OCTOBER 2023 LOCAL MEETING

OCCUPATIONAL ORTHOPEDICS

INTRODUCTION TO GENERAL SPINAL COMPENSABILITY ISSUES IN OCCUPATIONAL STRESS CLAIMS

Preliminary Considerations

There are two main types of compensable spinal injuries under New Jersey workers' compensation law.

i. A compensable accident that either causes or worsens a pre-existing condition of the spine; and

ii. A compensable occupational exposure that either causes or worsens a pre-existing condition of the spine.

The overwhelming majority of compensable New Jersey workers' compensation claims that have been the subject of permanency Awards involve accident claims and not occupational exposure claims. There are many reasons for this disparity. The most obvious is that in most single accident spinal claims, the spinal trauma itself is a concededly compensable event. In such "typical" cases, the injury is the extent to which the petitioner's medical condition is based upon an accepted compensable trauma-related diagnosis. There can be issues regarding the severity of the trauma and the ultimate condition which is diagnosed, including, but not limited to, the extent of an aggravation of a pre-existing condition for treatment and/or permanency purposes, and/or for establishing liability of the diagnosis in the first place.

It should be remembered that Section 12d of the Statute places liability on the respondent to establish any pre-existing permanency disability whether or not the overall claimed permanent is from an accident or a compensable exposure. Such pre-existing "disability" is not merely based on the existence of pre-existing diagnostic "pathology" but requires a Section 36 Perez analysis requiring the respondent to prove not only pre-existing pathology but that petitioner also had a material interference with either working or non-working activities at the time of the compensable accident in question. This concept also has relevance in Second Injury Fund liability allegations where there are remote pathologies for which there can be a question of actual partial permanency (not just pathology) existing at the time of the last compensable accident or liability.

In many instances the existence of a significant pre-existing pathology in connection with a spinal situation can add significant value to the overall permanent partial compensation award.

Understanding successful handling of spinal injury claims [regardless of single accident or occupational exposure] is what is the overall extent of the pathology in question and the extent to which the same can be attributable to the compensable trauma in question. A solid working

understanding of spinal anatomy is critical to understanding such issues, including but not limited to the extent of overall permanency and medical causal relationship issues. Obviously, such issues are ultimately best resolved by the strength of the respective medical experts when there is such a dispute, but issue recognition often establishes the opportunity for having the issue properly recognized in the first place. For example, the mere fact that a sacroiliac joint was not initially addressed following the compensable trauma is not necessarily surprising when the original injury of the slip and fall with a positive MRI is demonstrating the significant L5-S1 herniation with bilateral clinical evidence of radiculopathy. The mere failure to address a potential SI joint issues does not mean this is not necessarily a compensable condition it simply means it wasn't initially addressed.

Spinal occupational claims are almost always more challenging than accident claims because it is rare that the initial occupational exposure is voluntarily conceded as representing a "compensable" condition, unlike most compensable accident-related low back claims.

It should also be remembered that a significant portion of the New Jersey occupational case law has been developed regarding insidious types of occupational exposures, i.e. pulmonary and systemic; not occupational spinal claims. The most significant litigated exposures having precedent value have to do with pulmonary/respiratory exposures with or without **latent developing pathology/manifestation.**

Our focus on spinal occupational disease is arguably different from the considerations of Bond v. Rose Ribbon and Carbon Manufacturing Company, 42 NJ 308, 311 (1964).. In Bond [the case most famous for "last employer pays" shorthand concept] (also referred to as last injuries and injury) represents a situation where the petitioner's medical condition (tuberculosis) did not manifest itself until years after the petitioner's specific occupational employment exposure occurred with the respondent. There had been a long period of overall exposure to the same toxins. In such a situation the Supreme Court deemed that the relative contribution of multiple exposures would be far too speculative to determine scientifically accepted relative liability of each of those successive exposures. The Court could have conducted a relative "temporal" or "dose specific" test, but instead it determined **in latent manifestation cases [emphasis supplied]** the carrier/employer with the last material contributory exposure would be held 100 percent liable for the petitioner's condition on a "rule of convenience" rationale. This would avoid excessive protracted and otherwise speculative litigation which admittedly might not necessarily seem fair in any one specific case. However where enough industrial insurance coverage was written, there would likely be an equitable distribution of relative liability over years of such written coverage. This premise has never been tested.

In such a "Bond" situation, the only potential defense available to the "last" carrier/employer is to either prove that there was **no** occupational exposure or at the very least such exposure was of such a miniscule de minimis nature, that it could not be considered a "material contributing factor" to the causation, aggravation, acceleration and/or exacerbation of the condition claimed. Presumably a subsequent non-compensable intervening exposure could also be potentially relevant under appropriate circumstances but this does not appear to have yet been tested by the courts. The point is that "last carrier pays" is continued to the type of occupational exposure where there is latent manifestation of the condition itself.

Spinal exposure cases are almost never "latent" manifestation cases. More often than not, there is manifestation during the petitioner's employment especially if the employment is hard enough and significant enough to contribute in a material way to the development of treatable pathology. Most people only go to the doctor when suffering symptomatically. As a general proposition, spinal pain does not represent an emergent surgical issue unless there is significant cord compression requiring a prophylactic decompression.

Spinal exposure claims often have significant manifestation involving multiple periods of employment regarding multiple different carriers. Because the overall issue has manifested itself over time before a definitive surgical lesion is determined to exist. When this occurs, there is the opportunity to have multiple compensation awards for the overall compensable exposure so long as the "manifestation" during a period of particular exposure is otherwise fixed measurable and arrested during each specific period of employment. If such a scenario occurs Bond is not the correct analysis and the last carrier is not solely responsible for all of the compensable liability. See Akef v. BAJF, 140 N.J. 408 (1995) Gullick v. E. H. Enoch, Inc., 280 N.J. Super. App. Div. 1995 (pulmonary); Levas v. Midway Sheet Metal, 337 N.J. Super. 341 App. Div. 2001. (Pulmonary)

However, the situation also raises more significant possibility of either notice and relatively more likely a statute of limitations defense and/or at least liability for multiple conditions for separate periods of time. Therefore, unless there is extremely remote manifestation in an occupational spinal claim, it is advisable for the petitioner to allege all "recent" periods of employment asserted as compensable exposure so long as there is medical treatment preferably with contemporaneous diagnostic studies of demonstrably objective medical evidence of compensable pathology. While manifestation can be technically met with clinically significant symptomatology and/or work incapacity, the ideal earlier compensable manifestation involves an apportionment of demonstrable objective medical evidence of disability preferably with a specific quantifiable diagnostic study similar that would be conducted in any single "permanent partial disability claim."

