

The Apportionment of Disability in Workers' Compensation Claims

Issue Analysis

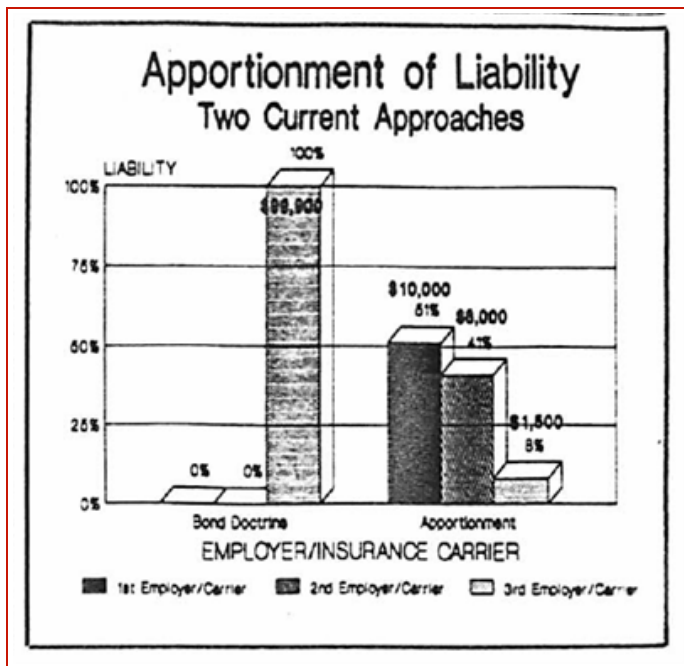
In an era of heightened technological sophistication, the Division of Workers' Compensation is increasingly faced with the necessity to apportion responsibility among successive employers or insurance carriers when dealing with occupational disease claims. The task has been the subject of increased importance as a result of scientific and medical discoveries relating various occupational exposures to either nonspecific toxic and carcinogenic substances or to carcinogenic

substances with long latency periods before a disease becomes evident. The function of the Division of Workers' Compensation has been complicated even further by the revelation of synergistic effects of exposure to various substances.

Historically, the method and manner of apportionment have been a controversial issue before the Division of Workers' Compensation in New Jersey and other jurisdictions. In England, in 1927, it was determined that an employee was entitled to recover compensation against the last employer irrespective of where and when the disease was first contracted.

The law regarding apportionment in the State of New Jersey has been developed through case law interpretation. In 1931, the New Jersey courts established the Textileather Doctrine, which held that a compensable disability for an occupational disease did not arise, notwithstanding any ongoing disease process, until "the employee was incapacitated for work." In a series of cases following this pronouncement, the courts continued to assess liability for permanent disability upon the insurer that was on the risk at the time that the employee ceased working. The court absolved any prior insurance carriers, regardless of the extremity of the progression of the disease short of cessation of work during their coverage, and without apparent concern for the short duration of the period of coverage of the last insurer. The court was of the opinion that there could be no compensation for a functional disability that did not result in the inability to work and held that the time fixed for the commencement of the award was when the disease resulted in either incapacity or death. The court, attempting to make a complex matter rather simple, declared "the only rule which would assure the benevolent legislative objective of recovery in every meritorious case was one which would fix liability at the single end and easily determinable point when there was the inability to work or death." [Textileather Corp. v Great American Indemnity Co.](#), 108 N.J.L. 121 (E. & A. 1931).

In the years following, there was a gradual departure from the Textileather Doctrine. The court reviewed factual situations where the manifestation of physical impairment was so tangible that the rationale of the Textileather Doctrine could not be applied, and the logic of recovery by analogy with traumatic injury in ordinary workers' compensation law was so compelling as to lead to the allowance of compensation notwithstanding the petitioner's continuing ability to work.



