

“How Recent Case Law Can Help You Succeed”
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I. Emotional Illness Claims

1. Physical Injury produces psychiatric problem = **Compensable**
i.e. severe burns cause pain and living with the constant pain produces psychiatric condition = **Compensable**
2. Physical injury produces psychiatric condition because claimant is afraid of reinjury if he returns to work= **Not Compensable**
3. Factors of Employment Cause Psychiatric Condition = **Maybe Yes or Maybe No- it depends on the factor of employment**
4. The “Common Law” of Factors of Employment
 - a. “Common Law” means law developed by judges rather than the Legislature. ECAB has developed a series of compensable and non-compensable factors of employment, but cases are always fact specific. Some lawyers like to push the envelope or are very ingenious or creative.
 - b. The most important case is Lillian Cutler 28 ECAB 125, 2005 LRP 43712 (1976). ECAB held that not every emotional injury or illness that is somehow related to the claimant's employment is compensable. In this case, the employee's emotional reaction over not receiving a promotion was not compensable.

<i>Compensable</i>	<i>Non- Compensable</i>
<ol style="list-style-type: none"> 1. Frustration with inability to complete job assignment See <i>E.M.</i>, 108 LRP 22527 (3-21-2008) 2. Fear of not being able to pass a fitness for duty exam 3. Psychological problem because wrongfully charged with misconduct 4. Fear of dangerous working condition 5. Inability to cope with volume of work 6. Specific change in work schedule because of injury 7. Physical/ Verbal Abuse- Watch case <u>Leroy Thomas III</u> 94-2373 (1995) threat to kill the claimant by supervisor did not constitute a compensable factor of employment because supervisor did not mean it- However if supervisor had actually tried, then the result would have been different. See <i>J.S.</i>, 108 LRP 831.3 9 (1-18-08) 	<ol style="list-style-type: none"> 1. Administrative actions do not provide the basis for a compensable claim (unless error or abuse occurred) 2. “Harassment” without factual proof of such action actually taken place will not suffice 3. “Discrimination”- must have facts of actual discrimination- really need a third party decision or a “smoking gun” 4. “Fear” of a “Rif”= NO 5. “Fear” of being fired = NO unless can prove that firing is going to happen and it is unjust. <u>D.L.</u> 108 LRF 17485 (3-6-08) 6. Failure to receive a promotion 7. Failure to be assigned to a particular job. 8. Not being given any work. 9. Being underutilized 10. Change in overall work schedule 11. Fear of commuting at night. 12. Change in scheduling 13. No being permitted to hold a particular position 14. Dissatisfaction with the work environment 15. Reassignment (Be careful- if in retaliation for injury, may be compensable) 16. Promotions/Demotions

17. Transfers
18. Poor Management
19. Use of Leave
20. Maintenance
21. Job Security
22. Salary
23. Training-
Agreement-may be
compensable
24. Changes in procedure

II. Suitable Job Offers A.C. vs. VA 108 LRP 4469 (1/10/08)

“Death with no hope of resurrection” or “Go Back and Die on the Shop Floor”

A. My letter to Claimant

I send a letter and statement of law urging client to return to work if at all possible.

B. Requirements of the Offer

1. Offer must be in writing
2. Description of the duties to be performed
3. The specific physical requirements of the position and any special demands of the work load or unusual working conditions.
4. The organizational and geographical location of the job
5. The date on which the job will be available.
6. The date by which a response to the job offer is required.
7. Pay rate information for the offered job.
8. The agency may make the offer, but it is not binding on claimant to accept. The offer must come from the OWCP.

C. OWCP will consider the following factors:

1. Is the job offer for four or more hours?
2. Is the job seasonal or temporary?
3. Will job last at least 90 days?
4. Does the claimant have a medical condition that has arisen since the compensable injury?

D. Challenge to the Job Offer (*may or may not work as a defense*)

1. Job does not exist.
2. Claimant found work that reasonably represents earning capacity.
3. Substantial, reliable and probative medical evidence that medical condition has changed for the worse.

