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EMPLOYER MAY BE LIABLE FOR BOTH DISABILITY AND DEATH CLAIMS ARISING OUT OF ONE INCIDENT

The recent case of *Freeman United Coal Mining Company* has called attention to the possibility that an employer may be held liable for a claim for disability due to lung disease, as well as for a death claim, when both claims arise out of a single "last day of exposure." The scenario for such a possibility first became apparent in the 1993 *Electro-Motive* case decided by the Special Appellate Court with Judge McCullough writing the opinion in both the *Electro-Motive* and the *Freeman Coal* case.

In the *Electro-Motive* case, the court considered the case of Joseph Jasko, who sustained a back injury on July 30, 1981. He filed an application for disability on August 21, 1981 and died due to un-related causes on May 13, 1984. On October 10, 1986, the arbitrator awarded TTD, medical expenses and 150 weeks disability under Section 8(d)(2). Electro-Motive filed a petition for review, together with a petition under Section 19(h), contending that it had no obligation to pay any type of disability award because of Jasko's death. On April 20, 1989, the Commission affirmed the arbitrator's award. Electro-Motive did not appeal the Commission decision but did pay the TTD, medical and the PPD award through the date of the decedent's death. On July 13, 1989, claimants filed a motion for penalties and attorney's fees because of Electro-Motive's failure to pay the entire award.

The appellate court found that Electro-Motive's failure to pay the award was unreasonable and vexatious and affirmed the Commission decision. The court cited three sections of the Act which were crucial to the resolution of this issue:

> *Section 19(h) of the Act provides:*
>
> *As to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the*

employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.

Section 8(e)(19) of the Act provides:

*In a case of specific loss and the subsequent death of such injured employee from other causes than such injury leaving a widow, widower, or dependents surviving before the payment or payments in full [***10] for such injury, then the amount due for such injury is payable to the widow or widower and, if there be no widow or widower, then to such dependents, in the proportion which such dependency bears to total dependency.*

Section 8(h) of the Act provides:

*In case death occurs from any cause before the total compensation to which the employee would have been entitled has been paid, then in case the employee leaves any widow, widower, child, *** such compensation shall be paid to the beneficiaries of the deceased employee and distributed as provided in paragraph (g) of Section 7.*

The court did not dispute Electro-Motive's contention that 8(e)(19) of the Act refers to a specific loss and thus by its own terms is limited to those kinds of cases. It found that Electro-Motive's Section 19(h) petition was premature because it was filed before the Commission decision became final. Finally, it determined that Electro-Motive had acted improperly because of the clear and unambiguous language of Section 8(h), which provides that benefits to which the employee would have been entitled, but for his death, are to be paid to the employee's survivors upon his death from any cause.

Electro-Motive offered no evidence to suggest that but for his untimely death decedent's disability would not have continued for the entire 150 weeks of the award. Thus, Electro-Motive's argument that Section 19(h) applies because decedent was entitled to the full 150 weeks of PPD because his disability ended with his death is erroneous.

ELECTRO-MOTIVE **REFERENCE TO 8(H) FOLLOWED IN** ***FREEMAN UNITED COAL*** **CASE**

In the *Freeman United Coal Mining Company* case, Kenneth Van Houten, a 61 year old coal miner who had been exposed to coal dust for approximately 38 years, mined coal until February 2, 1998. On March 10, 2000, decedent filed an application seeking benefits from Freeman United Coal Mining Company. Van Houten died on May 19, 2000. On August 2, 2000, decedent widow filed an application seeking death benefits from the employer. The two cases were consolidated. After a contested hearing, the arbitrator found for the widow

on the death case but denied the original disability claim because "the living miner's claim abates at the death of a miner."

Both employer and employee appealed. The Commission and the circuit court affirmed the arbitrator's decision. The appellate court affirmed the decision for the death benefits but reversed the decision denying decedent's original claim for disability because the commission should have held that Section 8(h) permitted the claimant's disability claim to continue as if the death had not occurred.

This appears to be a case of first impression when the court, in affirming a death benefit award based on occupational disease, has suggested that the disability claim should not have been dismissed but should have been referred back to the Commission for further hearing. The court stated:

> *The Commission's finding that "the living miner's claim abates at the death of a miner" is contrary to the law. As the Commission has already determined that "decedent suffered from occupationally related [COPD], chronic bronchitis, and CWP and its sequelae which caused a timely disablement," we remand this cause to the Commission to calculate the disability benefits to which decedent is entitled.*

EDITOR'S NOTE: It's difficult to speculate as to the action that the Commission might take with reference to the disability claim. Should the Commission now decide that the decedent was entitled to benefits from the last day worked until the date of death because the decedent was totally disabled for that period of time? In the alternative, should the Commission decide that the decedent was entitled to an award for disability on a percentage loss of use of a man, in which the disability and death claim compensation benefits might overlap?

It should be kept in mind that in *Electro-Motive*, the court did not actually disagree that when the death was due to unrelated causes that Section 8(e)(19) would not be applicable because the section referred only to a case involving "specific loss." Also, the court found that Section 19(h) was premature but did not rule out the possibility that Section 19(h) might be applicable on the basis as cited by Section 19(h), "that the disability of the employee has subsequently recurred, increased, diminished or ended."

Freeman United Coal Mining Company v. The Workers' Compensation Commission, Nos. 04-07-0905WC, 04-07-0907WC, decided September 29, 2008

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