The Mental-Mental Muddle and Work Comp in Oregon

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Despite its attractiveness as a place to live, in recent years the state of Oregon has not been very successful in attracting new industry. The current recession has made this especially evident. In analyzing Oregon's lack of appeal to business, the high cost of workers' compensation insurance in the state is frequently mentioned. In 1978, for example, the cost of this insurance per $100.00 of payroll in the state was $4.67, giving it a number one ranking in the U.S.[1] Michigan, next in line, had a cost of $3.52. In contrast Indiana, the lowest state for which data was available, ranked forty-second at $0.85. Oregon now has slipped from number one ranking but is still near the top.

With its heavy concentration of timber-related jobs, there is no doubt Oregon workers do have a high exposure to industrial accidents. But in 1978, from 970,000 employees there were 171,000 total claims, a rate above that of states with similar job situations.[2] Of these claims, 48,000 were considered disabling, a 49 percent increase from 1968. Either work is getting more dangerous or the mechanism for claim filing is being used more liberally. Physicians who do industrial work frequently joke about the so-called "Oregon back," meaning that back injuries in Oregon get better very slowly, if at all.

In the past few years, there has been a burgeoning of claims known as "mental-mentals." In the local jargon, three terms are used to describe work comp claims: physical-mental, mental-physical, and mental-mental. In a physical-mental claim, for example, a physical injury leads to some sort of mental distress, such as depression or anxiety following a back injury. A mental-mental claim, of course, means that some sort of mental stress has resulted in a mental problem.

This idea is not new, as the term traumatic neurosis is well known in the literature.[3] A famous such case was *Christy Bros. Circus v. Turnage* in Georgia in 1928.[4] Here, while attending a circus, a lady suffered mental embarrassment when a horse defecated in her lap. This concept was broadened in the case of *Carter v. General Motors*.[5] Here a man's schizophrenia was at least partially attributed to working on the assembly line.

Oregon cases in the 1960s and the mid 1970s tended to tread very cautiously in the area of job stress and mental illness. If there was an actual

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physical disease of some sort, it was accepted that stress could make it worse.[6,7] But the idea of a purely stress-induced mental illness was generally rejected.[8,9]

The main issue in viewing mental illness and the job was whether an individual had contracted an occupational disease. This was defined as "Any disease or infection which arises out of and in the scope of the employment, and to which an employee is not ordinarily subjected or exposed to other than during a period of regular employment."[10] Accidental injury also was spoken of in Oregon law, referring to a specific incident or an event related to a definite point of view. The distinction between an injury and a disease was to assume great importance as mental-mental claims suddenly burgeoned.

Other terms of importance were "materially contributed" and "aggravation." The term material contribution always has been hard to define specifically, being similar to the also used "proximate cause." Essentially it means that if one thing had not taken place, then the second would not have occurred. It is also known as the "but for" test. Aggravation is even less definite, especially when case law differentiated between the mere recurrence of symptoms and the actual worsening of an underlying condition.[11]

In any event, in the late 1970s, the early conservatism in judicial thinking regarding mental-mental claims broadened considerably. The increasing number of attorneys and psychiatrists practicing in the state, along with generally inadequate mental health insurance, seemed to be important factors in this change. There was a perceived need for better mental health care and the work comp system unwittingly became the means to this end.

The 1980 case of *Korter v. EBI Companies, Inc.* well demonstrated the broadening of judicial thinking regarding causation.[12] The Oregon Court of Appeals set the following principles:

(1) the mental disorder does not have to be the result of an extraordinary unanticipated event; it can result from the cumulative effects of each day's exposure to specific conditions at work;
(2) the conditions of employment claimed to be the precipitating cause of the mental disability do not have to be unusual; the disability is compensable if it results from the usual and ordinary job stress; and
(3) the claim is compensable even if the individual has a pre-existing emotional disorder if he proves that his work activity and conditions caused a worsening of his underlying disease resulting in an increase in pain to the extent that it produces disability or requires medical services.

These standards were so broad that the state's work comp insurance carriers were deluged with claims of all sorts. A chronic schizophrenic—just out of a mental hospital—would get a job, have a relapse, and file a claim. A disgruntled employee would argue with a boss, develop anxiety symptoms, and file a claim. Employers complained and fought back but became increasingly more downhearted as case after case before the Oregon Court of

Appeals was decided on behalf of the claimant.

On January 20, 1981 the Oregon Supreme Court decided the case of *James v. SAIF* (State Accident Insurance Fund), a landmark work comp case.[13] This case and four related ones involving mental stress and work had been argued and submitted on June 24, 1980. The court decided them all at once, referring the four others to the *James* case, in which it spelled out its reasoning in detail. The evolution of this case is worth examining.

