

Article and Examination 29

Cumulative Trauma

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CUMULATIVE TRAUMA – What is it and How to Address it

By: David Kizer, Esq.

Cumulative injury is one of the most difficult concepts for physicians in the workers' compensation field. Physicians often must address the long term harmful effects of work exposure to the psyche, the back and internal organs and must do so while simultaneously explaining (to the satisfaction of a workers' compensation judge) why some elements of the exposure contributed more to the overall snapshot of a worker's disability while others did not. They also must deal with claims and denials over whether there were, in fact, any periods of harmful exposure or, where more than one cumulative injury may have occurred to the same individual over a lengthy period of time; or where the injury slowly occurred with different employers over a period of time.

Labor Code Section 3208.1 defines the two types of industrial injuries:

An injury may be either (a) a specific occurring as the result of one incident or exposure which causes disability or need for medical treatment or (b) cumulative occurring as a result of repetitive mental or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of cumulative injury shall be the date determined under section 5412.

The DWC Physicians Guide contains the following discussion of cumulative trauma:

The Labor code defines cumulative injury as an injury that results from repetitive trauma (mental or physical) over a period of time. Since significant periods of time are usually involved and the worker may not realize that there is an industrial cause to his or her problems the date of injury becomes an issue. Obviously for someone to wait years before filing a claim raises the statute of limitations issue since the human body obviously deteriorates over time on its own and there must be an established industrial connection (causation) for the claim to continue.

Cumulative injuries have been described as a series of "micro-traumas" and "degenerative conditions" that occur slowly through repetition of some physical or mental stress to the body. Most people accept the premise that CTs (as they are commonly called) are typically some combination of physical and/or mental stress at home as well as the workplace. A physician's role is to determine what percentage lies with each (and often what percentage may lie with another employer). The physician should always keep in mind that injurious exposure alone does not necessarily mean cumulative trauma. There must always be a discussion in the report concerning causation which ties the exposure to whatever disability has been sustained.

The Date of Injury and the Statute of Limitations

For specific injuries, the statute of limitations in workers' compensation claims for a worker to file their claim is one year (Asbestosis and HIV related deaths have separate statute of limitations).

Labor Code section 5405 states:

"The period within which proceedings may be commenced for the collection of benefits ...is one year from the date of injury" (the other two provisions will not be addressed for purposes of this discussion).

On the other hand, the statute of limitations for cumulative trauma claims or occupational injury claims is treated differently. As noted above, the difficulty with cumulative trauma cases is that workers often do not know when the one year to file their claim began because they are not sure when the injury initially took place.

Because of this, the legislature devised sort of a sliding scale method of finding a fixed point for the date of injury.

Labor code Section 5412 defines the “date of injury” as follows:

The date of injury in cases of occupational diseases or cumulative trauma injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by the present or prior employment.

So the “clock starts running” one year after the “knew or should have known” date is established – not a strict one year as with specific injuries claims. Note: The WCAB defines “disability” here as compensable loss of time from work due to the injury. Thus, if the worker is “toughing it out”, a physician could not conclude with reasonable medical probability they were disabled at that point in time.

In short, the law provides the worker with sort of a “connect the dots” method of placing the date of injury in these cases - the date the employee began to suffer disability (as opposed to symptoms to be addressed below) and either knew or should have known (ostensibly from application of basic common sense) that the disability was related to their work.

For example, in repetitive stress cases, a woman works as a secretary and begins to experience back pain after a period of weeks where she was lifting heavy files. The pain occurs each day at work until finally on May 31 she goes to her physician who discusses the heavy lifting at work with her, takes her off work for a week, prescribes pain meds and physical therapy and returns her to modified work with no lifting of any kind above 5 pounds. In this example, the secretary would have knowledge of the industrial connection and a date of disability – May 31.

Now change the facts a bit. The same secretary has recently given birth and has symptoms of carpal tunnel. The years spent working on a keyboard 6-8 hours a day have also given her difficulty off and on over the years. How much time after the pregnancy or the return of symptoms after resuming work should the woman be entitled to before a judge would conclude that she “knew or should have known there was an industrial connection to her carpal tunnel?”

