FEBRUARY 2024 LOCAL MEETING

HYPOTHETICAL – CERVICAL

Petitioner is a 60-year-old plumber who has been a plumber all of his adult life. His main employment has always been union plumbing and he worked full time for the past 25 years with Pipeline Plumbing doing mostly commercial work. He had his own unincorporated business named Al's Plumbing which he operated for the past 20 years on essentially a part-time basis where he may have averaged 5 to 10 hours per week and typically earned a reported income of approximately $30,000.00 per year. His union job was typically at least 40 hours per week and he typically grossed in the area of $2,000.00 per week. His only pre-existing medical conditions (other than the spine) are long-term medication controlled hypertension and obesity. He is 5 foot 8, 220 pounds.

Approximately 15 years ago he began having intermittent low back pain without any specific injury. Approximately 10 years ago he actually went to his primary care physician who examined him and took X-rays. He had no radiculopathy but had intermittent pain in the C5-C7 region. His primary care doctor advised that he was just "getting older" and he should be "careful" with his work because he had a "degenerative" spine and that the type of work he did "was not helping". The doctor did not order an MRI study. The doctor never prescribed any other specific diagnostics. He did not prescribe any prescription medication. He suggested that the petitioner might want to go on a chiropractic maintenance program with the chiropractor who practices next door to the doctor's office. He felt that that would be a "good health consideration." He also had indicated that in a "perfect world" the petitioner may want to find a new occupation because "eventually" his spine was going to get worse and worse and "could" require surgery "at some point".

The petitioner was very accomplished at his trade and took precautions not to "over exert" himself at any time. He avoided any type of situation where he would put himself at any type of significant risk for injury. He had learned additional information from his chiropractor about proper body mechanics and doing repetitive lifting, bending, reaching, pushing and pulling which were frequent maneuvers which he routinely performed in connection with his full-time commercial work and his part-time residential plumbing work. He had been seeing his chiropractor basically on a monthly basis for the past 7 years. He would see his primary care physician mostly with respect to medication requirements and general wellness visits. He had remained relatively stable over the last five years. He felt the chiropractic maintenance was part of his general health maintenance program. He felt it was part of a lifestyle which would keep him as healthy as possible.

By his 58th birthday the petitioner began developing increasingly worsening radiation of pain going from his neck down his arms and into his hands and fingertips. At night he had bilateral hand numbness that interrupted his sleep. He was concerned that he might have some type of vascular problem and eventually saw his primary care physician on February 1, 2020 with a history of increasing severity with radiation to bilateral upper extremities with increasing numbness in the bilateral hands. The primary care physician advised him that this "might be a spinal and/or a carpal tunnel issue or both: and ordered both a cervical spine MRI study and an

EMG of the neck and bilateral upper extremities. Both tests were performed on May 1, 2020 revealing moderately severe C5-7 bilateral radiculopathies, with myelopathy and moderately severe bilateral carpal tunnel syndrome with MRI evidence of severe stenosis at C3-C7 with herniated and/or extruded discs with moderate cord compression at C3-7 with moderate to severe cord compression at C4-6 with myelopathy.

The petitioner was referred to a neurosurgeon on May 3. The neurosurgeon advised that he needed prophylactic spinal cord decompression with instrumentation and felt that a C3-7 instrumented fusion was in his best interest to fully protect his overall cervical spine. The neurosurgeon further advised that he probably would also need carpal tunnel decompressions for his significant carpal tunnel disorder but that the priority from a health standpoint was to have his cervical spine surgery performed without further delay. The neurosurgeon explained that the spinal cord was now at risk for getting seriously damaged now that it was compressed.

The petitioner had been continuing working all the way up to this date. The surgery was deemed emergent and was performed on May 5. Thereafter he underwent bilateral carpal tunnel decompressions on September 1, 2022. He was ultimately discharged from all medical treatment by December 31, 2022. He underwent a functional capacity evaluation indicating that he was incapable of lifting anything greater than 5 pounds with his bilateral upper extremity and he ultimately filed and received both state temporary disability benefits for a maximum 6 month period and ultimately Social Security disability benefit with a date of entitlement of December 1, 2022.

On January 2, 2023, petitioner filed an occupational exposure claim alleging orthopedic and neurologic residuals with respect to a continuous occupational exposure regarding his cervical and bilateral carpal tunnel conditions. The attorney for the respondent Pipeline Plumbing had two carriers involved. ABC Insurance provided coverage for all of the petitioner's employment through October 1, 2021 and thereafter EFG Insurance provided coverage from October 2, 2021 through his last date of employment on May 3, 2022.

The treating neurosurgeon provided a report finding the employment at Pipeline was a material contributing factor in determining the need for surgery.

His own business had no workers' compensation insurance coverage. Pipeline Plumbing's attorney filed an Application of Joinder for petitioner's own business (Al's Plumbing). On the return date of the motion the judge held a "settlement conference" at which time a number of issues were discussed based on all of the limited information above. Advise how you would address the following issues:

1. What must Pipeline Plumbing submit in order to present a prima facie claim of joinder of the petitioner's business.

2. What must be proven in order to establish "concurrent" liability between the respondents? If there is "concurrent" liability, to what extent does the court have discretion as to

apportionment between the respondents in terms of relative percentage of liability or must it be shared equally. What proofs must be submitted to determine relative concurrent contributions.

3. What would be the wage and rate for the permanency aspect of the petitioner's potential claims to his own company.

4. Is there a viable statute of limitations defense through the entire claim made by the petitioner and if so, what is that based upon? What is the respective potential liability between ABC Insurance and EFG Insurance and carriers for Pipeline Plumbing. Would there be a potential viable primary award against each carrier?

5. Is this a potential Second Injury Fund case, if so, why? If not, why not? Assume that there are no other relevant medical conditions than those stated in the hypothetical.

6. Discuss the leading cases on successive compensable partial disability awards for a continuous exposure with progressive manifestations.

7. What would be your working assessment of realistic value of the occupational claim against Pipeline Plumbing, on a permanent partial disability basis or, permanent total disability basis and/or Section 20 value. With regard to a Section 20 analysis, to what extent would you be discounting the claims with respect to concurrent employment, multiple carriers and/or potential statute of limitations and for Second Injury Fund. Otherwise discuss overall settlement value and options between the parties based on the limited information provided.