When there are multiple conditions alleged over a period of time involving various body parts, the specific diagnostics must be considered together with the mechanism of injury. A carpenter might have a severely degenerative cervical spine and a severely degenerative right shoulder manifesting with overlapping treatment. In such a situation it is likely that the specific overall occupational exposure impacting the shoulder would also be impacting the neck and vice versa. However, an overall exposure involving bilateral knee pathology over one period of time and thereafter a later right shoulder period of treatment for a subsequent year and a half period of time could be evaluated for permanency with two separate awards rather than one compensable overall permanent partial disability award. See Levas N.J.S.A. 34:15-36 together with Poswiatowski v. Standard Chlorine Chemical Company, 96 N.J.321 (1984. All of this could have significant repercussions regarding not only the overall value of an apportionment claim but also potential Second Injury Fund liability regarding an overall occupational disease claim with continuous exposures, especially involving separate carriers.

The one area where occupational disease claims are more forgiving than a specific accident claim is in the area of statute of limitations since all occupational disease claims involve a discovery rule [when the petitioner knew or should have known of a compensable disability] versus an accident claim which has a hard and fast 2 years from the date of the accident regardless of subsequent circumstances short of becoming incompetent. [This, of course, assumes no subsequent authorized medical treatment or indemnity payments paid.] See N.J.S.A. 34:15-34.

In an occupational discovery claim, there is the potential for an "earlier" known compensable manifestation not being pursued but thereafter being pursued due to a continued occupational exposure further worsening the condition to the point where it now was a surgical lesion. Presumably this last exposure diagnosis would be subject to a new statute of limitations with credit given for pre-existing disability for prior manifestation. However the totality of circumstances are always a critical overall consideration in any given case.

Not unlike accident claims, occupational spinal exposure claims are always more significant when they involve surgeries vs. non-surgical considerations. However, when such treatment has already occurred before an occupational exposure claim petition is pursued, there will always be additional issues which normally do not arise in accident claim [unless fully contested ab initio] such as liens and collateral source considerations such as state temporary disability, private medical care insurance carrier payments; Medicare, Medicaid, state temporary disability and the like]. Modern occupational disease spinal claims therefore require a lot more investigation and considerations especially since so many have Section 20 potential final dispositions. This in turn requires significant investigation inclusive of all treating records for not only the alleged compensable condition but also primary care and chiropractic treating physicians. The latter two are fertile grounds for discovering other potentially etiologically significant considerations potentially impacting compensability. Surveillance is often a frequent potential in such "fully contested" claims.

All occupational spinal cases require a compensable exposure of material significance. However, the exposure does **not** have to be the **sole** nor even the "**primary**" etiologic factor. The quality of the exposure must rise to the level of at least being **a material** contributing factor to **either** the causation, aggravation, acceleration and/or exacerbation of the condition alleged. [Emphasis applied]. It is not sufficient that the exposure merely produce subjective complaints of pain [see Peterson v. Herman Foundry Co., 267 N.J. 493 (1993). Such subjective complaints alone do not represent a compensable occupational exposure which relieves a prior respondent of a compensable claim for further liability for a specifically diagnosed condition.

However, a relatively low grade occupational exposure deemed significant enough to have aggravated or otherwise worsened pre-existing compensable low back spinal disc disability can potentially relieve a prior respondent of any additional medical treatment if there is a bona fide aggravation demonstrated by way of the change of pathology and now greater need for treatment than previously existed. Such an exposure would need to be part of a bona fide occupational exposure in order to possibly be compensable. There are situations where the proofs could be such that the court could find concurrent liability but once again these concurrent liability cases normally involve accidents with separate employers very close in proximity

periods of time where both episodes are of significance depending upon the outcome of all relevant proofs. However, it should be remembered that the activities of normal daily living even if somewhat exertional and which otherwise might be contributory if part of a subsequent employment, do not normally represent a defense to a claim if they are merely routine activities of daily living. Part and parcel of a respondent's liability for the overall compensable condition set forth in an award is that there is a "natural deterioration" of that condition within the statutory time permitted for re-opening that particular award, the employer will be responsible for an overall worsening even if there may be some "activity" and/or even "exertional activity" involved. While every such case involves a totality of the relevant circumstances, as a general proposition the respondent is supposed to have continued liability for a compensable condition absent a very clear significant subsequent occurrence that is substantial enough and non-compensable enough to break the chain of causation.

This brief introduction is just a preliminary overview of a very broad topic. Every totality of circumstances is different. What follows is a detailed "hypothetical" legal memorandum arguing the particular facts and opinions of a contested aggravation claim. It addresses the broad scope and necessity of understanding the spine as a structure and the relative strength of medical opinions and relevant precedent in determining compensability and/or defenses to a specific occupational spinal claim.

HYPOTHETICAL REGARDING OCCUPATIONAL SPINE OVERVIEW

The following "hypothetical" involves an actual compensable accident of October 13, 2001, which resulted in a November 19, 2003, Award of 37 ½% permanent partial total, credit 17 ½% pre-existing for the orthopedic and neurologic residuals of an L4 and L5 decompressive laminectomy with fusion [right iliac donor site] superimposed upon 1986 non-compensable low-back chemonucleolysis. At the time of the 2003 Award, the petitioner was 60 years old. He had been employed as a utility asphalt laborer by the respondent for 24 years. He continued to work for the respondent following the Award until the first week of July 4, 2005, when he had an exacerbation of his continuing low-back pain symptomatology following lifting a container of grass clippings at home, resulting in his going to the emergency room and ultimately undergoing a two-level further low-back instrumented fusion. He had utilized his private health coverage, but following the surgery, he filed an Application for Review or Modification of his November 19, 2003, Award, and he filed an additional occupation claim petition against his employer [Asphalt, Inc.] for his overall occupational exposure through July 4, 2005. These two claims were fully contested and resulted in a full trial that ended in November of 2008.

Attached is a facsimile of the petitioner's comprehensive letter trial memorandum outlining the evidence which was presented, argument in connection with the same, and the legal precedents supporting the petitioner's claim that the respondent should be liable for petitioner's overall condition. Respondent had strenuously argued that the "grass clipping episode" provided a full defense since it was a non-compensable subsequent "accident" legally breaking the chain of causation of any further compensable liability. The outcome of this case was never appealed. The detailed attached memorandum delves into many of the relevant proofs concerning establishing a compensable condition especially in an occupational setting. The petitioner's job duties routinely involved being a back hoe operator, trench hoe operator, jack hammer operator, cutting through asphalt/concrete up to 18 inches in thickness, compacting asphalt, shoveling dirt and asphalt, digging through asphalt, removing excess pieces of dirt/asphalt by hand, raking hot asphalt from the back of a truck into holes; carrying heavy steel and plastic pipe.

After the petitioner's November 19, 2003 Award was entered, the Petitioner's back presentation worsened to the point where he had difficulty getting in and out of bed in the mornings. He could no longer perform the job the way he had been previously accustomed to performing it. He gradually became increasingly unable to stand fully upright. His sleep pattern became increasingly poor, and sometimes he could not sleep at all due to back pain. His legs would cramp in the middle of the night. He would regularly call his wife from work to have a whirlpool bath waiting for him by the time he came home from work because of the severity of his back condition. He and his wife had constant arguments about his stopping work on a permanent basis because she was afraid he was going to end a "cripple" like her brother did. His wife would give him regular massages to address his pain presentation. He kept working because he feared he was at financial risk of losing his home.

