EMPLOYER LIABILITY FOR THE CONSEQUENCES OF ECONOMIC LAYOFFS

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If you ask them on the street they have opposite opinions. Claimants' counsel firmly believe that employers should be required to prove the existence of new suitable alternate employment on any occasion that a claimant is laid-off from employer-provided light duty. Employers' counsel contend that by treating layoffs as a compensable economic consequence, courts interfere with legitimate personnel decisions, turning the workers' compensation system into one of unemployment compensation.

The Benefits Review Board decisions diverge in all directions. Compare, Edwards v. Todd Shipyard Corp., 25 BRBS 49 (1991), rev'd sub nom, Edwards v. Director, OWCP, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1539 (1994) (holding economic layoffs do not give rise to compensation liability under the Act); Suppa v. LeHigh Valley Railroad Co., 13 BRBS 374 (1981) with Andrews v. Jeffboat, Inc., 23 BRBS 169 (1990); Mendez v. National Steel and Shipbuilding Co., 21 BRBS 22 (1988) (holding economic layoffs do give rise to compensation liability under the Act).

The U.S. Court of Appeals for the Fourth Circuit recently weighed in on the layoff issue by trying to settle in favor of claimants, a direct conflict in its own unpublished opinions. Compare Cole v. Newport News Shipbuilding and Dry Dock Co., 120 F.3d 262 (Table), No. 96-2535 (4th Cir. Aug. 12, 1997) with Forgich v. Norfolk Shipbuilding & Drydock Corp., 153 F.3d 719 (Table), No. 96-2574 (4th Cir. Aug. 4, 1998).

In Norfolk Shipbuilding & Drydock Corp. v. Hord, 193 F.3d 797 (4th Cir. 1999), the Fourth Circuit held that a claimant who returned to light duty work three years prior to being laid-off, became entitled to temporary total disability compensation as a result of being laid-off. The Court in Hord held that an employer cannot rely "solely" upon employer-provided light duty employment to establish suitable alternate employment if, because of layoffs, the job did not exist during the period of disability claimed. This holding unfortunately avoids altogether the issue of **causation** of disability, which the Court dismissed summarily in a footnote as being **irrelevant** to the employer's burden of proof. 193 F.3d at n.3 ("Norshipco's proffer of the economic and nondiscriminatory nature of its decision to lay Hord off is not responsive to its burden of demonstrating that Hord had the capacity to earn wages in suitable alternate employment which was reasonably available to Hord").

Any discussion regarding compensable disability under the LHWCA should begin with the premise that to be compensable, the disability should meet the LHWCA's definition of "disability." Disability is defined in section 2(10) of the Act as "incapacity **because of injury** to earn " the worker's average weekly wage. Total disability is therefore a **total** incapacity "because of injury" to earn one's average weekly wage. Simply put, any disability from work that is not "because of injury" should not result in workers' compensation benefits.

Applying the traditional *prima facie* case analysis, the Fourth Circuit in Hord observed that a Claimant must first prove he cannot perform his prior employment **due to the effects of a work related injury**." 193 F.3d at 799. However, the disability in a layoff case is not necessarily due to the effects of a work-related injury and may simply be due to the effect of being laid off. Thus in a layoff case, only if the layoff is also due to the effects of a work related injury does it meet the definition of "disability" under the Act.

The logical *prima facie* proof of total disability **in a layoff case** should follow from a simple question -- if the claimant had been performing his pre-injury employment would he have been laid off? If the answer is **no**, he has established at least a *prima facie* case that his total disability is also due to injury -- in other words, that if he had **not** been relegated to a different, light duty job, he would still be working without a wage loss. If the answer is **yes**, however, the analysis should

end there, because absolutely no basis exists to establish further that the disability **claimed** -- that is, the period of disability in issue--was also disability **"because of injury."**

The second analytical trap in a layoff case lies in the means within which an employer is permitted to rebut a *prima facie* case of total disability. Under the traditional analysis, an employer must show the existence of **suitable alternate employment** in order to rebut the prima facie case of total disability. The Fourth Circuit in Hord went one step further by maintaining in its dismissive footnote that no means exist to rebut the presumption of total disability due to injury **other than** showing the availability of suitable alternate employment **during the period of claimed disability.**

In its analysis, the court in Hord turned a blind eye to the obvious knowledge that the employee had demonstrated an **actual** ability to perform light duty work without a wage loss on a regular and continuous basis **for years,** interrupted only briefly by the economic layoff in issue. The Court's logic cannot be reconciled with the principle that the Longshore Act is designed--not as a wage replacement system -- but to compensate for the loss of wage earning **capacity** due to injury.

The Fourth Circuit allowed employers one small concession in Hord through dicta instructing that had the employer proven other jobs existed in the

local labor market, then it could have relied upon the original post-injury light duty job as evidence of suitable alternate employment to meet its burden of proof:

> We do not view the result in this case as implying that an employer necessarily becomes liable for LHWCA total disability compensation when it lays off a permanent partial disability claimant from a post-injury position made available to the worker by the employer. Nor is an employer's method of satisfying its burden limited to making another light-duty job available to such a worker during the layoff. **However, in order to rebut a workers' prima facie case that the worker was totally disabled during a layoff period, an employer must do more than point only to the one internal light-duty job that the employee held prior to being laid off.** In the context of a layoff from internal post-injury employment, as with all claims of total disability under the LHWCA, an employer can satisfy its burden by demonstrating that there exists a range of jobs which the worker is realistically capable of securing and performing and which are reasonably available in the open market.