The above example is illustrative of justification for the delay. In some cases, the worker may be told specifically by a physician or warned by the employer that the problem is work related and still do nothing for a year or two. Those examples are more problematical and require far more consideration as to why the worker delayed in filing the claim. These cases are most likely not going to be dismissed by a judge out of hand if the employer contests the claim based on the expiration of the statute of limitations, but a deliberate delay, at minimum, will make medical determinations to causation more difficult as more time has passed between the injury and the claim.

In most cases, the board will look at any reasonable justification for a worker not making the connection and likely will extend the statute of limitations to include the claim. If there is a problem with the statute of limitations within the one year limit, it is not uncommon for a worker’s attorney to plead a cumulative trauma claim where it first appeared that the worker had a specific injury (provided there is medical evidence to support such a claim).

Historically the WCAB has given workers the benefit of the doubt on CTs where there is legitimate confusion or some reasonable doubt as to why the worker did not file the claim when first feeling the effects of the injury.

A good example of how these issues are tied together is found in the case of *Fekete v WCAB*. 28 CWCR 168

In that case, the worker had previous heart problems and had even filed two prior workers' compensation claims. After a management change had caused significant stress for him at work, he had a heart attack in November 1993. He was not having overt symptoms until the actual heart attack. The facts showed that the worker believed there might be a connection to work but was reluctant to discuss this with his supervisor.

He did not file a workers' compensation claim until 1996 and did not have a medical report indicating the industrial connection until 1997. The WCAB ruled that the statute of limitations barred his claim because the facts showed that he had "knowledge" of the disability and that it was work related. The WCAB relied on the fact that the worker believed there to be a connection, had prior heart issues and had prior workers' compensation claims so probably knew his rights.

The court of appeal disagreed. It noted that, not even the evaluating physicians in the case could agree on the etiology of the heart condition and, that despite the fact that the worker knew a little bit about the workers' compensation system, he was not held to a strict standard of "knowledge" that he should have known for certain in 1993 that his heart attack was work related back.

This view is consistent with the law. There are cases that have held that a worker cannot be charged with knowledge of industrial causation unless informed by a physician and that expert medical opinion is required before the worker is charged with actual knowledge of the cause of the injury. (25 CWCR 6)

"Knowledge of cumulative injury may not be inferred merely from the existence of symptoms, and applicant's lack of symptoms before 1993 refutes defendant's position that applicant knew the management change was causing his problems." (28 CWCR at p. 170)

In another case *Impastato v Legion Insurance Co*. 26 CWCR 108 the worker did heavy keyboarding resulting in symptoms of carpal tunnel. She eventually sought medical treatment and was prescribed wrist splints. Even though she lost no time from work the WCAB held that the wrist splints represented a "work disabling factor" which pegged the date of injury as the day she saw her physician and had her wrists splinted. In other words, significant medical treatment which could affect a worker's earning power signifies disability for purposes of establishing the date of injury for cumulative trauma.

Why would this information be relevant to a physician? As we shall see, in these cases (discussed below) where one carrier's coverage ends and another's begins during the CT period, it is a critical determination as to which carrier is liable for treatment and disability.

Multiple Injury Cases

There are currently two legal precedents for determining whether a worker has sustained one or two separate CTs over a length of time for one or more employers.

The first view was developed in a case called *Coltharp (Aetna Casualty & Sur Co v WCAB (Coltharp))* 35 CA 3d 329.

In *Coltharp* the worker was a quality inspector for over 20 years from the late 40s through 1969 and filed five separate claims for injuries to his back, hips and legs over the years. In one of the claims he contended he had sustained one long CT but in the other four he claimed four separate CTs over a period of 15 years. In 1969 the worker was taken off work and returned to light duty and, later in the year, had another injury.

The WCAB found that the worker had sustained two separate periods of disability, one covering up to the first 1969 injury and one after the second injury, yet still concluded there was only one CT during his entire term of employment. The court of appeal disagreed with this finding, noting the inconsistency and stated that the worker clearly had separate and distinct periods of disability in 1969 and they would have to be treated as such. The court based its finding on Labor Code section 5303 which states:

There is but one cause of action for each injury coming within the provisions of the division. All claims brought for medical expense, disability payments, death benefits, burial expenses liens, or any other matter arising out of such injury, may, in the discretion of the appeals board, be joined in the same proceeding at any time provided however, that no injury whether specific or cumulative shall for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

This section, called the “anti-merger” statute, prevents the splicing together of specific and/or cumulative injuries into one large claim and artificially increasing the disability level under the rating schedule. The WCAB may consolidate or “join” actions into one case for judicial economy but the claims remain separate if they separately caused need for treatment and resulting disability.