4. If claimant has left the agency's rolls and moved before the job offer:
 - a. agency failed to offer reimbursement or relocation expenses
 - b. Claimant's health or family member's medical condition (either pre-existing or subsequent to the injury contraindicates a return to the area of residence at time of injury)
5. The job requires a license.
6. Job offer violates independent medical examiner's restrictions.
7. Job offer violates attending physician's restrictions- medical report needs to contain substantial, reliable and probative evidence as to how job violates restrictions.
8. Job offer violates Union Contract.
9. The agency made no effort to find a job in the Claimant's geographic area. (H.H. v. Department of Navy, 108 LRP 17347 (3/5/08)).
10. Claimant cannot drive to work and has no way to commute - *maybe*

E. Arguments that will not work:

1. Claimant does not like the job.
2. Claimant does not like the format.
3. The job in fact involves doing nothing.
4. The job is boring.
5. There is no chance of promotion.
6. There is no job security.
7. If claimant is on the agency rolls and moves, such move is not an acceptable reason for refusing an offer of suitable employment. *This always involves a heated argument.*

III. Personal Comfort Doctrine- Performance of Duty or Course of Employment

A. Performance of Duty = arising out of and in the course of employment

1. Law does not grant blanket coverage
2. There must be some connection, *i.e.* claimant must be on employer's premises = but premises really is determined by the relationship of the property to the employment rather than on who has title to the property. "*Premises*" is not synonymous with property.
 - a. parking lot- *yes-if it is agency's lot or controlled or managed by agency*
 - b. lunch- *if on employer's premises*
 - c. bathroom- *yes*
 - d. acts preparatory or incidental to arriving or leaving work - *maybe*
 - e. coffee breaks - *if on employer's premises*
 - f. horseplay - *maybe*
 - g. assaults - *maybe*
 - h. travel required as part of job - *maybe*

B. Claims that will be denied = not in performance of duty:

1. *Time*- *i.e.*, incident occurred two hours after quitting time- no explanation of why employee is still on premises.
2. *Injured before work*
Claimant is on premises early - was he performing activities related to his work?
3. Going for coffee before starting work.
4. Going into work on non-scheduled days (*i.e.* pick up a check).
5. Employee on leave (unless employer requires the employee to be present).
6. Helping co-employee fix a flat tire.

7. Illegal Acts.

8. Prohibited Activities.

IV. The “Magic Word” Requirement. “Causal Relationship” NOT “Casual Relationship”
“You do not have to or know the name of the bug that bit you.”

- a. A claimant must prove that the factor of employment was “*a*” cause of the injury or illness. The doctor must base his opinion as to causation on “**reasonable medical certainty**”

The “law” requires the recitation of certain “magic” words.

“Possible” = NO and “Probable” = YES

- b. D.T. v Department of VA 108 LPP 37741 (6/4/08).

Note: I was the attorney. Very important on issue of “*Factor of Employment*” and “*Magic Word*”.

HIV Case

1. OWCP held that the claimant did not identify the particular needle stick
2. I argued that this was not the law. The claimant did not have to identify the particular needle stick. He did not “*have to know the name of the “needle.”*”
3. Claimant is required to prove that the work environment provides “*a*” cause of the particular injury or illness. There may be numerous other causes, but if the work environment is one of the causes, then it is a compensable factor of employment.
4. The medical issue was denied based on use of word “*possible*” used by the doctor.
5. OWCP again denied on basis that report was not “*reliable, “probative”*” and “*substantial*” Again- “*magic*” words.

c. Types of Causation

1. Direct Causation - “natural and unbroken sequence of events”
2. Aggravation – Preexisting condition is worsened.
3. Temporary v. permanent
4. Acceleration- hastens the development of an underlying condition.
5. Precipitation- condition would not have manifested itself but for the work

incident

d. Medical evidence

1. Causal relationship must be substantiated by a rationalized medical opinion.
What does that mean?
 - Opinion must be based on a complete and accurate factual background, including how injury occurred
 - Medical history given to doctor must also be complete and accurate
 - Reasonable medical certainty
 - Doctor must explain the causal relationship between the injury or condition and the employment factors identified by the employee
 - Opinion cannot be speculative or equivocal
 - Conclusions without explanation won't suffice
 - Checking "yes" on a form as to whether injury is work-related = Not enough!
2. The employee's belief that her condition was caused by employment factors is not enough.

