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Workmen's Compensation Law - Fixing Liability in Occupational Disease Cases - Olson v. Federal American Partners

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WORKMEN'S COMPENSATION LAW—Fixing Liability in Occupational Disease Cases. Olson v. Federal American Partners, 567 P.2d 710 (Wyo. 1977).

Ralph Olson was an underground uranium miner for thirteen years and had been employed as follows: January 3, 1958 to February 27, 1970—Continental Uranium Co.; March 4, 1970 to January 15, 1971—Federal American Partners; October 11, 1970 to January 15, 1971—Continental Uranium Co.; January 18, 1971 to December 29, 1971—Federal American Partners. During the last period of employment with Federal American Partners, Olson became ill and died on May 23, 1973 of small cell undifferentiated lung cancer. His widow filed a claim seeking benefits under the Wyoming Occupational Disease Law[1] contending that her husband's lung cancer was induced by radiation exposure arising out of his employment. The claim was filed against Federal American Partners, allegedly because it was the last employer to injuriously expose Olson to radiation, though he had worked only eighteen months for the company.[2] The employer denied liability, claiming Olson had not been subjected to injurious radiation exposure during the time he was employed by the company and, therefore, his employment with Federal American Partners was not the cause of the lung cancer. Lastly, the employer contended there was no certainty the cancer was caused by uranium mining since the deceased was a habitual cigarette smoker, having smoked daily at least a pack to a pack and a half from 1949 to 1971. Both the lower court and the Wyoming Supreme Court refused to award compensation to the claimant. The court concluded that although the cancer may have been caused by uranium mining, there was not sufficient evidence to prove that Olson was last injuriously exposed by this particular employer.[3]

As noted above, the court applied the provisions of the Wyoming Occupational Disease Law in deciding this case.[4] This law has since been repealed and future occupational disease disputes will be resolved by a revised Workmen's Compensation Act.[5] Unlike the Occupational Disease Law, the current Workmen's Compensation Act does not contain a

1. WYO. STAT. §§ 27-288 to 27-309 (Cum. Supp. 1973) (repealed 1975).
2. WYO. STAT. § 27-293 (Cum. Supp. 1973) (repealed 1975). The employer's account in whose employment the employee was last injuriously exposed is solely liable for any compensation.
3. Olson v. Federal American Partners, 567 P. 2d 710, 713 (Wyo. 1977).
4. WYO. STAT. §§ 27-288 to 27-309 (Cum. Supp. 1973) (repealed 1975).
5. WYO. STAT. §§ 27-12-101 to 27-12-804 (1977).

provision which is comparable to Section 27-293. In a typical disease case, this provision came into play only after the employee had established he had suffered a compensatory industrial disease.[6] Often the ailment had developed gradually over a number of years and more than one employer had contributed to its debilitating effect. The purpose of the provision was then to attach liability to the employer who was the last to injuriously expose the employee to the hazardous substance.[7]

Because there is no replacement for Section 27-293 in the present law, this Note will address three questions: First, is there a need under the current law for the court to adopt a test or method for fixing liability in a case involving occupational disease? Secondly, if such a test is desirable, what are the alternatives from which the court might choose? And finally, should an employer have an action of contribution against previous employers who have contributed to the disease?[8]

AWARDING COMPENSATION

It is not surprising to find that compensation for occupational disease has lagged far behind other types of industrial coverage in the United States.[9] One reason may be because it is difficult to show that a disease is causally connected to a particular period of employment.[10] Olson's situation provides a good example. Determining the actual time when lung cancer first begins in a human is medically impossible.[11] Doctors are limited to looking at a period of exposure to a carcinogenic substance and can only conclude that the cancer was induced sometime during that exposure. The length of time necessary for the development of the cancer varies from four to twenty years depending upon several factors, including the concen-

6. *See* WYO. STAT. § 27-293 (Cum. Supp. 1973) (repealed 1975). This provision requires the employee to have, "suffered a compensable occupational disease covered by this act," before it will employ the last injurious exposure test to fix liability on an employer.
7. 4 LARSON, WORKMEN'S COMPENSATION LAW § 95.12 at 17-71 (1978) [hereinafter cited as 4 LARSON].
8. WYO. STAT. § 27-293 (Cum. Supp. 1973) (repealed 1975). This Section specifically denied an employer any right of contribution against previous employers who might have contributed to the occupational disease.
9. 4 LARSON, *supra* note 7, § 41.20, at 7-258 to 7-260.
10. *Id.* at 7-258 to 7-260.
11. Transcript of Trial Proceedings, Vol. 1 at 83, Olson v. Federal American Partners, *supra* note 3.

tration level of the exposure and the existence of other promoting agents. Once the cancer has taken hold, further exposure to a hazardous substance, like radiation, may accelerate or promote the development of the disease.[12] Consequently, a miner who works in several uranium mines over the years may contract lung cancer and not be able to identify the period of employment that caused the disease. Yet, it is likely that each employer contributed to the malady.

