DECEMBER 2023 GROUP MEETING

Consider the following brief hypothetical:

1. The petitioner is a heavy duty diesel truck mechanic who is 50 years of age and successfully prosecutes an occupational exposure claim for a three-level fusion surgery L3 through S1 instrumented fusion and received an award of 40% permanent partial total on January 10, 2022. At that time he had alleged a 10-year period of employment with the respondent performing the same significant physical duties and had the above-referenced compensable surgery performed on January 10, 2021. The claim was based upon manifestation in February 2020 at which time there was a severely deranged disc presentation at L3 through S1 following and the one-time instrumented fusion of January10, 2021. The petitioner had 6 months of post-op treatment. He resumed employment with the same employer and was fully discharged as of July 1, 2021. The award was based on 2020 manifestation. However, he was placed on a permanent lifting restriction of no more than 25 pounds.

The petitioner had been greatly appreciated by his employer as he was highly skilled and the employer placed him in a supervising position which was still moderately physically demanding but did not require him to lift more than 25 pounds. The employer employed approximately six mechanics on a full-time basis. The petitioner's job duties while primarily supervisory in nature but also involved approximately 50 percent of the day as being "hands on" and performing repetitive employment duties consistently approximately within the 25-pound lifting restriction. Occasionally he would lift up to 50 pounds when absolutely necessary. It also involved fairly significant flexion and de-flexion of the back, which he was permitted to do at his discretion based on symptomatology.

At the time his 40% award was entered for his January 10, 2022, he was no longer under active treatment with any physician but he was taking ibuprofen 800 milligrams prescription strength every morning and every evening and was wearing a back brace for his 8-hour shifts 5 days per week. He had stopped all sporting activities other than outdoor bicycling which his neurosurgeon felt was good for him. He was permitted to ride his bike up to 10 miles per session on flat roads. A new carrier for the employer provided coverage beginning February 1, 2022.

Following the entry of the award, there had been a transition with half of the employees who chose to work for a different employer that was paying better which in turn resulted in the employer hiring some lesser experienced individuals who were not as good as the workers they replaced. The petitioner found himself becoming even more "hands-on" on a typical day but he was still substantially complying with all of the restrictions imposed by his surgeon. By the summer of 2022 the petitioner was working 45 hours per week instead of 40. He was now required to work on Saturdays 5 hours primarily because the new mechanics were not able to meet the repair demand that existed. Now 75% of his typical date was "hands-on."

By Thanksgiving 2022 the petitioner was experiencing enhanced low back pain, increased stiffness and a return of increasing radiating pain in his bilateral lower extremities all the way to each of his feet which were becoming increasingly numb with general leg weakness.

The petitioner had no other health issues of which he was aware. He did not have diabetes nor did he have any other muscular or neurologic deficit. He consulted with his attorney and an Application for Review or Modification of the original award was filed on December 15, 2022 together with a request that he be returned to the authorized neurosurgeon. The authorized neurosurgeon evaluated the petitioner and concluded that he needed to undergo further MRI study of his spine which was authorized and ultimately a new L 2-3 disc herniation was diagnosed. The petitioner underwent three epidural injections for the lateral herniations that were compressing nerve roots. The petitioner's condition did not improve. He was still being permitted to work; however, his radiculopathy was worsening and his neurosurgeon felt that he had developed adjacent disc disorder that was a known risk factor related to the original surgery and as such, petitioner should go undergo further instrument infusion surgery to expand the fusion to the L2-3 level. The petitioner had answered interrogatories and indicated no new accidents or injuries of any type. He had not even seen his primary care physician. This appeared to be a relatively "straightforward" situation. He had stopped riding his bike by the time he requested to see the authorized neurosurgeon, because his pain was progressively worsening, especially regarding the severity and frequency of lower extremity radiation.

At an informal conference, there was a new respondent's attorney because the prior law firm was discharged. The new attorney advised petitioner's counsel that he should file an occupational claim and if he did so, new respondent's attorney would recommend that the respondent provide the surgery that the petitioner required. Petitioner's counsel advised respondent's counsel that the petitioner needed to get the surgery and he didn't want to delay the treatment he "clearly" needed. The petitioner's attorney advised the respondent's counsel that the Respondent could file an application to compel joinder of the new carrier on an occupational basis but that in order to have the motion granted, respondent would have to establish a "substantial likelihood" of liability. The respondent's attorney had his carrier inquire of the neurosurgeon as to whether or not the continued occupational exposure was of any etiologic significance. They had provided a detailed description of the petitioner's "current" job duties. The authorized neurosurgeon advised that petitioner's L 2-3 disc herniation was a known potential surgical risk in all authoritative literature which predisposed him to having further herniation which he felt was the natural consequence of the altered intradiscal pressures created by the three-level instrumented fusion in part enhanced by the petitioner's repetitive lumbosacral flexion and de-flexion and to some extent with his recreational activities of riding 10 miles per week.

