co-workers testified that she saw Ms. Fontenot fall to the floor as if she had fainted. Several others testified that when they arrived on the scene after Ms. Fontenot fell, it appeared that she was having a seizure. The record reflects that she was bleeding profusely from the head and was moaning in pain.
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> The plaintiff's accident was not the fainting spell, heart attack or slip which may have caused her to fall. Plaintiff's accident was the fall itself and this is so regardless of the precipitating reason therefor. *Guidry, 378 So. 2d at 940*.

> An otherwise compensable accident does not cease to arise out of the employment simply because it can be attributed to a physical infirmity of the employee. *Guidry v. Serigny, 378 So. 2d 938 (La.1979)*. It is clear that a worker's pre-existing condition does not bar his recovery under our worker's [sic] compensation statute. *Id.* Moreover, the jurisprudence is replete with statements that an employer takes the employee as he finds him. An abnormally susceptible worker is entitled to the same protection as a healthy worker. *Allor v. Belden Corp., 393 So. 2d 1233 (La.1981)*.

Paraphrasing *Guidry v. Serigny*, the panel held that "[the claimant's] accident was not the epileptic attack which may have caused him to fall. [The claimant's] accident was the fall itself and this is so regardless of the precipitating reason therefor." *Id. at 642*. [2] Parenthetically, the court observed that the claimant was prescribed Dilantin for his seizures but did not regularly take his medicine. *Id. at 641-642*. The claimant's failure to take his medication as prescribed did not preclude his recovery.

Heart Attack and Stroke

One area in which the Louisiana legislature has limited the availability of workers' compensation benefits is when a worker's injury is a heart attack or stroke. This is true even when the heart attack or stroke occurs in the course and scope and arising out of employment. When the injury is a heart attack or stroke the employee is <u>not</u> given the benefit of "take your employee as you find them" or the presumption of causation. To recover workers' compensation benefits, the employee must show that physical work stress and not some other cause is the predominate and major cause of the heart attack or stroke.

The Workers' Compensation Act Section 23:1021 states:

> Heart-related or perivascular injuries. A heart-related or perivascular injury, illness, or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter unless it is demonstrated by **clear and convincing** evidence that:
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> (i) The physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and
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> (ii) The physical work stress or exertion, <u>and not</u> some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death.

In Young v. Capitol Concrete Prods., 858 So. 2d 513 (La. App. 1 Cir. June 27, 2003) the worker's death at work caused by a heart attack was not compensable as he was not engaged in extraordinary physical work stress:

Willie Young, Jr., was employed as a truck driver by Capitol Concrete Products, Inc. On March 9, 2001, after having reported to work, Mr. Young was either sitting in the dispatcher's office or standing outside talking with a co-worker while awaiting the arrival of a forklift operator to load his trailer, when he suffered a heart attack and died.

Both prongs of the test set forth in *La. R.S. 23:1021(7)(e)* must be satisfied for the claimant to prevail. Thus, Mrs. Young had the burden to prove by clear and convincing evidence that Mr. Young's physical work stress on the day of his fatal heart attack was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in the truck driving occupation. Mrs. Young also had the burden to demonstrate that the physical work stress or exertion, and not some other source of stress or pre-existing condition, was the predominant and major cause of Mr. Young's fatal heart attack.

In a workers' compensation case, a claimant must establish that the disabling or fatal injury was caused by an accident which arose out of and occurred during the course of the injured or deceased workers' employment. *La. R.S. 23:1031*; *Guidry* ***v. Chevron U.S.A., Inc****., 461 So. 2d 625, 626 (La. App. 1 1984)*. As already discussed above, Mr. Young was not involved in a physical work stress that was extraordinary and unusual in comparison to the stress or exertion experienced by the average truck driver and thus, [physical work stress] was [not] the predominant and major cause of Mr. Young's heart attack and subsequent death. As a result, Mr. Young's heart attack and death were not compensable under the Workers' Compensation Act.