He had ignored Functional Capacity Evaluations of sedentary/light duty employment in November 2002 and actually resumed employment in March 2003 at his own insistence so that he could adequately address his financial situation. Initially, he was reassigned by his employer to Long Branch. He could not tolerate the drive from Cape May County to Long Branch, and

thereafter he ended up sleeping in the back of his pickup and found a room in a boarding house until he was reassigned to Cape May County, where he was a sub-foreman but routinely performed heavy physical employment duties of shoveling, jack hammer operation, digging, carrying, and back hoe operations.

This curriculum assignment involves reviewing this memorandum (which is the sole document for review) and addressing the issues presented. The original memorandum was actually submitted to the Court on November 21, 2008. Unfortunately, none of the transcripts nor exhibits are available. There have been some minor changes to the original submission. The detailed submission provides a significant review of the proofs necessary to establish liability in connection with a specific accident claim and thereafter a spinal occupational aggravation claim together with a comprehensive review of the proofs necessary to establish a non-compensable aggravation defense to both of the petitioner's claims.

The compensability of occupational exposure spinal claims are always going to be based upon a totality of the specific and unique circumstances presented and the credible evidence supporting one side or the other. Feel free to consider and discuss more recent relative precedent other than the citations in the submission to the Court. Feel free to raise any other arguments which you feel might be relevant and add whatever additional relevant factors that might be missing or not clearly addressed in order to fully address any issue you feel appropriate. This exercise is a template for the manner in which proofs were submitted and analyzed in one case where respondent was raising non-compensable activities of daily living to avoid liability in connection with a re-opened claim that had been contested together with an additional occupational exposure claim following the last award as a potential secondary additional basis for respondent's liability.

Specific discussion questions will follow the memorandum.

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November 21, 2008

LETTER MEMORANDUM IN LIEU OF FORMAL TRIAL BRIEF

Honorable Robert Wright
DIVISION OF WORKERS' COMPENSATION
1333 Atlantic Avenue
Atlantic City, NJ 08401

Re: Robert Smith v. Asphalt Inc.
CP No: 2002-0000 and 2006-00000

Dear Judge Wright:

Please accept this letter as the Petitioner's Trial Memorandum concerning the above-referenced matter. Included with this Memorandum is a separate comprehensive outline/summary of the relevant evidence in support of Petitioner's position.

Overview

The Petitioner has two claims before the Court. The first, Claim Petition No. 2002-00000, involves an Application for Review or Modification of an award entered on November 19, 2003, for 37 1/2% partial total disability for the orthopedic/neurologic residuals of L4 and L5 decompressive laminectomy, with instrumentation, with right iliac crest donor site, superimposed upon prior (1986 non-compensable) low back chemonucleolysis, for which a 17 1/2% permanent partial total credit was given. The second, Claim Petition No. 2006-00000, involves an occupational claim wherein Petitioner alleges to have sustained a worsening of his low back condition as a result of the stress and strain of his job duties with Respondent from November 2003 through July 2005, thereby necessitating a third surgical procedure which involved an L2-L4 laminectomy with discectomy and posterior interbody arthrodesis with instrumentation of Hydrosorb prosthetic with pedicle screw fixation, and removal of prior hardware, with left posterior iliac crest harvest, status post moderate to moderately severe degenerative disc disease at L1 through S1 with disc herniations at L1-2, L2-3 and L3-4, with severe disc collapse at all levels.

This Memorandum is submitted to support a finding, based upon a preponderance of credible evidence, that the Petitioner's period of occupational exposure through on or about July 2, 2005, was a material contributing factor to the causation, aggravation, acceleration and/or exacerbation of his

compensable low back condition, and to the "contested" October 2005 L2-4 fusion surgery performed by Dr. M. Grasso, thereby resulting in the Petitioner being rendered permanently and totally disabled as a result of the compensable low back disability, in combination with pre-existing disability.

Compensable Occupational Claim Standard of Proof

This Memorandum establishes that the Petitioner has met his burden of proof set forth in the leading Supreme Court decision of Lindquist.v. City of Jersey City Fire Department, 175 NJ 244 (S.C. 2003), **and** further establishes that the Respondent's sole "defense" (grass clippings incident) is not a viable defense supported by the facts, medical proofs, or relevant case law. Lindquist re-affirms the standard for proving a compensable occupational condition. It compels a finding of a compensable occupational condition so long as the Petitioner demonstrates that the credible evidence more likely than not supports that the occupational exposure alleged is at least **a** material contributing factor ***to either the causation, aggravation, acceleration and/or exacerbation of the particular medical condition alleged as compensable.***

***Medical* Evidence Supporting Compensability**

Subsequent to his initial compensable accident of October 13, 2001, the Petitioner underwent lumbar surgery involving an admittedly compensable decompressive laminectomy at L4 and L5, with instrumented fusion L3 bilateral facetectomy and inferior laminectomy of the L3 lamina. Consequently, both vertebrae (above and below the L3-4 disc) were repaired, thereby subsequently subjecting the L3-4 disc to altered and increased intradiscal forces both above and below it.

This compensable surgery took place on June 27, 2002, and was performed by Dr. Kotter. (In connection with this accident, the Petitioner was awarded 37½% of partial total disability on November 19, 2003). After recovering from surgery, the Petitioner returned to work full duty in March 2003 and resumed physically demanding job duties including digging, lifting, carrying and jackhammering. When the Petitioner resumed employment in March 2003, he did so in the face of an authorized functional capacity evaluation, which concluded his spine should only be subjected to sedentary/light duty employment. However, the Petitioner was experiencing financial problems and was faced with losing his home and therefore, had no choice but to return to his former employment (see Outline, pg. 1).

Every medical witness (the treating neurosurgeon, Dr. M. Grasso, whose opinion is to be given the greatest of deference under applicable case law; the Petitioner's evaluating physician, Dr. B. Andrews; and Respondent's evaluating physician, Dr. H. Conner) agreed upon three critical points conclusively establishing Respondent's liability:

1. The Petitioner's highly demanding employment duties were a material contributing factor to the causation, aggravation, acceleration and/or exacerbation of his overall spinal pathology at L1-S1 as of the time he received his first compensation award on November 19, 2003 (37½% permanent partial total) (not merely the L4-5 fusion site) (meeting the Lindquist mandate);
2. That the **continued** occupational exposure from March 2003 through July 2005 (especially in the face of an authorized functional capacity evaluation of November 2002 limiting the Petitioner's compensable spinal capacity to sedentary/light duty employment) materially

worsened his overall spinal condition, ultimately resulting in the October 2005 L2-4 surgery performed by Dr. Grasso (again meeting the Lindquist mandate); and

3. The L3-4 adjacent disc disorder is a known surgical risk flowing from the Petitioner's compensable June 2002 L4-5 fusion. The L3-4 disc herniation was therefore in material part caused by the increased intradiscal pressure resultant from the compensable instrumented fusion at L4-5 (including the repair of the L3 vertebra as part of the L4-5 surgery), which disc was -subjected to both benign and significant external stress forces of the Petitioner's continued employment and activities of daily living and significantly increased their axial and torsion pressures on it, thereby causing deterioration and making its ultimate herniation a compensable surgical condition. Its further herniation is derivative from the compensable surgery due to the altered and materially increased spinal forces placed on the L3-4 disc. Even non-compensable external stress forces, once passing through the compensable surgical spine repair became compensable increased intradisc forces due to the prior compensable surgery.