In response to this problem, an occupational disease law will often contain a specialized provision designed solely to fix liability.[13] Section 27-293 of the repealed Wyoming Occupational Disease Law[14] was an example of these specialized provisions in that it attached liability to the employer who was the last to injuriously expose the employee to the harmful substance.

Surely, the court will have to adopt a similar test when fixing liability in future occupational disease cases unless the current Workmen's Compensation Act contains language that would resolve the question if it arose. One possibility lies in the burden of proof provision which requires the claimant to prove by a preponderance of the evidence that the disease arose out of and in the course of the worker's employment.[15]

A court's interpretation of the word "employment," as used in Section 27-12-603, is critical to a claimant seeking benefits because of an occupational disease.[16] One obvious definition is that the word refers to the relationship of a particular employer to an employee. The use of the term in this way would cause few problems, if any, in most industrial accident

12. *Id.* at 40-41.
13. 4 LARSON, *supra* note 7, § 95.21, at 17-86 to 17-87.
14. WYO. STAT. § 27-293 (Cum. Supp. 1973) (repealed 1975).
15. WYO. STAT. § 27-12-103 (1977). In order to discharge this burden the claimant must show:
(i) There is a direct causal connection between the condition or circumstances under which the work is performed and the injury;
(ii) The injury can be seen to have followed as a natural incident of the work as a result of the employment;
(iii) The injury can fairly be traced to the employment as a proximate cause;
(iv) The injury does not come from a hazard to which employees would have been equally exposed outside of the employment; and
(v) The injury is incidental to the character of the business and not independent of the relation of employer and employee.
See generally 4 LARSON, *supra* note 7, § 41.32 at 7-264 to 7-265. Factors, such as those found in the Wyoming Statute, are designed to create a general test of causation.
16. *See* WYO. STAT. § 27-12-102 (1977). The Act fails to provide a definition of the word employment.

cases.[17] However, such an interpretation has a disastrous effect on a claimant who, because of the peculiar nature of the disease, is unable to pinpoint which period of employment caused the injury. A claimant, such as Olson's widow, is imposed with an extremely difficult burden of proving it was the eighteen months of employment with Federal American Partners that caused the lung cancer. If she could make such a showing, there would be no need for the court to invoke a test for the purpose of fixing liability. Obviously, the employer who caused the injury would be held accountable for the total amount of compensation.

On the other hand, the court could use the term in a generic fashion, *i.e.*, as referring to a type or class of employment such as uranium mining. Adoption of this interpretation would cause few problems in the usual case of an industrial accident, and it would ease the burden of a worker suffering from an occupational disease immensely. The claimant would only be required to show that her husband's lung cancer had a direct causal connection to uranium mining and not that it was caused specifically by the eighteen months of employment with Federal American Partners.

This view is not without the endorsement of several jurisdictions.[18] Perhaps the best example is Virginia which has a workmen's compensation law containing a provision very similar to the one found in the Wyoming Act.[19] In fact, there is a possibility that the Virginia Statute was used by Wyoming in formulating its law.[20] In examining the burden of proof provision, the Supreme Court of Appeals of Virginia agreed with the majority opinion of the Industrial Commission of Virginia that the word "employment", as used in the statute, does not describe the relationship between employer and employee. Rather, the word refers to the nature of the work in which an employee has been engaged.[21] A New York court further explained when it pointed out that an occupational disease is one which results from the nature of the employ-

17. Transcript of Trial Proceedings, Vol. II at 215, Olson v. Federal American Partners, *supra* note 3. It appears the district court chose to use the term in this manner.
18. *E.g.*, Elm Springs Canning Co. v. Sullins, 207 Ark. 257, 180 S.W.2d 113, 115 (1944); Anderson v. Roberts-Karp Hotel, 171 Minn. 402, 204 N.W. 265 (1927).
19. VA. CODE § 65.1-46 (1973).
20. Olson v. Federal American Partners, *supra* note 3, at 715. The dissenting opinion suggests that Wyoming took its burden of proof language from the statutes of either Virginia, Illinois or Indiana.
21. Pocahontas Fuel Co. v. Godbey, 192 Va. 845, 66 S.E.2d 859, 863-64 (1951).

ment, and by "nature", the court is alluding to conditions common to employees of a class.[22] However, jurisdictions adopting this interpretation must also devise a means of attaching liability in cases where more than one employer has contributed to the disease.