Essentially, Ms. James was a woman in her thirties who had a chronic problem with anxiety and depression of neurotic proportions. In October 1976 she began work at a social agency as a counselor for the elderly poor. In June 1977 she was unable to continue her job because of anxiety and an almost phobic reaction to her place of employment. She blamed all of this on working conditions. She and a supervisor had ongoing problems, and on at least two occasions he allegedly reprimanded her in a loud voice in front of other staff members. She also found the physical plant upsetting. Her office was in a windowless basement with no air conditioning and no partition between the individual work spaces. She usually smoked to relieve tension but was not allowed to smoke here. Finally she could go on no longer, stayed home, and filed a work comp claim.

She had been seeing a psychiatrist on and off for about four years prior to this filing of the claim. On occasion she had also seen a psychologist. She had been treated with minor tranquilizers and psychotherapy. Her psychologist and psychiatrist attributed the exacerbation of her symptoms to work conditions. An independent examination requested by the insurance company, however, emphasized her personality inadequacies as being by far the major factor in her downfall, pointing out that her job stresses weren't that unusual.

Based on broadening criteria of causation, a hearings officer ruled that her illness was compensable. In February 1980 the Oregon Court of Appeals agreed.[14] In its opinion the court noted some Wisconsin cases that said, to prove causation in a work comp claim, the causal factors must be unusual or extraordinary. The court disagreed with this notion, pointing out that heart attacks and back injuries have been accepted as claims when they arose out of usual and ordinary stresses of the job. The court saw no reason to say that emotional illnesses should require a higher standard.

The court then addressed the issue of pre-existing disease. Here, of course, it has long been accepted that an employer must take the worker as he finds him. Referring to back injuries the court stated that primarily the worker had to show that the work activity and conditions caused a worsening of the underlying disease resulting in an increase in pain to the extent that it produces disability or requires medical services. The court decided that Ms. James's situation did fulfill these conditions.

In its opinion the court downplayed the difference between an accidental injury and an occupational disease. It was this point, however, upon which the Oregon Supreme Court focused in its January 20, 1981 decision that once again narrowed considerably the causation issue.

The Oregon Supreme Court did point out that workers' compensation is governed by statute, and that there is nothing in the statutes to distinguish between the test for mental illness and other kinds of injury or disease. So mental illness is clearly covered.

However, the Supreme Court made quite a bit out of the difference between an occupational disease and an accidental injury. An occupational disease has already been defined. The court, in its opinion, underlines the following part of this definition: and to which an employee is not ordinarily subjected or exposed to other than during a period of regular actual employment therein.

The court explained that accidents are sudden and unexpected. An occupational disease, on the other hand, is recognized as an inherent hazard of continued exposure to conditions of a particular employment and comes on gradually. It would appear that Ms. James's neurosis would constitute an occupational disease and not an accident. Therefore, to be compensable, it must be caused by circumstances to which an employee is not ordinarily subjected or exposed except during a period of regular employment.

The court labored over this last point. For example, if a person handled similar yet different allergenic materials both on and off the job and then became ill, a claim would be precluded. Another example would be loud noise. If a claimant is exposed to different loud noises both on and off the job, a claim might very well be disqualified.

Looking at Ms. James's history in detail, the court pointed out that she was apparently highly sensitive to any criticism, both on and off the job. They pointed out that she had become quite upset a few months before she left work after a school principal was critical of her in an incident involving her child.

So in this case the court thought that there was a fact question as to whether her condition was caused by circumstances "to which an employee is not ordinarily subjected or exposed to other than during a period of regular actual employment." With this in mind the case, along with the others, was remanded to the Appeals Court to answer this fact question.

This ruling is seen by insurance carriers as at least a partial victory. Claimants' representatives are generally displeased with it.

The story, of course, is far from over. Now a number of old cases are being relitigated with this new standard. There is much quibbling over whether a certain stress is or is not present only on the job. Some voices in the Legislature are asking whether mental illness should be compensable at all. Few legislators really understand these issues, however, and those who do are reluctant to rock the boat much in this no-win area. If you tighten the law, you're accused of being anti-labor. If you ignore it or broaden it, you're accused of "leading us further down the road to socialism."

We are dealing here with a social problem, the problem of how to support those who just cannot cope with our complicated society. Whether the cause of their inability to cope is industrial or non-industrial seems almost

irrelevant. What is not irrelevant, however, is the amount of money spent on the legal process and medical examinations in an attempt to answer this probably unanswerable question. Also not irrelevant is the demeaning process an often quite ill individual is forced to go through as he or she joins in the debate of how much to blame on the job. One solution would be to move toward a system where those who cannot "make it" are adequately provided for, with no particular advantage, financial or otherwise, for the industrial case over the non-industrial. There is considerable danger in too readily making a job, so important for good mental health, into a villain.

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