These unanimous medical opinions not only establish full compensability, but eliminate from either a factual or medical perspective the Respondent's "defense" of an "independent" legally superseding event which should completely resolve it from responsibility. This is without reference to the well-established legal precedent (which will hereinafter be addressed) that the "grass clippings incident" is not the qualitative type of an "incident" under the particular facts of this case to legally break the chain of causation, even if Respondent had been able to establish that all subsequent medical treatment and increased disability was solely related to pathology caused by the event (which is wholly unsupported by the proofs for reasons hereinafter set forth).

During testimony, Dr. M. Grasso provided a detailed three component etiology analysis (which did not include the July 4, 2005, grass clippings "incident") regarding the need for the October 2005 surgery. Even though the Petitioner received a previous award of 37%%, apportioned 20% compensable and $17^1/_2$% pre-existing (regarding the chemonucleolysis surgery), the 37%% permanent partial total legally representing overall spinal disability at that time. Dr. M. Grasso explained that the imaging studies at the time Dr. Kotter performed the compensable fusion surgery indicated significant disc disease at multiple levels with a herniation at L2-3 (one of the additional two levels fused by Dr. Grasso). According to Dr. Grasso, Dr. Kotter simply elected to address the single worst disc at that time. ***There is unrefuted opinion (as advanced by Dr. Grasso and agreed to by both Dr. Andrews and Dr. Conner) that Dr. Kotter ould just as easily had performed an L2-L5 instrumented surgery in June 2002 (the surgery performed by Dr. Grasso in October 2005), rather than the single level surgery which was performed. In other words, the Petitioner's overall compensable spinal pathology as it existed in November 2003 (when his*** $37^1/_2$% ***permanent partial total award was entered) included not only the Petitioner's surgical residuals at L4-S, but also the multiple-level unoperated disc pathology presented, superimposed upon an L5-S.1 chemopapaine repair.*** While that may not have been explicitly spelled out in the Order, ***all the medical experts have conceded that the Petitioner's spinal presentation in June 2002 was an overall compensable spinal presentation at every level from LI through S1, even though the actual surgery was performed only at L4-5 and the L3 vertebrae.*** The Court should note that Dr. Kotter 's records never merely indicated that there was a one-level lesion when he performed his compensable surgery in June 2002. His records consistently indicated multiple discogenic disc disease with lumbar radiculopathy generally described as a lumbosacral presentation. Unquestionably, ***every lumbar segment had been materially pathologically impacted by the Petitioner's employment by the time Dr. Kotter 's first surgery was performed in June 2002.***

Every medical expert conceded that adjacent disc disorder is a known surgical risk from the original compensable fusion surgery at L4-5. Every expert also testified that the Petitioner's adjacent disc disorder was a significant consideration in the ultimate worsening of the Petitioner's adjacent L34 disc, and a partial reason for the 2005 L2-L4 fusion performed by Dr. Grasso. Without the first compensable surgery there is no adjacent disc disorder. As indicated by Dr. Grasso, the original compensable fusion at L4-5 placed increased and abnormal stress tension on the adjacent L3-4 disc so as to place that disc at greater risk for further deterioration and herniation which is what ultimately occurred. The abnormally increased intradiscal pressure occurred, whether the force was lifting at work or grass clippings at home. Whether such stressors came from normal daily life activities, occupational stress, and/or the grass clippings "incident" is immaterial to the compensability issue (for reasons hereinafter set forth), so long as there was materially increased intradiscal force derivative to the compensable fusion. ***Even Dr. Conner concluded that the compensable L4-5 instrumented fusion, was more likely than not an indispensable material contributing factor to the enhanced intradiscal pressures which ultimately resulted in increased pathology at the L3-4 level. Since the compensable surgery performed by Dr. F. Kotter in June 2002 was a material component to the continued abnormal increased stresses placed on the Petitioner's L3-4 disc, any further deterioration of that disc would be considered a "derivative" injury as a matter of law, and therefore it is Respondent's liability.***

Grass Clippings "Incident" Does Not Offer Respondent a Medical or Legal Defense

Respondent has based its entire defense on a "grass clippings incident" which occurred at the Petitioner's home on July 4, 2005. Respondent claims that this incident should be considered an intervening non-compensable accident which is solely responsible for all subsequent pathology demonstrated on imaging studies and treatments received by the Petitioner. ***In order to succeed with its argument, the Respondent must show that the incident was sufficient to break the chain of causation running from the original compensable back claim. The unrefuted facts and medical opinions presented through testimony, in light of the applicable case law, do not support such a finding, but rather conclusively establish compensability for reasons hereinafter set forth.***

The prevailing case law (see Selak, Kelly, and Cucciniello) as hereinafter set forth establish that a Respondent cannot escape liability when a compensable condition is worsened by an ordinary life activity or incidental daily occurrence (e.g., "innocent" aggravation), ***even where it is established that the compensable condition is actually aggravated by that activity.***

The "grass clipping" activity cannot be fairly described as anything other than an "ordinary life activity." Dr. Grasso described it as a ***"trivial mechanical event"*** which he testified was far less significant than any of the routine daily exertions performed by the Petitioner in connection with his 27 years of employment. This is not the type of independent traumatic event which can be considered by our well entrenched case law as the type that conceivably could break the chain of causation. ***Every*** **physician** who testified indicated that the Petitioner's compensable disc pathology involves every spinal segment from Ll through Si. The Petitioner ultimately had an L2 through L4 spinal surgery performed on that pathology, in part to address the L2-3 disc herniation, which was present prior to Dr. Kotter 's surgery of June 2002, and to address the Petitioner's adjacent disc herniation at L3-4, the level adjacent to the L4-5 surgery and derivatively worsened due to materially increased intradiscal forces caused by that surgery (as previously discussed in this Memorandum). ***According to Dr. Grasso, at most, the L3-4 disc***

was further herniated and this possible increment was not the primary reason for the Petitioner's two-level surgery. Every expert (including Dr. Conner) concluded that the compensable fusion instrumentation at L4-5 was an indispensable part of the stress equation resulting in the worsening of the Petitioner's L3-4 disc level. The compensable fusion placed increased and abnormal stress tension on the adjacent L3-4 disc so as to place that disc at further risk for further deterioration and herniation, which is exactly what ultimately occurred. Whether such stressors came from normal daily life activities, occupational stress, and/or the grass clippings "incident" is immaterial to the compensability issue and conclusively and exclusively make Respondent responsible for Petitioner's medical treatment and resultant permanent total disability.

