SJR 30 Briefing Paper

Issues Involving

Compensable Conditions

Within the Course and Scope

Of Work

Submitted to Jerry Keck, Administrator
Employment Relations Division of the Montana Department of Labor and Industry

By

Ann Clayton, Workers' Compensation Consultant

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Issues Involving Compensable Conditions within the Course and Scope of Work

Background

Workers' compensation system costs are to a large extent a product of the number of claims accepted and paid and the amount and length of benefit payments. This usually is measured by the frequency and duration of injuries occurring within a jurisdiction. However, additional questions that impact system costs have to do with:

- the extent to which all employers and workers are covered under the Act;
- the laws and regulations that define compensable injures under the Act;
- the level of and duration of benefits paid and the laws and rules on when those benefits may be discontinued, when they should be reinstated, and the conditions under which they remain payable and other similar questions.

This policy paper deals only with the laws and regulations that define compensable injuries under the Act; some of the subtleties of the case law on these issues; and how Montana compares in this regard to other states.

The laws and rules defining what injuries and diseases are "compensable" under a workers' compensation act are very state specific. Although there are similarities among states, generalizations are very difficult to make. However, for purposes of giving the reader a basic understanding of these issues, some generalizations are necessary.

For example, in most states there is a general rule that the employer "takes the employee as they find them". In other words, whatever physical conditions and issues an employee has at the time of hire will not bar the employee from being eligible for workers' compensation benefits if the work they do or the work environment aggravates or accelerates a pre-existing condition. This is often difficult for employers to accept, but the courts in general have found that if the employee was able to work prior to an aggravation of a previous physical condition and their employment aggravated or accelerated this condition (as documented by medical evidence) and as a result, they now cannot work; it is logical (barring any intervening cause for the disability) that the employer pay for the disability and medical treatment related to the worsened condition. The legal standard for when the employer has to pay these claims differs. In some states there only has to be a showing of causality between the work and the worsening non-related condition and in other states the work must be the major contributing cause or predominant cause.

Obviously, this is only one example of where reasonable minds may disagree about when a condition or injury is related or caused by work and when it may

not be. In general, states define a “compensable injury as either in injury or disease that “arises within the course and scope of employment” or as Montana’s law reads in MCA 39-71-407, “each insurer is liable for the payment of compensation…to an employee of a covered employer…**who receives an injury arising out of and in the course of employment**…” (Emphasis added). In addition, this section goes on to state that an insurer is liable for an injury if such injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or
(ii) a claimed injury aggravated a preexisting condition.

The “arising out of and in the course of employment” is really a two part test:

1. “arising out of” generally requires that a causal link exist between the worker’s injury and his/her employment; and
2. “within the course” generally means the time, place and circumstances of the injury.

In addition, most statutes also state which injuries or under what conditions such injuries are not covered under this definition. These are often situations such as intentional injuries, travel to and from work unless the employer furnishes the transportation or traveling is a regular job responsibility, and if the employee’s use of alcohol or drugs not prescribed by a physician is the “major contributing cause” or the “proximate cause” of the injury.

This issue has become part of the workers’ compensation debate in Montana as a result of a number of individual cases decided by the courts that employers and insurers feel strongly should not have been compensable. They seek to limit the effect of those cases. The ones of most concern appear to be:

- Oksendahl v. Liberty Northwest – Involved whether the claimant’s arthritis was aggravated or accelerated by work activities. The court concluded that work significantly aggravated or contributed to his condition and therefore, he was entitled to compensation and indicated that a requirement that a greater than 50% work-related aggravation was not required for a condition to be compensable.

- Coles v. American Motorists Insurance – Involved a claim for PTD benefits. The Court found that once a claimant presents evidence showing there is no reasonable prospect of employment, the burden of proof shifts to the employer to show that suitable work is available.

- Bevan v. Liberty Northwest – The claimant was injured in an auto accident when returning to work after letting her dog out at home during a paid break from work. The Supreme Court found this was not a substantial personal deviation and was compensable. The facts indicated the employee was away from the employer’s premises on her paid break; she

regularly left the employer's premises on paid breaks and the employer regularly allowed this; and her employer's convenience was the reason for her taking the break when she did.

- Michalak v. Liberty Northwest –The claimant suffered severe injuries after being injured while riding a "wave runner" at a picnic at the home of his employer. The Supreme Court found that the four part standard set by previous case law was appropriately followed in determining if the claimant injuries arose out of and in the course of employment. Such four part test was (1) whether the activity was undertaken at the employer's request; (2) whether the employer, directly or indirectly, compelled the employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether the employer and the employee mutually benefited from the activity.

- Popenoe v. Liberty Northwest – Claimant broke his ankle when he fell while removing his bicycle from the back of a friend's truck in the employer's parking lot five minutes prior to his work shift. This was found compensable under the premises rule, meaning the employee was injured on the employer's premises, which is an exception to the going and coming rule.

