

Claims Management: Routes to Liability and Controls

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Agenda

- MSD claims experience – current trends
- Routes to liability
 - Exposure – foreseeable injury
 - Reports/complaints/claim – On notice
 - Absence and RTW response
 - Causation and Defences
 - Evidence
- Case study

MSD Claims Experience

- Upper limb disorders
 - Type ones : specific diagnosis/labels
 - Type twos : systemic injury/controversial
- Back injury - various
- Knee/foot
 - Beat knee
- MSD complex :
 - Whole body vibration
 - Adverse posture
 - Seating/workstation/control layout

Routes to liability

- Duty of care – yes
- Breach of duty
 - Regulation/statute
 - Common law – foreseeable cause of harm
 - Inherent or overt
- Causing injury
 - Breach cause?
 - Medically – cause or contribute?
 - In fact?

Exposure – foreseeable injury?

- Work process/environment – “objectively” assessed – was injury foreseeable?
 - Regulation
 - ACOP
 - HSE literature
 - Technical literature – reasonable access
- Manifest – in risk assessment process
- Employer – up to date with best practice
 - *Stokes v GKN (Nuts and Bolts)*
- **Functionally – less relevant?**

Reports and Complaints

- Reports of discomfort or injury
 - Investigation
 - Considered findings
 - Action
 - Spectrum of responses
 - Reassurance ----- Work Change ----- Redeployment
 - Record keeping and analysis
 - Inform work design review
 - Medical review/intervention
 - Complaints – tailor response, open case file
 - Consider medical intervention

On Notice

- Overt / on notice of - reports/complaints?
- Manifestation – point to work place “stress”?
- Scrutinise management response
 - Reveal a foreseeable risk? Y/N
 - If Y may be liable for previous exposure
 - Trigger need for intervention? Y/N
 - If Y may be liable for future exposure (if response inadequate)
- Interventions?

Interventions

- Risk reduction
 - Physical : work review and redesign
 - Organisational : training/hours/breaks
 - Redeployment : subject to safety checking
- Management package
 - Warning : residual risk, likelihood and consequences
 - Advice : symptomology, what to do, what will happen
 - Monitoring – spectrum
 - Checking ----- Medical Supervision
- Evidence – documents, meeting minutes, confirmations

Return Reporting

- HR linkage
 - Employment law cross over
 - Fitness for work
 - Contractual issues
 - Employee relations
- Safest reasonable work
- Medical analysis
- Document

Return to work

- GP sign off
 - End of absence or fitness to return?
- Reasons for absence – link to RTW response
- Non work related? – no special duty to investigate
- Work related MSD:
 - RTW protocol to include “management package”
 - Documented
 - Liability?

RTW Liability?

- Employees can accept minimised risk of suffering “minor” injury
- If injury is certain or risk is of “serious” injury employer may be liable in any event
- Threshold – minor v serious?
 - *Withers v Perry Chain*
 - *Chrysler v Kossinski*
 - *Baker Refractories v Bishop*
 - *Coxall v Goodyear*

Previous Claims



- Relevant as incidence
- Impact on later/comparable claims?
 - Tasks/environment/injury/personal factors
 - Tactical burden on employer to differentiate
 - Previous payments not “fatal”
 - Previous admissions, if relevant, maybe
- Repercussive cases
 - Consider impact on future cases as well as current
 - Manage liabilities holistically – project approach

Defences: Causation

- Complications:
 - Natural incidence
 - Personal susceptibility
 - Conditions can be activity or non activity related
 - Incomplete medical concensus
 - Conditions : specific diagnostic factors – attribute to work activity
- Defences :
 - Fundamentals – causable?
 - Confounding factors
 - Work component – caused by the breach of duty?

Defences: Causation – of what?



- Frank causation
- Contribution to injury – apportionment/divisible?
- Natural occurrence – aggravation/hinder recovery
 - Symptoms – longer duration/more profound
- Acceleration – personal susceptibility
 - Early promotion of symptoms
 - If recovery possible – arguments about “damage”
 - If permanent impact – damages flow from additional period of disability
- Problem – can be running two/three arguments concurrently – adds to uncertainty of outcome

Defences : Legal causation

- Was the breach causative?
 - Would things have worked out the same anyway?
- Examples : *Horton v Taplin*
 - Failure in risk assessment – impact? Conditions were “as if”
 - Failure to warn – would have ignored warning?
 - Failure to advise – would not have acted in conformity with the advice
 - Technical burden on claimant to prove causation but...tactical burden on employers too

Case Study

- Lady age 48
- Tenosynovitis
- Electronics component assembly
- Risk assessed – safe
- Complaint followed by medical interview
- Return to work – controlled
- Ten days in – symptoms/off work
- Permanent disability/ill health retired
- Newcastle upon Tyne County Court
- Liable?

Lessons and Controls



- Risk assessment and control necessary foundation
- People management – “package”
- Responsiveness – to reports and complaints
- Managing return to work and re reporting
- Generating evidence of that done and agreed
- Recognising being bullet proof - elusive

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