Dr. Conner did not opine in either his report or his testimony that the "grass clippings incident" was either an intervening accident or resulted in any specific pathology for which any significant additional medical treatment was rendered. In fact, the Court should carefully review Dr. Conner's original report of August 28, 2008 (a report in connection with this longstanding claim authored *after* all lay testimony had been taken), which makes *no reference to any etiologically significant pathology associated with the grass clippings episode.* It should be remembered that objection was made concerning any testimony from Dr. Conner concerning this issue since his report *expressly and unequivocally* found a compensable increase in the Petitioner's lumbosacral disability (now finding 20% permanent partial total as "unchanged" from Dr. Brown's previous 20% rating, which in turn was an increase from his pre-award finding of 15%). The Court is invited to review that portion of Dr. Conner's cross examination, where he conceded that he had a standard approach in the preparation of his permanency reports when finding compensable disability or not finding the same. *He has authored over 30,000 reports over the past 23 years,* and he conceded that notwithstanding his knowledge of the medical records concerning the "grass clippings" incident, and an opportunity to fully assess and fully review all relevant treating records both before and after this episode, in addition to obtaining a complete history from the Petitioner with an opportunity to ask him any and all questions which he desired, Dr. Conner concluded in his report of August 28, 2008, that the Petitioner now had a compensable disability of 20% permanent partial total resultant from the compensable original surgery at L4-5 and the *compensable* additional surgery at L2-L4. *Nowhere in the report did the doctor find any type of non-compensable intervening accident or injury (inclusive of the so-called "grass clippings" incident) that could fairly be considered of etiologic significance in terms of causing any pathology for which additional medical treatment was rendered.* The grass clippings data was provided to Dr. Conner at the time of his report and he found it of no etiologic significance in his reports. *He specifically testified that this report found increased compensable permanency to 20% which was not inconsistent with many individuals who can no longer maintain employment.* He also testified that if he had any basis for a denial of compensability, he either would have expressly stated that in the report, or found disability "regardless of cause," neither of which are anywhere to be found in his report. *In short, his report fully agrees with the Petitioner's claim*

Even over objection (when Dr. Conner was permitted to expound on the etiologic significance of the grass clippings incident), he carefully worded his answer indicating the incident simply led the Petitioner to a path where he was seen by a physician and thereafter, at a later period of time, ultimately, a two-level fusion surgery occurred. At no time in his testimony did he ever state that either the grass clippings episode represented a new accident of any etiologic significance, that there was new pathology associated with the same, or that the same in any way, shape or form represented a defense of this claim.

1-Ie still maintained a compensable worsening of the Petitioner's condition, in concluding that he could not dispute that the Petitioner's employment duties, especially during the last period of the Petitioner's employment, represented a material contributing factor to the worsening of the Petitioner's disc pathology at all levels from Li through Si which in turn was a material reason for Dr. Grasso surgery. ***This testimony fully supports a finding of compensable occupational aggravation consistent with the opinions of Dr. Andrews and Dr. Grasso.*** (See outline regarding Dr. Conner's specific opinions which, when considered collectively, leave only one possible conclusion: the Petitioner has prevailed in establishing a compensable occupational condition and Respondent has failed in establishing a defense.)

Therefore, the "grass clippings" incident does not represent an intervening accident of a type for which Respondent can be exculpated from continuing liability since it was nothing more than an ordinal), activity of daily living, far below that which the Petitioner was subjected to on a daily basis in connection with his employment duties, ***which represented nothing more than a "trivial mechanical event"*** (according to Dr. Grasso, and agreed to by both Dr. Conner and Dr. Andrews), which at most may have increased some of the Petitioner's disc pathology at L3-4, but *nowhere else* in the Petitioner's entire spine. **It is** only Dr. Grasso who has suggested that there may have been some increased pathology at only the L3-4 level by the "grass clippings" episode, but even he concluded that it would be ***"absurd"*** to conclude that that episode, in the context of the severely deranged spine which the Petitioner had, would represent a material contributing factor to the Petitioner's underlying pathology. In fact, it is the benign nature of the lifting episode (unquestionably a normal activity of daily living far below what the Petitioner was routinely exposed to during this employment) which, if the same represented any type of enhanced mechanical force on the Petitioner's spine, simply illustrates the extreme level of deterioration of the Petitioner's compensable spinal condition. It was Dr. Grasso considered opinion that not only was the overall compensable spinal pathology such that Dr. Kotter could have previously fused the discs from between L2 through L5 (rather than confining the surgery to L4-5), but that the Petitioner's spine was so deteriorated by July 4, 2005, that had the Petitioner gone to work the next day, it is unquestioned that the Petitioner would have experienced the same outcome.

Case Law in Support of Respondent's Continued Liability for "Innocent Aggravations"

Where an ordinary life activity innocently aggravates a pre-existing compensable condition, the employer cannot escape liability as a matter of law. There is no known reported or non-reported workers' compensation claim which relieves a Respondent from liability for an ordinary life activity performed by an employee who has a compensable medical condition resulting from a compensable accident when that condition is worsened from the non-reckless or non-negligent performance of an ordinary life activity, and not the result of some new workers' compensation injury. The case law is clear.

One of the earliest cases recognizing this doctrine is Selak vs. Murray Rubber Co. and American Mutual Liability Insurance Company, 8 NJ Misc. 838 (1930). Here, the Petitioner sustained a compensable fracture of the left forearm. Eight months later, the Petitioner fell on the way home, re-fracturing the forearm at the same previous compensable fracture site. The New Jersey Supreme Court addressed this "innocent aggravation" doctrine and concluded that based upon the medical testimony, the Petitioner's fracture site had a weakness resulting from the original compensable injury, and that, as a matter of law "....a condition existed which caused a secondary event to prolong the disability," and

therefore, "....the original fracture is responsible for the present condition." The Supreme Court specifically concluded that there were three etiologic considerations for the Petitioner's pathology. The first was the original compensable fracture. The second was the failure of that fracture to form a proper union. The third *was* the supercedent injury. The Court concluded that "had the bones fairly grown together, the second accident would not have caused the fracture," and as such held compensability. The Court reasoned that under these circumstances, *"if a reasonably prudent person innocently aggravates the painful effect of the original injury, 'the original wrongful cause continues to the end and accomplishes the final result."*