193 F.3d at 800 (citing Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988) (holding that an employer must identify **more than one job opportunity** to prove suitable alternate employment).

An employer arguably can rely upon the Court's dicta to maintain that the wages in post-injury light duty employment, even though not **actually** available and paying **more** than other jobs available in the local market, nevertheless represent the claimant's wage earning **capacity**. See also, 197 F.3d at 799

(framing claimant's contention that employer cannot point "solely" to the post-injury job to meet its burden of proof).

The net result of a rule of law that automatically permits compensation under the Act to laid off workers, unless and until an employer proves that work exists somewhere else, is to render a legitimate personnel action illegal as it applies to any worker who happens to have work related light-duty restrictions at the time. Employers in the Fourth Circuit who are subject to the Longshore Act, would be financially penalized under the Hord decision for laying off workers who, even absent their restrictions, would have been laid-off anyway, and ironically pushed into laying off additional workers in order to pay the windfall to claimants and claimants' attorneys resulting from additional claims under the Longshore Act.

A rule of law that accounts for the requirement of causation founded upon the definition of disability in the Act would **not** deny compensation to workers who, but for their claimed injury, would otherwise have retained their pre-injury jobs, or not been laid-off, or who are unable to be recalled after a layoff because of restrictions. These facts each give rise to a *prima facie* case of total disability under the Act; however, just being laid-off should not.

By employing a *prima facie* case analysis that fails to address the cause of disability inconsistent results occur not only in "layoff" cases, but also when

disability is due to "misconduct" or to an "intervening cause." In all of these cases the parties and courts are vulnerable to the temptation of finding an equitable solution based upon who is at fault, rather than focusing upon whether the legal requirement that a claimant's disability be due to the claimed injury. Economic layoff cases consistently present the most troubling equity scenario because in virtually every case, no one is blameworthy.

"Misconduct" cases, see, e.g., Brooks v. Newport News Shipbuilding and Dry Dock Co., 2 F.3d 64, 27 B.R.B.S. 100 (CRT) (4th Cir. 1993); Walker v. Sun Shipbuilding and Dry Dock Co., 12 B.R.B.S. 133 (1980) may be factually distinguishable because of relative "fault;" however, they are absolutely analogous as a matter of law because they rest upon the same legal premise that a Claimant's disability must be related to the injury claimed to be compensable under the Act. See Armfield v. Shell Offshore, Inc., 25 B.R.B.S. 303, 307 (1992). This principle is central to, and in fact, normally identified as the underlying **rationale** in misconduct cases for finding that an employer does not have a "continuing responsibility to identify new suitable alternate employment" when such employment is lost, especially only briefly, for reasons unrelated to one's claimed injury. Brooks, 26 BRBS at 6.

In Brooks, the Fourth Circuit specifically affirmed the Benefit Review Board's reasoning that a claimant's wage-earning capacity loss "is not

compensable under the Act **inasmuch as it was not due to claimant's disability resulting from the work-related incident,**" and that when a claimant loses work "for reasons unrelated" to his claimed injury, the "**employer did not have a continuing responsibility to identify new suitable alternate employment as employer is not a long-term guarantor of claimant's employment**" (emphasis added). Id.; see 2 F.3d at 65.

The Fourth Circuit's legal analysis in Hord completely contradicts its legal analysis in Brooks. As in Hord, the employer in Brooks provided the claimant and relied exclusively upon post-injury light-duty work that was no longer available. Also as in Hord, the disability was neither caused by nor related to the claimed injury. The only analytical difference between the two cases is that the Fourth Circuit did not in Brooks dismiss the causation issue, much less summarily in a footnote. No question can exist that had the Fourth Circuit applied in Brooks the analysis followed in Hord, an opposite result would ensue, requiring an employer to either refrain from firing workers with restrictions who engage in unrelated misconduct, or to incur immediate compensation liability for the termination.

Knowing that no system of workers' compensation is premised upon principles of negligence or allocation of fault, courts should resist the temptation to consider degrees of fault and the inconsistent legal analysis that results from that analytical trap, and to concentrate instead upon whether the disability claimed

is also "disability" within the plain meaning of Section 2(10) of the Act. Likewise, they must adjust the *prima facie* case analysis to account for, rather than ignore the cause of disability.

As a result of the Fourth Circuit's decision in Hord, employers should be careful to prove through vocational experts that other work would be available in the local market whenever an employee is terminated, regardless of the reason or length of time, from employer-provided light-duty employment. Also, employers should no longer **concede** that claimants meet their *prima facie* case of proving total disability from pre-injury employment -- rather, they should argue that the reason for total disability from that job **during the period claimed** has nothing to do with the injury claimed, and therefore, that during that period the Claimant fails to prove a *prime facie* case of inability to perform pre-injury work **due to injury**.