In a series of cases flowing from chrome poisoning, the court declared that there need not be an interruption of work or earnings to permit the allowance of partial permanent compensation. The issues evolved around the perforated septum (nasal membrane) due to chrome poisonings, accompanied by no lost time from work. In [Koval v Natural Products Refining Co., 25 N.J. Misc. 489 \(Sup. Ct. 1947\)](#), the court declared that the compensable injury arose when the perforated septum reached its full size. At that time, the court contended that the compensable injury had reached maturity. The court embarked at that juncture upon the "definite fault concept", indicating that "incapacity...need not occur to create partial permanent disability arising from occupational poisoning." [Calabria v Liberty Mutual Ins. Co., 4 N.J.64 \(1950\)](#). The rationale of the court was that the status of the compensable disability arising from an occupational disease such as chrome poisoning could be related to a definite fault similar to when a traumatic injury occurred. In a series of cases that followed, the court determined that other conditions arising out of occupational diseases that were work-related were also compensable, although not involving impairment of earning power or capacity to work. These cases included impotency arising out of exposure to a chemical containing female hormones and the impairment of hearing because of occupational noise exposure.

In other occupational exposure cases, the court determined that when a disease was gradually progressive in nature and did not manifest a kind of tangible bodily injury or impairment that was specifically demonstrable and associated with a specific exposure but rather progressed as a general overall condition of malaise which eventually forced discontinuance of work, then the condition was determined to be compensable only when there was an inability to work. The court did not determine whether or not this inability to work had to be permanent; however, apportionment was denied even when the employee only worked for nine days for the last employer.

Evolution Of Apportionment In New Jersey

The evolution of apportionment in New Jersey can be traced back to traumatic disease claims. In 1944, the Supreme Court announced what is known as the Silberman Rule. In those cases where there were successive accidental injuries in different employments which, in combined effect, produced a given degree of partial permanent injury, apportionment was permitted if estimates of disability could be attributable to the first employer even if there was no interruption of work. [Silberman v. National Egg & Product, Co., 131 N.J.L. 286 \(Sup. Ct. 1944\)](#) The rule of Silberman was applied to successive insurers of the same employer. The New Jersey courts have continued to permit apportionment in traumatic disease claims. "Where there are two or more successive and compensable injuries which combine to produce permanent injury, there should be apportionment among employers to the degree that each contributes to the total result." *Quinn v Automatic Sprinkler*, 50 N.J.Super (App.Div. 1958). The court clearly sought the interpretation of medical evidence and relied upon it in favor of the view of the allocation of responsibility in these cases.

In an application of apportionment to occupational disease claims, the Appellate Division in 1958 declared that the apportionment of liability remains a possibility in certain types of occupational disease claims. The court sought to define certain occupational disease claims as being similar to "definite fault akin to a traumatic injury." [Bucuk v Edward A. Zusi Brass Foundry](#), 49 N.J. Super 187 (App. Div. 1958). In *Bucuk*, the court declared that " an employer, or insured, where a disease originates, is liable for later injurious conditions which are exclusively the result of the natural progression of the disease, even if becoming manifest and resulting in a disability to work at a later employment." In determining applicability, the court did not preclude a later award against another employer for additional injury due to additional causative exposure with that employer.

In *Bucuk* the court permitted the recovery against the former employer even in the light of subsequent physical deterioration since this deterioration was found to be a result of the natural progression of the

disease caused by the prior employer.

The Bond Doctrine

The New Jersey Supreme Court in 1964 was faced with the issue of the establishment of apportionment in allocating disability in certain types of occupational cases where evidence could not be established as to what work condition activated or caused the progressive occupational disease. Taking a liberal approach in favor of the employee, the court sought to solve what was believed to be an "impossible" undertaking. The court stated, "where an employee is exposed to work conditions which aggravate or cause a progressive occupational disease, and the existence of such disease remains undisclosed and unknown over a period of time, and it is impossible upon the ultimate revelation of its existence by medical examination, work incapacity, or manifest loss of physical function to pinpoint, in retrospect, the triggering date of such activation or inception," then the last employer or carrier during whose employment or coverage the disease was disclosed was held to be liable. The court in Bond v. Rose Ribbon & Carbon Mfg. Co., 42 N.J. (Sup. Ct. 1964)] contended that the principle need be established to create a workable rule that was most consistent with the philosophy and public policy of the Workers' Compensation Act. The court admitted that it was an arbitrary decision and that it might, on occasion, cause some apparent unfair results over the years, but it felt that in the long term, the doctrine would produce an equitable liability.