The holding in Selak is conclusive precedent in supporting a finding of compensability on behalf of the Petitioner. The analogy is a perfect one. The Respondent's entire defense is focused on the etiologic significance of the grass clippings "incident." However, the medical evidence is uncontroverted that if there was *any* pathology associated with the grass clippings "incident," at most there would have been a further worsening of the original compensable deterioration at only the L3-4 disc due either to the general occupational stress on the disc with further degeneration and/or adjacent disc dynamics resulting in enhanced derivative pressure placed on the L3-4 disc. *Under either scenario, the Court must conclude that any worsening of the Petitioner's condition associated with the grass clippings incident would be, at most, due to "an innocent aggravation," which may have worsened the compensable condition for which the Respondent already had or should have had responsibility* (this is without reference to the previous discussion of derivative causation by way of adjacent disc disorder). All of this assumes the Respondent's best case scenario that the grass clippings episode had *any* etiologic significance on any pathologic worsening of the L3-4 disc. Even disregarding the "innocent aggravation" doctrine, there is no testimony in this claim that the overall primary spinal condition for which the surgery was ultimately performed at L2 through L4 was anything other than the Petitioner's compensable severely deteriorated spine, for which this very surgery could just as easily have been conducted in 2002, when Dr. Kotter decided to confine his surgery to the L3-4 level.

The unquestionable primary etiologic cause of the Petitioner's increased disc pathology at L3-4 is the increased distribution of force at the L3-4 level due to the Petitioner's compensable L4-5 instrumented fusion surgery, which according to all medical experts is an indispensable part of the biomechanics worsening that disc, It is not simple "lifting" which is causative (even if the Court concluded that there was an additional herniation at L3-4 caused by the grass clippings "incident"), but rather it is the lifting in combination with the adjacent compensable fusion and the altered L3 vertebral disc surgically repaired in 2002 that altered the natural forces on the L3-4 disc, which in turn made it more vulnerable and more prone to the very deterioration which occurred radiographically when the 2002 imaging studies were compared to the 2005 imaging studies. Any stress caused by any lifting was filtered through the fulcrum effect of the L4-5 fusion, which in turn increased that stress' significance in a material way. This biomechanical fact is not only uncontroverted, hilt it is agreed upon by every physician who testified in this claim. *Consequently, there is no medical testimony which would support a finding that the grass clippings episode was some wholly independent traumatic event which in and of itself solely caused the need for the Petitioner's multi-level fusion surgery in October 2005.* The Court must apply a totality of circumstances assessment of this claim, and not view any single incident in an isolated vacuum, as Respondent would like. It is simply misdirected "wishful thinking" on the Respondent's part to assert that because the Petitioner had an increase of pain on July 4, 2005, which led <u>him</u> to emergency room medical treatment, and ultimately led him to have further imaging studies that the

Respondent should be absolved from any continuing responsibility. What did the diagnostic studies show? What was the opinion of the treating neurosurgeon concerning the nature of the surgery he performed and the reason for it? Every single physician in this claim has concluded that the Petitioner's overall spine (from Ll through S1) was so severely deteriorated by November 2002, that he should not have ever resumed employment, and following 27 months of significant labor, almost every lumbar segment worsened objectively resulting in an ultimate determination that initially a two-level fusion should be performed (L2 through IA) following which further surgeries could have been performed (both at L1-2 and L5-S1), but the Petitioner ultimately opted to discontinue any further surgical management.

The concept of "innocent aggravation" is similar to the concept of "derivative injury," which is another well established doctrine of compensability well entrenched in the body of workers' compensation law. *The Respondent should be held responsible for any worsening of the L3-4 disc because it flows derivatively from the enhanced stress and deterioration caused by both the Petitioner's many years of employment and the fulcrum effect of the compensable instrumented fusion at L4-5; with associated partial vertebral repair at the L3 vertebra, also performed by Dr. Kotter.*

In Kelly vs. Federal Supply and Dry Dock Company, 1 NJ Super 245 (App Div) 1929, the Respondent was held responsible for a wholly new injury to a different body part than the compensable injury. When a Petitioner is performing an activity as "a reasonably prudent man" such activity does not exculpate a Respondent from liability when an individual sustains derivative injury while acting in the capacity of an "ordinary prudent man." The Court stated that a *Petitioner's "negligence can break the chain of causation, but the law consistently imposes liability for reasonably foreseeable risks that logically flow from a compensable injury."* In Kelly, the Petitioner was wearing a cast for a compensable foot fracture while attending a wedding ceremony, and while on a flight of steps took immediate instinctive action to grab a young child who he thought was going to fall, and in turn lost his balance, fracturing his right arm. The Court concluded that this accident was compensable and since the Petitioner was performing a foreseeable ordinary life activity where the compensable condition was a material contributing factor to the mechanics of an accident resulting in new trauma. This type of "but for" analysis has been consistently recognized in workers' compensation law, which in turn consistently has been described as social legislation, remedial in nature, to be liberally construed -to bring as many injured workers under its protective umbrella as is possible. This consistent strong social policy has been at the root of every significant workers' compensation decision addressing issues of continued liability of a Respondent for routine activities. Our compensation law does not microdefine "trauma" in a way that Respondent proposes for the purpose of exculpating it from liability.

Cucciniello, Decided September 2008, is the Most Recent Appellate Decision Addressing the Issues Before This Court, and Fully Supports Petitioner's Position

The September 2008 unreported decision of Cucciniello vs. Sports Authority, App Div Docket No. A-1235-07T3 surveys the innocent aggravation cases and could not be more compelling authority in support of Petitioner's position that Respondent is fully responsible for Petitioner's spine, and that the grass clippings "incident" does not break the chain of causation. While admittedly, all of the specific medical proofs referenced in Cucciniello are not known, what is known is that the Petitioner suffered a hip injury for which no surgical treatment was rendered. He then was admittedly asymptomatic for a period of time (unlike Mr. Smith), and every single medical expert in Cucciniello concluded that

the Petitioner's subsequent walk through deep snow biomechanically aggravated his condition. Had Mr, Smith been trudging through deep snow instead of merely emptying a partially filled plastic lawn mower container with some grass clippings in it (which was concededly far less lifting and/or bending that he routinely did every day at work for 27 years); the Respondent would vociferously argue that it "should" be relieved of responsibility because of the Petitioner's "catastrophic" trudging through snow because this is not an "ordinary life activity," that the Petitioner was grossly negligent in electively trudging through such deep snow, which every physician has agreed has symptomatically aggravated a completely asymptomatic hip, and. but for such exertion, the Petitioner would not have come to further surgery which he did not require otherwise since he was completely asymptomatic and there was no evidence of any loss of function prior to the snow trudging episode. Aren't these essentially the two arguments the Respondent is making here? The Appellate Court in Cucciniello simply concluded that this was an innocent exacerbation as the original cause was the Petitioner's compensable hip problem, and this was not the type of qualitative intervening traumatic event that can exculpate a Respondent from liability. Neither is the benign event of lifting grass clippings at home.