This approach has a certain amount of appeal in disputes involving workmen's compensation. The philosophy behind such coverage is that one need show only that the injury is work-related in order to receive benefits in their most dignified, efficient and certain form.[23] The test of liability depends on a proven connection between work and injury, and that is all.[24] There is no requirement that the injury also be connected with a particular employer.

In *Olson*, the court applied a burden of proof provision which is almost identical to the one found in the present Workmen's Compensation Law.[25] Nevertheless, the court was able to avoid articulating its interpretation of the word "employment". Instead, it appears to have disposed of the case by focusing on the "last injurious exposure" requirement of Section 27-293.[26] It should be noted, however, that the mining company argued the term "employment" should be used to refer specifically to the eighteen months Olson worked for Federal American Partners and indeed, it seems the district court used the term in this manner.[27] The question will certainly arise again, and because there is no comparable provision to Section 27-293, the court will eventually have to define this term.

FIXING LIABILITY

It is possible, if not likely, that the court will interpret the burden of proof provision so it will require the claimant to demonstrate only that the disease is causally linked to the employee's occupation. In this event, the court would also

22. Harman v. Republic Aviation Corp., 298 N.Y. 285, 82 N.E.2d 785, 786 (1948).
23. 1 LARSON, WORKMEN'S COMPENSATION LAW § 2.20, at 5 (1978).
24. *Id.*
25. WYO. STAT. § 27-12-102 (1977). The current Workmen's Compensation Act incorporated the burden of proof provision of the repealed Occupational Disease Law. However, the new provision substitutes the word "injury" for the word "disease". The act goes on to define injury as any harmful change in a human organism other than normal aging. WYO. STAT. § 27-311(n) (Interim Supp. 1977).
26. Olson v. Federal American Partners, *supra* note 3, at 713.
27. Transcript of Trial Proceedings, Vol. II at 215, Olson v. Federal American Partners, *supra* note 3.

have to develop a method whereby it could attach liability where successive employers have each contributed to the ailment. It should be emphasized that at this point, the claimant will have already established that he has suffered a compensatory occupational disease.[28] The only question remaining is whether this particular employer should be held liable.

Since it is settled that the claimant is entitled to benefits, any test developed for the purpose of fixing liability ought to be designed to assure compensation. For instance, the test should require a showing that is readily susceptible to a positive demonstration. Above all, it should add a degree of definiteness and predictability to the law, so the claimant does not have to guess as to which employer he should sue.

Last Injurious Exposure Rule

Unfortunately, the last injurious exposure rule, as set forth in Section 27-293 of the repealed Occupational Disease Law, fails to reflect either of these characteristics. This rule places full liability on the employer who is the last to injuriously expose the worker.[29] An injurious exposure is said to have occurred, when the exposure causes the malady or at least aggravates, promotes or accelerates the disease.[30]

A claimant, such as Olson's widow, undertakes the extremely difficult task of proving the radiation from the employer's mine contributed in some identifiable fashion to the development of the cancer. As mentioned above, it is not medically feasible to demonstrate the specific effect of particular units of radiation. As a result, the claimant is required to prove an element which is presently not susceptible to proof.[31] The sad result is that, even though it is certainly conceivable that Olson died of an occupational disease, his widow is denied benefits simply because the method of fixing liability is difficult, if not impossible, to satisfy.

Furthermore, this rule does not make clear which employer the claimant should sue. Perhaps, Olson's widow would have

28. WYO. STAT. § 27-293 (Cum. Supp. 1973) (repealed 1975). This provision specifically stated that it came into play only, "[w]hen an employee has suffered a compensable occupational disease covered by this act."
29. 4 LARSON, *supra* note 7, § 95.12, at 17-71.
30. Pocahontas Fuel Co. v. Godbey, *supra* note 21, at 864.
31. Transcript of Trial Proceedings, Vol. I at 83, Olson v. Federal American Partners, *supra* note 3.

been successful if she had filed an action against the first employer, but a suit of this type involves an additional risk.[32] The claimant not only must satisfy the injurious exposure requirement, but also must prove the *last* injurious exposure occurred during that period of employment.[33] Again, this point cannot be conclusively established by medical evidence.[34] Therefore, it is possible for a claimant in Olson's position to sue each employer separately, establishing in each case that he has suffered an occupational disease, and be denied compensation in each case because of the last injurious exposure rule.

