Occupational Diseases: No Remedy, No Immunity

A cleaners employed a worker for five months to remove spots from clothing by plying a chemical (methoxyethanol) into the affected area with her bare hands. After three years the worker began experiencing medical problems and was diagnosed with a form of aplastic anemia, which caused her bone marrow to produce abnormal cells, consistent with her exposure to the toxic chemicals at the cleaners. Can she sue her former employer in tort under a negligence theory?

Yes, said the supreme court, on rehearing, in *O'Regan v. Preferred Enterprises, Inc.*[1] Reversing its previous decision, [2] the high court agreed with the district court and court of appeal, both of which denied the employer's motion for summary judgment based on a claim of employer immunity. The worker had originally filed a workers' compensation claim for benefits as a result of contracting an occupational disease. A workers' compensation judge denied benefits and the court of appeal affirmed.[3] The worker then filed a suit in district court against her employer and various other defendants who allegedly designed, manufactured and/or distributed the hazardous chemicals used in her job, giving rise to the issue before the supreme court.

Occupational diseases have never easily fit into the workers' compensation scheme. Louisiana introduced the workers' compensation system in 1914[4] but it was not until 1952 that the legislature established coverage for some occupational diseases under the rubric of workers compensation and then only if the disease had been caused by contact with certain substances.[5]

The 1952 legislation also specifically provided for occupational diseases contracted by employees who had worked less than twelve months for the employer in a provision that applied to this case and survives today unchanged as La. Rev. Stat. § 23:1031.1 (D):

> Any occupational disease as herein listed contracted by an employee while performing work for a particular employer **in which he has been engaged for less than twelve months shall be presumed to be non-occupational** and not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months' limitation as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during the course of the prior twelve months' employment by an **overwhelming preponderance of evidence** (emphasis supplied).

The non-occupational presumption survived a 1975 legislative act removing the list of specific occupational diseases covered by workers' compensation and substituting the requirement that the disease be peculiar to the employee's particular trade.[6] Thus, according to the supreme court:

> [B]y virtue of the presumption that is operative because of the Legislature's creation of the temporal requirement, such disease has been

> identified as a risk that falls outside the protection of the compensation act. In this regard, we find that the Legislature has not only imposed a higher burden of proof, it has created a category which presumptively eliminates certain employees from workers' compensation benefits.[7] Second, if an employee attempts to be brought under the Act and fails to meet the heightened burden of proof, the disease remains "to be non-occupational and not to have been contracted in the course of and arising out of such employment." LA. REV. STAT. § 23:1031.1(D).

Since the employee has been eliminated from the benefits of the Workers' Compensation Act because of the presumption, the compromise that is the essence of workers' compensation theory is missing. By ratcheting up the standard of proof to an overwhelming preponderance of the evidence and expressly presuming that a claimant's injuries are non-occupational, and not contracted in the course of and arising out of employment, the Legislature has effectively withdrawn the compromise between worker and employer.

The court's decision was in accord with situations occurring under the former occupational disease statute which provided a specific list of compensable diseases. Employees harmed by substances not included in that list could sue their employer in tort because their disease was not covered by the Act.[8] The exclusivity provision does not apply if the claim is not covered by the Act since "there has been no quid pro quo and thus the claimant has not lost her right to sue in tort."

The court cautioned its holding does not allow an employee to always seek a subsequent remedy after unsuccessfully pursuing the first. Courts must distinguish between cases which failed because the Act does not apply and those cases in which the employee failed to prove an element of an otherwise compensable claim. The court noted that "[t]he underlying circumstance in cases allowing the employee to pursue an action in tort against his employer is that, for whatever reason, the injuries in question are not 'compensable' under the Act." This is so because "[t]he Act was not intended to give the employer a windfall and relieve him of all responsibility toward injured employees."

A thoughtful concurrence[9] stated that the critical issue is whether the legislature's raising of the burden of proof for certain employees with occupational disease claims either unconstitutionally discriminates against them or substantially departs from the compromise philosophy essential to the employer-worker tradeoff. The concurrence concluded that since the legislature never gave the plaintiff a chance to prove causation by a simple preponderance of the evidence (requiring instead an overwhelming preponderance of the evidence), she had been denied a remedy under the Workers' Compensation Act. Thus, a tort remedy is available to her if she can prove causation and negligence by a preponderance of the evidence.

---

1 98-1602 (La. 3/17/00), 2000 WL 284428.

2 *O'Regan v. Preferred Enterprises, Inc.,* 98-1602 (La. 6/29/99), 737 So.2d 31.

3 *O'Regan v. Number One Cleaners,* 96-769 (La.App. 5 Cir. 2/12/97), 690 So.2d 103.

4 1914 La. Acts 20.

5 This exclusive list included diseases caused by contact with specific substances, namely the

diseases of contact poisoning from enumerated sources, asbestosis, silicosis, dermatosis, and pneumoconiosis. LA. REV. STAT. § 23:1031.(A) (1952). Coverage was also provided for diseased conditions caused by exposure to X rays or radioactive substances. Subsequently, in 1958 La. Acts 39, the Legislature added tuberculosis as one of the specified occupational diseases, if it was "contracted during the course of employment by an employee of a hospital or unit thereof specializing in the care and treatment of tuberculosis patients." LA. REV. STAT. § 23:1031.1(A) (1958).

[6] 1975 La. Acts 583 revised LA. REV. STAT. § 23:1031.1 (A) to amend the definition of occupational disease by removing the list of specific diseases for which there was coverage under workers' compensation and substituted the following:

> An occupational disease shall mean only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease.

[7] Cf. LA. REV. STAT. § 23:1021(7)(b) (mental injury caused by mental stress), LA. REV. STAT. § 23:1021(7)(c) (mental injury caused by physical injury), and LA. REV. STAT. § 23:1021(7)(e) (heart-related or perivascular injuries) for examples of a legislatively crafted higher burden of proof (clear and convincing standard) without a non-occupational presumption.

[8] *Samson v. Southern Bell Tel. & Tel. Co.,* 205 So.2d 497, 500 (La.App. 1 Cir.1967) (holding that the employee could sue the employer in tort where the act provided no remedy for work-connected mental breakdowns).

[9] *O'Regan v. Preferred Enterprises, Inc.,* 98-1602 (La. 3/20/00), 2000 WL 300725, Lemmon, J., concurring.

"Occupational Diseases: No Remedy, No Immunity"
Robert E. Kleinpeter
April 2000