Understandably, most of Respondent's "argument" seeks to have the Court's attention focused on the "grass clippings incident" following which it is undisputed that the Petitioner had an increase in symptomatology and ultimately was referred to Dr. M. Grasso, who performed additional diagnostic studies and offered a first step of corrective spinal surgery to address what he felt was the most significant component of the Petitioner's spinal pathologic presentation at L2 through IA with reconstruction at the L4 vertebra. But this is a far cry from establishing cause and effect based upon a preponderance of the credible evidence. This is a far cry from establishing an occurrence which should represent a break in the chain of causation, the failure of which would continue to hold the Respondent responsible for the Petitioner's overall condition. The law does not allow asserted "defenses" to be viewed in a vacuum. That is why the law requires a consideration of the totality of circumstances and a preponderance of the credible evidence in the particular case under review. This analysis is a combination of factual, medical, and legal considerations. Once such multi-faceted analysis is conducted, it is clear that the Respondent's position in this case is indefensible as a matter of fact, medical, and law.

The Respondent's reliance on both Peterson and Baijnath decisions is misplaced. Peterson actually supports the Petitioner's position in this claim because it holds where subsequent occupational manifestation of symptomatology is resultant from a prior compensable accident-related disability, the subsequent employer is not held responsible. There is an implicit recognition in the analysis of the Peterson claim that there are residuals associated with a compensable disability which causes pain and limitations on ordinary activities that place stress on the injured body part, such as occurs in routine employment duties with another employer. Peterson does not analyze a situation similar to the case at bar where an employee has a compensable fusion surgery, and as a result of routine occupational stress with another employer, the stress is abnormally increased because of the prior compensable instrumented fusion at an adjacent disc. ***Again, the Respondent does not appear to appreciate the significance of the adjacent disc disorder in this Petitioner's spine, which unquestionably is a compensable condition and unquestionably is a material etiologic consideration as to the worsening of the Petitioner's overall condition clearly resultant from his 27 months of work effort, and even potentially was in part responsible for any enhanced herniation at L2-3 by the Petitioner trivial mechanical event of lifting grass-clippings.***

Simply put, the Peterson decision is not controlling precedent given the specific medical issues in this claim.

Baijnath is also not controlling precedent. Baijnath involved a compensable accident timely filed against the first employer, for which the Petitioner received a $250,000.00 third party award with medical and disability liens being satisfied, with the only remaining issue nature and extent of permanency associated with that claim (which involved a bulging disc in the Petitioner's back and a more significant psychiatric component). Liability in that claim was contested because the first Respondent impleaded a second Respondent for an occupational exposure for a six-month period, which occupational impleader was more than two years after employment. Notwithstanding the occupational exposure impleader, the Petitioner testified that on the last date of his employment with the second employer, he had a specific work-related episode following lifting doors weighing approximately 135 pounds. It appears that the diagnostic study was conducted after the Petitioner's employment with the second employer. The Appellate Division decision in Baijnath does not provide any significant specific information concerning diagnostics or nature of treatment other than indicating that the Petitioner did have one CT scan demonstrating a bulge at L5-S1 and for which the Judge assessed 10% permanent partial total and a 25% psychiatric disability as representing the Petitioner's overall disabilities. The Judge specifically found that the Petitioner's second accident was the cause of the Petitioner's compensable disability, and since it was an accident barred by the Statute of Limitations, the Petitioner's case was dismissed. The Appellate Division reversed and found that while the Court could dismiss the second accident as not being timely filed because of the accidental nature of the same, the Compensation Judge still was compelled to make an apportionment of liability against the first employer (which Appellate Division decision was made on the same date as the Peterson decision). Baijnath has nothing to do with the issues presented in this case.

Respondent's "Assertions" Are Not Supported by a Preponderance of the Credible Evidence

Turning directly to the Respondent's "assertions," the Petitioner disputes each and every one of those assertions as to their conclusions concerning the etiologic significance of what, if anything, pathologically occurred to the Petitioner's spine on July 4, 2005, and, if so, the factual, medical, and legal responsibility for the same. The Respondent has described the Petitioner's benign lifting of a light plastic container of partially filled- grass clippings as a "catastrophic accident at home," and contends that "to speculate and assume that [Petitioner] may have or would have gone to this surgery due to his work efforts does not follow from the medical proofs and is not fair to the employer." Frankly, there is nothing more speculative in this claim than that which the Respondent has asserted. The Respondent has offered no proof that there was any non compensable pathologic injury to the Petitioner's spine as a result of the grass clippings episode. What has been agreed to by all of the physicians, including the Respondent's own expert, was that it would not have been unreasonable for this Petitioner to have undergone the very same surgery performed by Dr. Grasso in October 2005 as early as June 2002, when Dr. Kotter decided to confine his surgery to one level (L4-5) rather than L2 through L5 (which ultimately were repaired). There is no doctor who has "speculated" concerning the clear etiologic significance of the Petitioner's work effort on behalf of the Respondent, nor the etiologic *Insignificance* of the grass clippings episode. Even the Respondent's own expert has rejected Respondent's assertions that the grass clippings incident was of any etiologic significance regarding pathology, and to the extent that it may have contributed to some worsening of one disc level, the same would never have occurred but for the severe compensable spinal derangement which every physician has agreed is the responsibility of the Respondent under our

workers' compensation law because of its nexus to employment, and the compensable pathologies' fulcrum effect magnifying stress loading on the L3-4 disc.

Respondent's "Unfairness" Argument is Without Merit

The Respondent has also argued the "inherent" unfairness of applying one standard to impose liability for workers' compensation resulting from a seemingly "minor" lifting episode, and a different standard for relieving a Respondent from continued liability for the same type of lifting episode occurring outside of work. There is and always has been a difference between trauma which establishes compensability and thereafter maintains a Respondent's liability under the Workers' Compensation Act, and trauma which relieves a Respondent from continuing liability once a compensable condition is established. Imposing liability upon a Respondent is often "easier" in many aspects of the workers' compensation law as compared to what is necessary to allow a Respondent to avoid further liability once compensability is established. This is not an "unfair" "double standard" as alleged by the Respondent in connection with this claim, but rather, ***it is required because of the strong public policy supporting the Workers' Compensation Act in protecting the injured worker.*** It is supposed to be easier and, in fact, it must be easier to bring deserving workers under the protective umbrella of the New Jersey Workers' Compensation Act than it is to allow a Respondent to escape further liability for a compensable medical condition ***once the same is otherwise established.***

Since the Compensation Act is intended to liberally protect injured workers, it is axiomatic that in order to do so, it should be presumptively a lesser challenge to ***establish*** the protection under the Act than it is to ***extinguish*** it. This is especially true when addressing the more seriously injured worker who is entitled to the greatest of benefits and protection.