One might avoid this predicament by filing a single cause of action joining all employers as defendants.[35] In this situation, if a court found that an employee's disease was a result of his occupation, it would have all the accountable parties present and would have heard the evidence in total. Conceivably at this point, the court is in the proper position to make a fair determination as to who committed the last injurious exposure, and a claimant would not come away without compensation.[36] Unfortunately, due to jurisdiction and venue considerations, it is not always possible to join all the former employers.[37] In this event, the claimant would have no alternative but to deal with the perplexing requirements of the last injurious exposure rule.

Time of Disability Test

There is a second method of fixing liability which could be used by the Wyoming courts in occupational disease cases. The majority of jurisdictions assign liability to the party who is the employer at the time the disease results in disability if

32. Transcript of Trial Proceedings, Vol. II at 213. Olson v. Federal American Partners, *supra* note 3. The district court doubted that the claimant could have satisfied the rigors of the injurious exposure rule even if she had sued Olson's first employer.
33. 4 LARSON, *supra* note 7, at 17-71.
34. Transcript of the Proceedings, Vol. I at 83, Olson v. Federal American Partners, *supra* note 3.
35. WYO. R. CIV. P. 20(a). All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.
36. WYO. R. CIV. P. 20(a). The rule provides that a judgment may be given to the plaintiff against one or more of the defendants according to their respective liabilities.
37. *See generally* WYO. STAT. § 5-1-107 (1977). For instance, if an employee had worked for a mining company outside the state and this company had engaged in little or no mining activity in Wyoming, then it is unlikely that a state court could acquire personal jurisdiction over this employer. *See also* WYO. STAT. § 1-5-105 (1977). According to this provision it is feasible that two domestic corporations could not be joined because a court would lack proper venue.

the employment was of the type that could contribute to the disease.[38] This method is notably simple and easy to apply in comparison with the last injurious exposure rule.[39]

First, it requires a showing which can be readily demonstrated. The claimant need only establish the date of disability and that the employment at the time was of the type that could contribute to the disease.[40] For instance, the claimant in *Olson*, would have had little trouble in demonstrating the date her husband became ill and had to cease work. Nor would there have been much difficulty in establishing that his employment at the time was of the type that might contribute to the cancer.

Unquestionably, the standard of proof imposed by the time of disability test is much easier for the claimant to establish, and perhaps, this is one reason why it should be preferred over the last injurious exposure rule. Workmen's compensation laws are designed to protect persons who have suffered casuality from industry, and their provisions should be construed accordingly.[41] Certainly, at the stage of fixing liability, the court should require showings of proof which claimants can regularly provide.

In addition, this test has the cardinal merit of being definite.[42] It identifies an instant at which a court can establish a claimant's right to benefits and fix the employer's liability.[43] A claimant in Olson's position does not have to speculate as to which employer he should sue. The time of disability test provides sufficient guidance in order that he may make the decision with reasonable certainty.[44]

In essence, this test permits the court to focus on the primary issue of an occupational disease case: is the ailment casually connected to the worker's occupation? If a claimant

38. 4 LARSON, *supra* note 7, § 95.21, at 17-79 to 17-80.
39. *Id.* at § 95.22 gives an explanation as to how the time of disability test is applied in a case where disability occurs after termination of employment. *Id.* at § 95.23 examines how the test might work where an employee suffers a compensable disease without disablement.
40. Mathis v. State Accident Ins. Fund, 10 Ore. App. 139, 499 P.2d 1331, 1336 (1972).
41. Wright v. Wyoming State Training School, 71 Wyo. 173, 255 P.2d 211, 217 (1953).
42. 4 LARSON, *supra* note 7, § 95.21 at 17-85.
43. *Id.* at 17-83 to 17-85.
44. *Id.* at 17-85 to 17-86.

can satisfy this requirement, he is reasonably assured that compensation will not be denied simply because the law employs a problematical method of fixing liability.

CONTRIBUTION

Once the requirements of either test have been met, full liability is imposed on the appropriate employer without considering his actual contribution to the disease.[45] The employer is held accountable for the total award even though the worker may have been employed by him for only a brief period.[46] Several states attempt to limit the unequal distribution of liability by providing the employer with a right of contribution against previous employers who have contributed to the ailment.[47] This contribution reduces the hardship imposed on an employer who may have benefited from the employee's services for only a short length of time.[48]