In an unreported decision, *Cyrus E. Falcon v American Cyanamid, et al*, the Appellate Division affirmed the trial court's decision which used the Bond Doctrine to fix responsibility on a single insurance carrier which was on the risk at the time of manifestation of bladder cancer. In *Falcon*, the petitioner was exposed to beta naphthalamine (1939-1941) and to bitumastic tar paint (1941-1979). The last employer had three different insurance carriers. Although the petitioner had experienced recurrent bladder infections beginning in the 1950's, the court determined, based on medical testimony, that the disease (bladder cancer) did not manifest itself until he underwent surgery in 1980. It could not be determined which exposure caused cancer. The court followed the Bond Doctrine and placed total responsibility on the carrier on the risk at the time of final exposure.

Beyond Bond

Several approaches have evolved in an effort to establish a basis on which apportionment can be followed. In addition to the standards established in the Bond case, the court permitted and further clarified that medical examination and diagnosis are not ordinarily required to ascertain when a readily observable medical condition manifests itself. The court stated that an external injury need not require medical examination and diagnosis by a professional when it is recognizable by a layman. The external injury will permit an indication that the disability is fixed, arrested, and definitely measurable. In the instance of a bricklayer who was employed for 20 years in the industry and suffered from chronic arthritis, the court permitted the apportionment of disability based upon a non-invasive medical evaluation and did not require surgical intervention to determine the existence of a disease process.

It has been determined that the Bond Doctrine should be limited to "impossible situations" and should only be invoked when the court is unable to determine accurately the time of inception and the rate of progress of the condition during multiple coverages and/or employments. In an increasing trend, there has been a further definition and restriction of the Bond Doctrine. In instances where dependency claims have been brought following a death related to an occupational disease, the court has relied upon the allocation made for the lifetime claim and has not permitted the use of Bond to place liability upon the last employer or carrier at the time of the employee's death.

In instances where it has been shown that there has been an increase in disability subsequent to an original award for an occupational disease, the court has taken into consideration the cause of the increased disability as the determinative factor in imposing liability for the increase and has apportioned

liability in whole or in part based upon evidential considerations. In instances where there has been both natural progression of the disease and continued exposure which caused an increase in disability, the court has permitted apportionment. The original employer or carrier and the subsequent employer or carrier have been allocated a proportion of the increase that is chargeable to each case as a result of the natural progression or continued exposure. [Schnaars v Canfield Oil Co.](#), 91 N.J. Super 443 (App. Div. 1966).

Bond has not been applicable where there is a natural progression of the disease which can be attributed to a particular time, prior employer, or insurance carrier. In an instance where there were two insurance carriers and one employer and where partial disability was caused by a "fixed, non-progressive disease, resulting from a specific period of dust exposures" at the time the first carrier was on the risk, Bond was held inapplicable. However, subsequent exposure causing further disability placed liability on the subsequent carrier.

Over the years, the courts of New Jersey have continuously and consistently attempted to define apportionment in a manner that would establish a just and fair result to the parties. The courts seem displeased with using an arbitrary principle and have asserted the need for an orderly and evidential result. Continued medical research and technological achievements have permitted the advancement of the application of apportionment in most present-day occupational disease cases in New Jersey. In an organized system of justice, where a rational application of the law to the facts is continually sought, there can be said to be an intense dissatisfaction with arbitrariness.

In instances where an increased disability is chargeable to natural progression and continued exposure, the court has declared that apportionment between two carriers in the proportions that the increase was chargeable to each case should be made. The courts have demanded that the facts be obtained so that apportionment can be established in all applicable cases. The Appellate Division has placed an additional burden upon the Division of Workers' Compensation to ascertain the essential facts in order to make apportionment attainable. The court has directed that, wherever possible, evidence be secured concerning the date of inception of diseases and their rates of progress. In light of the increasing compensation rates applicable at the date of manifestation or last employment, the burden upon the last employer to go forward with proof establishing the date of inception or the rate of increase of an occupational disease is justifiable.

The courts continue to use both the Bond Doctrine and apportionment in their decisions. (See chart) In cases where apportionment cannot be used because of the lack of evidence regarding the date of inception or rate of progress of the disease, the court continues to invoke the Bond Doctrine in an effort to adequately compensate the injured employee. Apportionment, wherever possible, would seem to be the more scientific, albeit less liberal, approach to affixing a remedy in workers' compensation cases, both traumatic and occupational in nature.

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