In *Coltharp*, the court of appeal decided that, where the facts show there were distinct periods of disability, (following deleterious exposure, repetitive physical or mental stress/exposure) there are separate cumulative trauma periods under the anti –merger law and accordingly, separate CTs. Factors which indicate disability after these exposures would include significant medical treatment, a period of temporary disability (unable to work), significant job modifications and the like.

Coltharp seemed to work well for the WCAB and was fairly established law when many years later another court of appeal took an entirely different approach to the same multiple injuries issue addressed in *Coltharp*.

The second view was developed in a case called *Western Growers (Western Growers v WCAB A(Austin) 16 CA 4th 227*.

In that case, a worker was hospitalized for six weeks and eventually returned to work. There were two different insurance carriers and the WCAB found both carriers liable for two separate CT periods. The court of appeal reversed a WCAB decision and found that the Date of injury was at the time of the first hospitalization and the second carrier was dismissed from the case. The court focused on the fact that it felt there was additional harmful exposure after the return to work and therefore only one CT.

The court was very much aware of the *Coltharp* decision and appeared to bend a fact or two to distinguish the two cases:

“In (Coltharp) the WCAB found two specific incidents causing injury to the employee’s back were part of a continuous trauma to the back and thus the injury could be classified as cumulative. However, because the record revealed two distinct periods of disability separated by periods without compensable injury and two specific incidents which gave rise to compensable injury, the anti-merger doctrine precluded treating the two specific incidents as a single cumulative injury. The court found a finding of two distinct periods of

disability and the need for medical treatment was inconsistent with the finding of a single cumulative injury and annulled the award...”

(Coltharp) is distinguishable from this case. Here (the worker) had only one continuous compensable injury. Unlike (Coltharp) (his) two periods of temporary disability were linked by the continued need for medical treatment. The two periods of temporary disability were not “distinct” as was the case in (Coltharp), nor were they instigated by separate specific incidents.”

Remember that “disability” has been defined as significant medical treatment. It is questionable that a period of hospitalization would not be considered a period of “disability” under just about any analysis, but the court in *Western Growers* stuck to its conclusion of one long CT, thus creating a second approach to cumulative trauma analysis. Under *Western Growers*, the question of when the injury manifests and whether treatment is broken off or continued is central to the discussion.

The current state of the dispute as to whether there are single or multiple CTs in a case can lead to those proverbial grey areas of the law. Here are two examples involving similar facts.

In *Henderson V Federal Ins Co 27 CWCRCR 286* the WCAB reversed a finding that there was one CT instead of two CTs and sent the case back for further evidence. The facts of the case involved a worker who filed two claims (1994 and 1997) for CTs. In 1994 the facts showed that the worker was treated and disabled in 1994 but later returned to work (as in *Western Growers*). In 1997 the worker sustained disability and needed further treatment. The WCAB, in a decision which seemed to skate between *Coltharp* and *Western Growers*, held that whether there was one or two separate CTs was a question of medical fact. In other words, the medical history and a physician’s opinion were needed to address whether the second “disability” was separate or was merely a recurrence of the first disability.

On the other hand, in *SCIF v WCAB (Rodriguez) 31 CWCRCR 203* the court of appeal reversed the WCAB when it found two separate CTs using the *Coltharp* analysis. In that case, the worker began having knee problems from work resulting in his physician finally taking him off work in October 1999. (There were two carriers involved on the risk in the case so the issue of whether there was one or two CTs was central to each carrier’s potential liability). The worker returned to work in January 2000 working “to the extent that he could” but finally was taken off work in June 2000. Dr Steiger, reporting for the applicant, was asked to apportion liability between the two carriers and he did so based on time periods of exposure. The WCAB, using the *Coltharp* method, found two periods of exposure and two separate CTs. The court of appeal, applying the *Western Growers* method, reminded the WCAB that the date the injury manifested itself, the date the employee knew about it and sought continuous treatment was the date of injury of the CT.

As the Editor of the CWCRCR eloquently summarized:

“The court reasoned that Dr Steiger’s reports did not support two trauma periods. His various reports indicated several different injury dates, and he wrote that he was apportioning between two periods of cumulative trauma only because he was asked to do so; the only thing different between the two periods was the carrier. He did not discuss applicant’s treatment after he returned to work, and he believed applicant was returning to full, not limited duties. A doctor’s opinion based on misunderstood legal standards or facts cannot constitute substantial evidence.