In contrast an action for contribution is actually undesirable under the workmen's compensation schemes of some states.[49] For instance, Virginia's workmen's compensation statute creates a general fund to which each employer pays premiums in order that the cost of industrial accidents may be distributed among them.[50] When a worker suffers a compensatory injury, the appropriate employer files a report, and the award is paid from the general fund.[51] An action of contribution in this circumstance is largely without merit because it would simply redistribute an already distributed cost. Certainly, an overworked judicial system should not have to tolerate additional actions of this sort. Therefore, states such as Virginia statutorily deny an employer any right of contribution against previous employers.[52]

45. *See generally* 4 LARSON, *supra* note 7, § 95.21.
46. *Id.* at 17-87.
47. *E.g.*, MICH. COMP. LAWS § 417.9 (1967); MINN. STAT. ANN. § 176.66(5) (1966); N.Y. WORK. COMP. LAW § 44 (McKinney 1965).
48. Climax Uranium Co. v. Smith, 33 Colo. App. 337, 522 P.2d 134 (1974). In this case the employer was charged with full liability even though the claimant had been employed only 20 days.
49. *E.g.*, ILL. ANN. STAT. ch. 48, § 172.36(d) (Smith-Hurd Cum. Supp. 1977); VA. CODE § 65-14.6 (1973). Each of these states has denied by statute the employer an action of contribution against other employers in occupational disease cases.
50. VA. CODE § 65.1-104 (Cum. Supp. 1977). Under the Virginia Law the employer also has the option to insure his liability with a private carrier or simply provide proof of financial ability to pay workmen's compensation.
51. VA. CODE § 65.1-93 (1973).
52. VA. CODE § 65.1-50 (1973).

In Wyoming, the workmen's compensation scheme operates in much the same manner. Each employer pays premiums which are placed in three central accounts, the main one being the general account.[53] But unlike Virginia, the Wyoming system also maintains a separate account of the payments made by each employer.[54] Any award for the death or injury of a worker is charged against the specific account of the appropriate employer.[55] If an employer has numerous claims charged against his account, it may become overdrawn. When this happens, the employer is required to make increased payments until the overdraft is cleared.[56]

Under the Wyoming compensation scheme, an employer can save a significant amount of money if he can avoid having large awards charged against his account. Thus, where a worker receives a substantial award, it is in the employer's best interest to be able to apportion the burden of compensation among the accounts of other employers. However, the repealed Occupational Disease Law specifically denied an employer any right of contribution against previous employers.[57] Consequently, if the claimant in *Olson* had been awarded compensation, the account of Federal American Partners would have been charged the full amount without right of contribution, even though the company received the benefit of Olson's services for only eighteen months. Perhaps the Wyoming Court considered this disparity when deciding against compensation.

At any rate, the present Workmen's Compensation Act is silent on the subject of contribution. The Act neither condones nor prohibits contribution among employers who have contributed to the disease.[58] In the future, it would appear the Court has the option of adopting a right of contribution in industrial disease cases.[59] The adoption of this right would significantly diminish the hardship imposed on an employer

53. WYO. STAT. § 27-12-701 (1977).
54. WYO. STAT. §§ 27-12-701, 21-12-704 (1977).
55. WYO. STAT. § 27-12-704 (1977); *see also* WYO. STAT. § 27-70 (Supp. 1973) (repealed 1975). This provision explains that the purpose of keeping separate accounts is to encourage care on the employer's part, and thus decrease the rate of industrial injury. It almost connotes a tort concept.
56. WYO. STAT. § 27-12-203 (1977).
57. WYO. STAT. § 27-293 (Supp. 1973) (repealed 1975).
58. WYO. STAT. § 27-12-101 to 27-12-804 (1977).
59. *See* 4 LARSON, *supra* note 7, § 95.32, 7-111 to 7-112.

who is held liable. It follows, that by distributing the employers burden through contribution, the court might also increase the likelihood that the claimant will recover in the first place.

CONCLUSION

The State of Wyoming is destined to become one of the leading producers of uranium ore in the United States.[60] As a consequence the courts will, with increasing frequency, be dealing with miners who contend they have contracted lung cancer because of their occupation. Many, if not most of these miners, will have worked for several mining companies. As new mines open and older mines close, Wyoming miners will remain in the industry regardless of the name of the company.[61]

By virtue of the relatively recent Workmen's Compensation Act, the Wyoming Court has the opportunity to consider what possible methods exist for fixing liability in cases of occupational disease like lung cancer. It may also consider the question of whether a right to contribution should exist. The Court should strive to resolve these issues in a manner that will afford employees with maximum protection and at the same time avoid imposing an unfair burden of compensation on employers.

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60. Casper Star Tribune, June 15, 1977, at 12-14.
61. Supplemental and Amendatory Brief of Appellant, Olson v. Federal American Partners, *supra* note 3.