

Legal Panel Discussion

Chairperson: Dr. Dean Hashimoto

Monday, April 30th

10:20 – 11 am

*Work Related Injuries Workshop
April 30th & May 1st, 2018*

Judge Panel Discussion: Interesting Legal Issues

Dean Hashimoto, Chair
Judge Omar Hernandez
Judge Phyllis Phillips
Judge David Braithwaite
Judge Roger Lewenberg

*Work Related Injuries Workshop
April 30th & May 1st, 2018*

Judge Omar Hernandez

Interesting Legal Issues in Workers' Compensation: Claimant's Right to Videotape Neuropsych Exam

Hon. Phyllis GoSox Phillips
Vermont Department of Labor
Montpelier, VT
Phyllis.phillips@Vermont.gov

*Work Related Injuries Workshop
April 30th & May 1st, 2018*

Unlike baseball, legal issues aren't
always a battle between

Good and **Evil.**





The Question:

- Given the neuropsychologist community's refusal, **on ethical grounds**, to conduct a forensic neuropsychological evaluation in the presence of a third-party observer, does the employer's statutory right to an IME trump the injured worker's statutory right to videotape it?

Red Sox = Good.



The Medical Issue:

- Does third-party observation (live or videotaped) really invalidate test results?
 - Yes: The “**social facilitation**” phenomenon means that people perform differently when they’re being observed.
 - No: “Normed” tests are already suspect when used in a **forensic setting**.



The Legal Issue:

- When statutory rights collide, who wins?
 - Employer: **10 of 10** board-certified neuropsychologists in New England refused to conduct evaluation if videotaping was ordered.
 - Injured worker: Without videotape, how else to establish whether test was **administered properly**?

The Ruling:

- Employer's right to IME trumps injured worker's right to videotape.
 - Though imperfect, there are ways to protect the injured worker's interest in ensuring that the evaluation proceeds appropriately and yields valid results.
 - But short of barring the injured worker from videotaping, there is no way to safeguard the interests underlying the employer's right to an IME.

Goodrich v. Fletcher Allen Health Care, Opinion No. 07-17WC (April 14, 2017).

Go Sox. Yankees s*ck. Go Sox. Yankees s*ck. Go Sox. Yankees s*ck. Go So

Medical Marijuana

Judge David Braithwaite

Alternative Dispute Resolution of Issues Related to Opioid Medications

Judge Roger Lewenberg

Q and A

Attorney Panel Discussion: How Do You Prove Your Claims?

Dean Hashimoto, Chair
Martin Schneider, Esq.
Edward Moriarty, Esq.

*Work Related Injuries Workshop
April 30th & May 1st, 2018*

Section 7A Presumption of Compensability

By Buzz Schneider, Esq.

*Work Related Injuries Workshop
April 30th & May 1st, 2018*

G.L Chapter 152 S.7A

- In any claim for compensation where the employee has been killed or found dead at his place of employment or...
- Is physically or mentally unable to testify and such testimonial incapacity is causally related to the injury.
- It creates prima facie evidence that a compensable injury has occurred.

S.7A Prima Facie Evidence

- Establishes...
 - 1. The employee was performing his regular duties on the DOA or death.
 - 2. That the claim comes within the provisions of the Workers' Compensation Act.
 - 3. That sufficient notice of the injury has been given.
 - 4. That the injury or death was not occasioned by the willful intention of the employee to injure or kill himself or another.



What is Prima Facie Evidence?

- In the absence of contradictory evidence it **requires** a finding that the evidence is true.
- May be overcome by evidence sufficient to warrant a contrary conclusion.
- Even in the presence of contradictory evidence, however, prima facie evidence is sufficient to sustain the proposition to which it applies.
- Anderson's Case – 373 Mass 813 (1977)

Defense of Industrial Exposure Claims Post Patterson and Canavan

Edward M. Moriarty, Jr.

Edward M. Moriarty, Jr. and Associates, P.C.
Wakefield, Massachusetts

*Work Related Injuries Workshop
April 30th & May 1st, 2018*



PATTERSON v. LIBERTY MUTUAL INSURANCE COMPANY

48 Mass. App. Ct. 586 (2000) Lawrence, J.


- one of a group of cases brought by workers exposed to environmental conditions at Brigham and Women's Hospital, especially latex.
- The cases allege respiratory issues, such as MCS and industrial asthma, due to exposure to latex dust and other substances in the workplace, including ED and OD.



Dr. Mary Kay Patterson

Anesthesiologist at BWH and BWH Anesthesia Foundation

Patterson worked as an anesthesiologist from 1981 to 1993. In 1992 she began to develop sensitivity to the latex gloves she wore in the operating room. In 1993, she developed a cough in the operating room and then other respiratory problems which abated when she stopped working at the hospital. She filed a Workers' Comp Claim, alleging permanent disability secondary to toxic latex exposure.

- 
- Before Patterson, to establish an exposure claim the EE would need to show only that the EE had an occupational disease and that the disease was consistent with the conditions and environment of employment.
 - EE obtained a favorable §11A IPE with an internist, specializing in occupational environmental medicine, whose report opined that Patterson's disease was occupational and consistent with her employment. But, the IPE doctor was:
 - not in a recognized specialty by the ABMS
 - had no personal knowledge of or experience in the hospital's operating rooms
 - had no expertise in toxicology, environmental engineering, or HVAC.
 - Report relied on documents regarding environmental conditions, which were either inadmissible hearsay or not properly admitted and authenticated at Hearing.



Justice Lawrence, for the Mass. Ct of App., found:

- Employee has the burden of establishing, by a preponderance of the evidence, all the elements of her claim.
- The claim fails if any critical element is left to conjecture or otherwise lacks admissable evidentiary support.
- In the case of expert medical opinion on industrial environmental causal relationship, the opinion must be expressed in terms of probability, not mere possibility.



Post Patterson

- Employee must prove exposure to injurious occupational substance at the workplace during the policy period and that said environmental exposure had an injurious effect on him.
- No longer enough to show EE has an occupational disease and that the disease is consistent with your employment.

Defense yields benefits! TRY IT!

Q and A