Once that report was received, petitioner's attorney agreed to file an occupational exposure claim petition with the understanding that respondent's attorney would recommend to have his client authorize the three further surgical intervention and pay temporary disability benefits without the necessity of a motion on a "without prejudice" basis to the respondent's attorney reserving the "right" to seek ultimate liability on the part of the subsequent carrier on an occupational exposure basis and seek reimbursement for any and all payments made by the respondent. The respondent's attorney formally advised the court that respondent did not want to delay the surgery and since it appeared that this was acceptable to the petitioner's attorney, he wanted to make certain that this proposal was acceptable to the court. The judge felt that he could not prevent the respondent from taking the position which he asserted. As it was

"permitted" by statute. The Judge stated she "appreciated" respondent wanting to "expedite" a prescribed surgery.

The surgery went as planned on December 1, 2022. The petitioner resumed employment on April 1, 2023.

The surgical result was not nearly as good as the neurosurgeon anticipated. Petitioner's overall functional capacity had been significantly reduced. The doctor felt that he could now only be employed in a strictly sedentary position with no lifting greater than 10 pounds, no significant flexion, extension, carrying, stranding or climbing. The radiculopathy had been reduced but the pain in his spine had significantly increased and was now chronic in nature and he was under formal pain management with various narcotic medications being prescribed that in turn prevented him from doing any type of significant repetitive lifting or doing anything of type of work with any type of dangerous equipment. However, he was able to maintain his employment. The respondent kept him in a supervisory capacity. While his position was not exactly sheltered, he was no longer capable of continuing in his chosen career but for this unusual set of circumstances. He was grateful to have a very understanding employer and at least for the time being he was able to continue his employment. He stopped his outdoor bicycling because he did not feel that he could risk further injury in the event some type of accident occurred even though his neurosurgeon was "permitting" such "light exercise." In fact he was encouraged by his neurosurgeon to exercise as much as reasonably possible. The doctor suggested a stationary bike to take the place of his outdoor bicycling, which petitioner did. Petitioner continued to do light exercising on a regular basis.

The parties obtained further permanency evaluations. The claim was confined to orthopedic and neurologic residuals. No one obtained a psychiatric evaluation. The matter was conferenced with the court and ultimately it was agreed that the petitioner's disability would be 60% permanent partial total. He was a max rate individual. The only issue was the manner in which liability should be imposed between the two pending claims. Respondent's counsel for the first award was adamant that the proofs established subsequent compensable occupational exposure based on the opinion of the treating surgeon and the petitioner's evaluating physician had indicated that there was liability on both theories on the basis that this was an anticipated natural deterioration since adjacent disc disorder which is an anticipated risk factor typically because of the nature of the first surgery in question, but that the evaluating physician also found an occupational aggravation of the continued employment subsequent to the entry of the award.

Of interest is that the respondent used the same evaluating permanency physician for the re-opened claimed. This was the physician who originally found the absence of medical causal relationship in the original occupational exposure which the petitioner succeeded upon (which original occupational exposure was concededly far more physically demanding than the employment subsequent to the award. The respondent's original evaluating physician concluded that in light of the significant instrumented fusion surgery the petitioner was now at far greater risk for enhanced impact by additional occupational exposure which he indicated "clearly" caused a 5% increase in the overall disability which he originally found. The respondent for the subsequent carrier was unwilling to make any additional payments in part on the basis that the respondent's medical "expert" was disingenuous given his original report. His evaluating

expert on the last exposure found the need for further surgery "solely" resulting from the original compensable exposure and the specific surgery which was performed to address its original residuals. His expert indicated that further surgery which the petitioner required was going to be necessary simply based upon his predisposition and that the additional occupational exposure did not in any way accelerate the timing of the surgery. The Petitioner was just one of those "unfortunate individuals" that are part of the "risk community" for further adjacent disc instrumented fusion extension and the known risk presented itself in this case.

QUESTIONS

1. If you were the judge how would you decide liability between the two carriers?

2. What additional information would you be most interested in knowing?

3. How would you handle the pre-trial conference and resolve this claim?

4. What other options would you consider for disposition?

5. Is this a case where there could be shared liability between each of the respondents for the increase? If so, on what basis?

6. Can the second carrier argue that this is strictly a "but for" liability on the part of the first carrier? Why or why not?

7. What is the "de facto" reason for the last surgery?

8. How should that impact ultimate liability?