Two points come out of this case. The first is that as a physician you should always be aware that your medical report may some day be quoted by a justice in a decision at the court of appeal so explain your rationale carefully. Second, whether the *Coltharp* or *Western Growers* analysis is used, physician’s should focus on the facts of the case (significant and/or continuous treatment, hospitalization, periods of temporary

disability, or lack of the same) in addressing whether there is one or more cumulative traumas involved in the worker's claim.

Multiple Employer Cases

The discussion of the one year statute of limitations above is admittedly a dry one, but necessary to address the subject of CTs. The reason is that in multiple employer cases (i.e. multiple insurance carrier cases), liability for cumulative trauma is limited to the last year prior to the date of injury or the last day of exposure to the hazards of employment. As discussed above, it is not unusual for parties to a workers' compensation claim to ask the physician to determine exposure (i.e. liability) during the last year in order to help settle up the finances between payors.

This problem exists in many cumulative trauma cases. This usually occurs when the worker is a tradesman, private health care, works in temporary clerical service etc. As a physician you will be asked not only to set the point in time for the date of injury but also set the point in time for the ending point (when disability began) for that injury.

In these multiple employer/carrier cases there may be two three or more carriers with keen interest in the start and finish date for the cumulative trauma. Liability only rests with those carriers on the risk in the last twelve months of exposure culminating in the disability. Where the carrier's coverage is in the timeline, of course, will also determine whether the carrier is a *Coltharp* supporter or a *Western Growers* fan.

Note that there is a difference between the last twelve months of exposure ending in disability and treatment rendered during the same period. A worker with a sore back may continue to work throughout the year taking Motrin or chiropractic visits and the like and still not be disabled from work (i.e. the very fact that they are working shows they are not disabled at that time) However the exposure is ongoing and at some point in the future the worker will be unable to "get by" with palliative measures and be forced off the job and onto temporary disability. It is this ending date which sets the state for the dispute over when the "prior 12 month window" began for all carriers on the risk.

The section controlling liability for carriers pertaining to cumulative traumas is Labor Code section 5500.5 which states:

"Liability for occupational disease or cumulative injury claims shall be limited to those employers who employed the employee during a period of four years (now one year) immediately preceding either the date of injury, as determined pursuant to section 5412 or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury whichever occurs first..."

In *Republic Indemnity v WCAB* (Hollis) 62 CCC 1067 (non-published) a case somewhat similar to *Impastato* above, the issue was the date of injury as divided between two carriers. The worker was placed on light duty by her doctor in June 1992 and informed her employer of the work connection. (Recall in *Impastato* the worker's belief of his heart condition's connection to the job was downplayed as consistent with case law) She continued to work until August 1994 (continuous exposure?) when she was terminated from her employment. She was found to be temporarily disabled in October 1994.

During the last year of employment (12 months) the employer's carrier was Citation Insurance from August 93 to May 31 1994 and RICA from June 1 1994 to August 19 1994. The date of injury as determined under section 5500.5 mattered a great deal to these carriers since the extent of their liability would be limited to the last 12 months prior to the "date of the injury or last date of harmful exposure."

If the date of injury was June 1992 Republic had 22 percent of the liability. If the date of injury was October 1994 Republic had about 4 percent. Obviously, if the worker's deposition were taken each carrier would want to grill the worker on exactly when she "knew" the condition was work related.

The court of appeal found that the worker's date of injury was in June 1992 when her "capacity to earn" was impaired when she was placed on light duty by her physician (and therefore "knew" her date of injury since she was informed by an expert). Under section 5500.5 this event occurred "first" and therefore was the controlling date of injury despite the fact of the ongoing harmful exposure at work.

As this article suggests, the issue of cumulative trauma claims are complex and require extra effort on the part of the physician to separate the various facts that make up the CT's "date of injury," factors that contribute to the CT, how long the CT period lasts, and finally whether the facts support a second or even third cumulative trauma claim.

About the Author

A frequent contributor to Perspectives, David Kizer, Esq., is well-known as an expert in workers' compensation law, speaking frequently on the various topics of workers' compensation medical legal issues. Former Counsel to the Industrial Medical Council, he currently practices for State Compensation Insurance Fund in Walnut Creek.

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