- Van Fleet v. Montana Association of Counties – Claimant traveled to a conference in Great Falls with his supervisor. After arriving, the claimant attended a hospitality suite where networking with other law enforcement officers was taking place and meet vendors of equipment the employer was considering purchasing. The hospitality room closed sometime after midnight. At approximately 1:30am, the claimant met up with four other individuals form the conference and they obtained a key to the hospitality room where they went a consumed more alcohol and played "dinking games". After leaving the hospitality room approximately 2 am, claimant was left alone in the hallway on the fifth floor by his companions. The claimant fell over the balcony and eventually died of his injuries. At the time of death, his blood alcohol level was .203. Once again, the application of the four part test mentioned above resulted in the Supreme Court's finding the claimant's injury within the course of employment.

<u>Public Policy Issues Involving Course and Scope</u>

Unlike the difficulty states have in attempting to define which injuries and under what conditions will be compensable under their workers' compensation law, the public policy issues are fairly straight forward. Workers and their advocates believe that any physical condition an individual suffers at work or that could be caused by or aggravated by work activities, regardless of where those activities are conducted, should be compensable, especially if the employer was aware of and condoned the circumstances of the work activities. The employer believes

that they should be responsible only for those conditions that were caused by work and should not be responsible for conditions that are a natural part of the aging process; are caused by some condition other than work; or are caused by a situation not within the control of the employer. They have inquired as to the level of contribution required by other states and how many states allow the employer and insurer to “apportion” the non-work related portion and pay only that portion that they believe is their responsibility.

Current Practice in Montana and Other States

In order to determine if Montana has a much broader definition of compensable injuries than do other states, two qualitative methods were used to gather information for comparison purposes. One was to use a survey of all jurisdictions and the other was to present six specific case examples to the comparator state agencies and have their legal counsel, workers’ compensation judge, commissioner, or other knowledgeable individual answer a set of questions related to those case examples. For Montana, these case studies were completed by staff at ERD, the State Fund, and by a trial attorney. These case studies were patterned in part after the cases mentioned above. Those responses were combined on the attached tables that compare and contrast the results in these case studies. Copies of the actual case studies used and questions asked are also attached.

Summary of Findings:

1. Based on table CS1 it would appear that the almost all of states responding to the survey treat aggravations of preexisting conditions and aggravations of conditions normally associated with aging to be compensable with medical documentation of such. In those cases, twelve of thirty states are responsible for paying those conditions until the condition returns to pre-injury state if the effects are temporary. If the effects are permanent, they may also pay for any PPD or PTD related to the combined conditions of pre-existing and aggravation from work activity. It also appears that the apportionment allowed in most states does not affect the payment of medical benefits but usually only affects permanency benefits. The exception is North Dakota, which only pays 100% of benefits for the first 60 days in the case of aggravations and then reduced their payment to 50% of benefits due after that time period.
2. Based on case study 2, the states of New Mexico, North Dakota, and Wyoming end TTD benefits at maximum medical improvement and PPD benefits would begin. In Montana, TTD would discontinue on the date the employee is released to return to work in some capacity. However, if at MMI the employee is found to have permanent restrictions, TTD would be converted to PPD benefits after the physician reviews and opines (based on a vocational job analysis) that the employee can return to work in a some suitable position. In the

states of Idaho, Oregon, South Dakota and Washington if the employee cannot return to the job at injury due to physical limitation, the employer has some responsibility to offer work the employee can do or demonstrate there are jobs in the local area that the employee can do before TTD can be discontinued. Eligibility for PTD benefits varies across states and will be looked at more closely when the benefit structure is studied.

3. It appears that the majority of comparator states (see Case Study 3) would not cover an injury similar to Bevan where an injury occurs off the employer's premises even on a paid break when the employer had knowledge of this personal errand. However, there are 9 states that have some additional requirements to determine compensability since they believed it "maybe" would be compensable depending on the facts (see second to last column on Table CS2).
4. Comparator states are split on a case like Michalak (see case study 4) being compensable. It would be compensable in Idaho and Montana, it might be covered in New Mexico, but it would not or probably would not be covered in North Dakota, Oregon, South Dakota, Washington and Wyoming.
5. In a case similar to Popenoe, (see case study 5) Idaho, Montana, New Mexico, Oregon South Dakota and Wyoming would find it compensable but North Dakota and Washington would not.
6. In a case similar to Van Fleet (see case study 6), Montana and Washington are the only two states that would clearly cover such a claim. It is unclear in New Mexico and it would not or likely not be compensable in Idaho, North Dakota, Oregon, South Dakota and Wyoming.

<u>Recommendation</u>

If a goal of the current Montana reform effort is to reduce costs, one might look at the differences between the comparator states with higher and lower costs and see how any of the medium costs states handle some of these course and scope issues differently than Montana.

I would not recommend the type of significant limitations that exist in North Dakota (who is rated 51st in the Oregon premium rate comparisons for 2008), nor would I anticipate Management and Labor in Montana would regard them as fair. However, it may make some sense to look at tightening the criteria for when injuries arise out of and in the course of employment when the employee is not on the employer's premises and deviates from his/her employment on a personal errand; and tighten the criteria for injuries that occur while the employee is engaging in or performing any recreational, or social activity primarily for the worker's personal pleasure during non-work hours, voluntarily and without pay.

Therefore, **I recommend the LMAC consider excluding injuries that occur off the employers premises while the employee is attending to a personal, non work related errand and also while the employee is engaging in or performing any recreational or social activity primarily for the worker's personal pleasure during non-work hours, voluntarily and without pay even if the event is sponsored or paid for by the employer.**