Mental Injury

Mental injuries are another area in which the Louisiana legislature has limited the availability of workers' compensation benefits. It is understood by the courts that mental injuries are difficult to verify and that the cause of a mental injuries are difficult to determine. As such, the Louisiana legislature has greatly limited workers' compensation recovery for mental injuries. The Louisiana Workers' Compensation Act R.S. 23:1021 defines mental injury as follows:

> Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter, unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.
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> Mental injury caused by physical injury. A mental injury or illness caused by a physical injury to the employee's body shall not be considered a

personal injury by accident arising out of and in the course of employment and is not, compensable pursuant to this Chapter unless it is demonstrated by clear and convincing evidence.

No mental injury or illness shall be compensable under either Subparagraph (b) or (c) unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association.

In Adams v. Temple Inland, LA, 858 So. 2d 855 (La. App. 3 Cir. Nov. 5, 2003) mental injury due to actions occurring over a prolonged period were not compensable:

The undisputed facts establish that Ms. Adams began working for Temple Inland, LA (Temple Inland) in late 2000 or early 2001 as a utility hand. Almost immediately after she began her employment, her supervisor, David James "Red" Harper, and a co-worker, Kevin St. Romain, began sexually harassing her. Initially, the harassment took the form of "little comments in front of all the . . . guys in the break room." For example, when Ms. Adams would bend over, Harper and St. Romain would talk about "what they would like to do." Another co-worker, Syrina Silas, also began making comments to Ms. Adams's male co-workers that Ms. Adams was not married and "needed to be laid." Harper carried the harassment even further by requiring Ms. Adams to leave her workstation at times and spend time in his office. There, he would describe to her the various ways in which he wanted to have sex with his wife and would complain about his wife's unwillingness to engage in these sexual activities.

It did not take long for Harper's and St. Romain's harassment to escalate beyond vulgar comments to propositions and threats. When Ms. Adams began refusing to enter Harper's office with him, he warned her that he could make her job easy or difficult. He also began propositioning Ms. Adams to have sex with him, which she refused to do. Despite her rejection of his advances, Harper continued to press Ms. Adams for sexual favors, explaining to her that her job would be in jeopardy if she did not submit. Additionally, in the presence of Ms. Adams's co-workers, Harper "offered to get a hotel room so the guys could get [her] out of their system." On at least one occasion, Harper required Ms. Adams, who worked the night shift, to stay late for clean-up duties and threatened to take her to a place where no one would be able to hear her screams and then rape her. Ms. Adams's fears in this regard were exacerbated by a rumor that Harper had sexually exploited another female employee by having sex with her in the sleeper cab of a truck at work and then requiring her to give sexual favors to other men at work, under the threat of job loss. St. Romain also threatened to rape her and to burn her house down.

Moreover, the sexual harassment by Harper and St. Romain turned physical as well. Harper confined Ms. Adams to "areas where he could just get to [her]," and "he would pin [her] in a corner, and [she] would get felt up." Additionally, Harper "would grab himself and

ask [her] if [she] wanted some." St. Romain also groped Ms. Adams.

In June of 2001, Ms. Adams reported the harassment to Temple Inland's human resources department. To its credit, shortly thereafter, Temple Inland terminated Harper's employment and suspended and then transferred St. Romain and Ms. Silas.

The court found that the claimant failed to prove her injury was caused by a sudden, unexpected and extraordinary situation; in fact, it was due to events that occurred over an extended period of time, not by a sudden, unexpected or extraordinary event. Claimant testified that the various events and occurrences of sexual harassment stretched from January 2001 to June 2001. Based on the testimony presented, the court is unable to identify a "sudden, unexpected and extraordinary" occurrence. This court by no means condones the behavior of the defendants' employees; however, this claim does not meet the conditions established under the *Workers' Compensation Act* to be a compensable claim

While we deplore the conduct of Ms. Adams' co-workers, we do note that as soon as she reported their offending actions to management, her chief protagonist was fired and the other two, lesser offenders, were first suspended, then transferred. Our review of the statutory scheme and the jurisprudence convinces us that, while Ms. Adams may have a legal remedy for the mental injury she sustained, that remedy does not lie under the Workers' Compensation Act.