This "differential dynamic" is precisely how the workers' compensation law functions at its maximum efficiency in order to accomplish its intended beneficent purpose. This differential dyn,amic can be seen, for example, with the Bond doctrine (where, in a post employment latency occupational claim, it is ***only*** the last employer which shoulders all liability for treatment and permanency even though the lion's share of deleterious exposure may have occurred from prior employers which are completely relieved from liability. The last employer is not free to argue it is "unfair" that it may have only contributed 5% towards the • overall pathology but is paying 100% of the same); "minor deviation" doctrine (when an employer is liable for an admittedly personal risk so long as that risk is an accepted part of the overall compensable risk associated with employment); the sliding scale of permanency benefits where a 5% permanent partial. disability award representing the difference between 60% and 65% permanent partial total results in far more substantial benefits than the same 5% paid without 12(d) liability; the judicial gloss of the "notice" doctrine requiring the Petitioner to only demonstrate that the employer should have a reasonable suspicion that the Petitioner might have a compensable accident when the actual explicit language of the Act is otherwise; the entire notion of a compensable aggravation of a non-compensable, pre-existing condition only requires a material worsening of that condition (and not the sole or even primary etiologic consideration). Once established, Respondent has full responsibility for all medical treatment even though a significant component of the overall medical treatment is actually non-compensable and pre-existing. Respondent is not responsible for some pro rata percentage of its liability with respect to medical treatment, but is required to provide all related medical treatment. It is only when the Respondent can establish that there is actually pre-existing disability, that it receives a credit for the

same under the permanency schedule. These are but a few policy driven examples of what equally could be described as "unfair" to Respondents, when they are fundamental to advancing the remedial and beneficial purpose of our Statute.

On the other hand, ***exculpation*** (especially once a claim is otherwise compensable with respect to a seriously injured worker) is always a far more challenging proposition (which is consistent with the liberal public policy supporting the Workers' Compensation Act). A few obvious examples include the intoxication defense (where even an intoxicated employee is entitled to workers' compensation benefits unless the employer can establish that the intoxication was the "sole" proximate cause of the claim); the failure to provide safety devices defense (which is such a cumbersome condition- laden provision that it is virtually an impossibility to avoid responsibility for the same, not unlike the intoxication defense); independent contractor defense (where even a contractually valid relationship which would be accepted for contractual purposes in a civil setting is not necessarily valid under workers' compensation law depending upon a totality of the circumstances and the specific considerations of the same which has led more than one commentator to conclude that, as a practical matter, there is no viable independent contractor defense in New Jersey); and, yes, even the "innocent aggravation" doctrine is part of this same analysis, especially with a seriously injured worker, where the Petitioner has severe compensable residuals, the law does and must allow the Petitioner to be functional in his ordinary daily activities without concern that the Respondent will escape further medical treatment liability if he engages in the innocuous type of activities which are anticipated outside of the workplace. This is especially true when any type of stress associated with the ordinary daily living activities is amplified, magnified, and made materially more severe because of the residuals of a prior compensable surgery such as occurred to the Petitioner in this case as a result of his adjacent disc disorder.

All of the above is consistent with our strong public policy of protecting injured workers and our even stronger public policy as cited in the 1980 amendments of providing even greater protection for our more significantly injured workers (in part, as reflected in the sliding scale of permanency benefits). There is nothing unfair about the notion that the quantum of force/trauma which can impose liability, especially for an overall serious medical condition, is not the same, nor should it be the same quantum of force which allows an employer to avoid all further liability once a compensable condition is established. This is the very mason for the ordinary life activity doctrine, innocent aggravation doctrine, and derivative injury doctrine, all of which are either directly or indirectly applicable to this particular case.

In Conclusion

The workers' compensation law allows a Petitioner to conduct his or her life following a compensable surgery and perform routine activities of daily living without fear that exacerbations of pain in connection with the same will exculpate Respondent from continuing liability when it is the compensable condition which is ultimately materially responsible for the Petitioner's condition. Set forth another way, without the Petitioner's compensable spinal presentation from LI through Si, and without the altered spinal stressors associated with the compensable surgery of June 2002, the benign activity performed by the Petitioner on July 4, 2005, would have been inconsequential. The fact that following such a benign "exertion" the Petitioner had any increased symptomatology in his spine is persuasive evidence as to just how severely (and on a compensable basis) the Petitioner's spine was immediately prior to this minor lifting episode. For months before this date, the Petitioner could not stand up straight

and was increasingly bent over. His wife was begging him to stop working because of fear that he would be a "cripple." The fact that he did not listen, and the fact that he was not actively treating is irrelevant under the totality of circumstances.

The Court cannot ignore the unanimous opinion of all of the medical experts in this claim that the Petitioner's spine was severely compensably deranged prior to the lifting episode of July 4, 2005, that his continued occupational exposure was unquestionably a material contributing factor to a worsening of the Petitioner's overall condition as opposed to any other etiologic consideration, and therefore, because of an absence of any type of intervening trauma which factually, medically, or legally could be considered a wholly independent trauma specifically responsible for some identified new pathology which alone resulted in the need for additional treatment, or would otherwise break the chain of causation, the Respondent simply cannot prevail. The Respondent argues, that this is "unfair." The Petitioner argues to hold otherwise would be "unjust"

Respectfully submitted,

John Jones, Esquire

QUESTIONS (OCCUPATIONAL ORTHOPEDICS – OCTOBER MEETING)

You will note the materials presented do not address the actual outcome of the case. Consequently, consider the following issues:

1. Notwithstanding the subsequent July 4, 2005 episode, has the petitioner made at least a prima facie claim of compensability for an occupational aggravation of the previous award of November 19, 2003? If so, what is the basis for your opinion. If so, does the original Claim Petition have any further liability? If not, why not?

2. What is the significance of the opinion of the treating surgeon on the issue of medical causal relationship regarding the two pending claims and the petitioner's last spinal surgery?

- What is your assessment of the adequacy of Dr. Grasso's reasoning on medical causal relationship?
- Generally what is necessary to avoid a "net opinion" defense on an expert's opinion?

3. Does there appear to be an adequate basis in the record to establish compensability of an overall worsening of the petitioner's spinal condition following his first award (either based on the first and/or second claims)?

4. Is there any basis for concurrent liability involving both claims having liability? Explain

5. Do you feel the grass-clipping lifting episode should have presented a defense to petitioner's claims. If so, provide the reasoning in support of your opinion together with appropriate citations.

6. Assuming compensability, is there a basis for Second Injury Fund liability (assuming the Second Injury Fund was a joined party to the claim?) If so, how would you approach a potential Second Injury Fund apportionment, if any, assuming the petitioner's only relevant medical history involves his spine?

7. If you were petitioner's attorney, would you have considered a Section 20 settlement? If so, what would have been your demand?

8. If you were respondent's attorney, would you have considered a Section 20 settlement? If so, what would have been your offer?

9. What are the collateral lien issues you need to consider regarding a possible Section 20? What are your options in addressing the same?

10. If you were the Judge, how would you have decided this case based upon the limited information presented? Provide your basic reasoning (not a formal written opinion).