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**REQUIREMENTS FOR LIMITING AN EMPLOYER'S
LIABILITY AS SET FORTH IN THE LONGSHORE AND HARBOR
WORKER'S COMPENSATION ACT.**

In order to limit liability under 33 U.S.C.S. § 908(f) for employee disability payments based on a pre-existing condition, the employer must sufficiently qualify the type and extent of the disability the employee would have suffered without the pre-existing condition.

Newport News Shipbuilding & Dry Dock, Co. v. Winn
United States Court of Appeals for the Fourth Circuit
326 F.3d 427
(Decided April 14, 2003)

Herbert E. Winn ("Winn") was diagnosed with asbestosis in April of 1997. A pulmonary function test revealed that Winn suffered from 20% permanent partial whole person impairment. Winn brought an action against his employer Newport News Shipbuilding and Dry Dock, Co. ("Newport"). It was stipulated that Winn was exposed to asbestos during his employment. However, Newport sought to limit its liability under the Longshore and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. § 908(f) based on a pre-existing condition which may have contributed to his asbestosis. Newport presented medical documentation suggesting that Winn suffered from chronic obstructive pulmonary disease as early as 1985. The chronic obstructive pulmonary disease was the result of Winn's smoking habit. Evidence was presented that Winn smoked a pack of cigarettes a day for nearly forty-five years.

In 1999, an Administrative Law Judge ("ALJ") denied Newport's claim that this pre-existing condition aggravated Winn's work related injury. The ALJ based this finding on the fact that Newport had failed to establish that existence of pre-existing permanent partial disability. Therefore, Newport failed to establish any credible arguments that would support the contribution requirement. Newport appealed to the Benefits Review Board ("Board"). On May 9, 2000, the Board issued a decision affirming the ALJ's findings. On appeal the Fourth Circuit stated that when the findings of an administrative law judge are being reviewed factual findings are deemed conclusive if supported by substantial evidence in the record. However, legal determinations are reviewed *de novo*.

Longshore and Harbor Worker's Act § 8(f) provided in part, "In...cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is material and substantially greater than that which would have resulted from their subsequent injury alone, the employee shall provide...compensation for 104 weeks only." The LHWCA requires that employers who want to limit their liability under §8(f) establish three element: 1) that the ultimate disability is caused in part by a pre-existing partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate disability materially and substantially exceeded the disability that would have resulted from the work related injury alone, in the absence of the pre-existing condition. The Court held that only requirements one and three were at issue in the present case.

Newport argued that Winn's pre-existing condition of obstructive pulmonary disease contributed to his present disability. It was Newport's contention that the disability Winn presently suffered exceeded the disability that would have resulted from the work related injury standing alone. Newport attempted to establish this contention by introducing medical evidence included x-rays and expert medical testimony. All three experts alleged that if Winn were only suffering from work-related asbestosis, his impairment level would be 10% less than his current state of disability. All three medical experts introduced by Newport testified that Winn's suffered from a pre-existing condition which increased his asbestosis.

However, Newport failed to introduce any evidence showing the type and extent of disability that Winn would have experienced if he was not suffering from obstructive pulmonary disease at the time he was exposed to the asbestos. The medical testimony merely concluded that because Winn was an admitted smoker and because medical records established that he was suffering from obstructive pulmonary disease, this clearly established a pre-existing condition, which partially contributed to the asbestosis. One expert called by Newport attempted to calculate Winn's disability by subtracting what his disability would have been if resulting from the work related injury alone from his present disability. The court held that this evidence was insufficient.

Therefore, the Fourth Circuit agreed with the ALJ and the Board concluding that the evidence presented was not sufficient to establish that a pre-existing condition contributed to Winn's current asbestosis. The Court utilized the same standard relied on by the Board. The standard was set forth in *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.* ("Carmines"), 138 F.3d 134 (4th Cir. 1998). *Carmines* required the quantification of the level of impairment that would ensue from a work-related injury alone. Therefore, Newport failed to meet its burden of establishing what Winn's disability would have been if he had not been suffering from a pre-existing condition at the time of the work related injury.

The court held that no evidence was provided establishing the degree of disability caused by the asbestosis separate and apart from the impact of the pre-existing condition. Therefore, the court found no basis for evaluating whether the prior injury materially and substantially contributed to the total degree of impairment. Here, Newport provided no evidence to show what Winn's disability would have been had exposure to asbestos been his only injury.

The Fifth Circuit held that it was not enough for medical experts to calculate the total current disability and subtract from it the disability resulting from the pre-existing condition. The Fifth Circuit affirmed the Board's decision in denying Newport's §8(f) claim.

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