WORKERS' COMPENSATION: Appeal of Margeson and Expansion of the Substantial Contribution Test

By Daniel R. Lawson

New Hampshire's workers' compensation law, like all others, is simple in principle: it gives workers a simple and efficient means of recovering for work-related injuries, that is, injuries arising "out of and in the course of employment." But this facially simple principle has spawned some serious complexities. Among them is the difficulty of determining whether an injury "arises out of and in the course of employment" when an injury involves both personal and work-related causes or when an injury arises spontaneously in the workplace without clear cause. If a worker smokes, has high cholesterol, a family history of heart disease, and is overweight, then is a heart attack work-related simply because it was triggered by work-related emotional stress? Is a strangulated hernia that was waiting to happen work-related because it occurred in the workplace? What about injuries caused by hazards that are either unexplained or unrelated to either the worker or the workplace? Is an injury caused by a freak lightning strike, a stray bullet, or a poisonous animal bite compensable? Can a worker recover compensation for a knee injury that was sustained while walking down a workplace staircase that presented no extraordinary hazard?

Examples such as these have presented courts with an obvious hazard: if the scope of work-relatedness is defined too broadly, workers who are susceptible to heart failure, serious back injury, or other internal failure could take advantage of the workers' compensation law by seeking compensation for inevitable injuries that happened to arise in the workplace. The workers' compensation law would thus require employers to shoulder the burden of injuries that were only coincidentally—rather than causally—related to the employment.

Thirty years ago, the New Hampshire Supreme Court adopted a rule to address this hazard: the "substantial contribution test." Though the Court's expression of this test has been somewhat misleading, a close look at its opinions reveal that the substantial contribution test is merely an application of the "increased-risk test" put forth in Larson's Workers' Compensation Law which, like the substantial contribution test, requires workers under certain conditions to satisfy a heightened burden of legal causation. Until recently, the increased-risk test had been confined to a narrow class of cases. But in Appeal of Margeson, decided in July 2011, the New Hampshire Supreme Court altered the landscape of workers' compensation law. The Court expanded the application of the increased-risk test and essentially eliminated an entire class of injuries from compensability. This article will take a close look at the substantial contribution test before and after Margeson and explore the impact of that recent case.

I. STEINBERG AND THE BIRTH OF THE SUBSTANTIAL CONTRIBUTION TEST

The New Hampshire Supreme Court resisted the trend towards limiting the compensability for injuries suffered by workers with preexisting conditions, but finally relented in a 1979 case, New Hampshire Supply Company v. Steinberg. Steinberg presented the court with a man seeking compensation for a heart attack that had occurred away from work but was allegedly caused by the psychological stresses of his job. Though the court held that such a heart attack could be compensable, it balked at Steinberg's claim because he had exhibited several personal risk factors before the heart attack occurred, including a family history of heart disease, high blood pressure, high cholesterol, a smoking habit, and excess weight. The court borrowed a theory from Arthur Larson's highly authoritative workers' compensation treatise and introduced its "substantial contribution test." The substantial contribution test takes a worker's previous health into consideration and requires claimants with preexisting conditions to satisfy a special test of legal causation. According to the Court, the test defines the "degree of exertion" that is necessary for an injury to be work-related. Whereas healthy claimants needed only prove a but-for causal relationship between an employment condition and their injuries, claimants with preexisting conditions must prove that their employment was also the legal cause of their injury by demonstrating that the employment contributed something substantial to the risk of injury and that it created a greater risk of injury than what would be encountered in normal, non-employment activities. Thus a
worker with a preexisting condition who suffered an injury as a result of lifting a 20-pound weight would not be entitled to compensation, the rationale being that lifting 20-pound objects presents no greater risk of injury than non-employment activities such as lifting bags of golf clubs and step ladders. The substantial contribution test thus serves to separate injuries that could just as easily have occurred at home as at the workplace from those that are truly a consequence of an employee’s work environment or obligations.

II. VARIANT: THE INCREASED-RISK TEST

To fully understand the substantial contribution test, one must first identify it as a variation of what Larson would term an “increased-risk test” as opposed to what he would call a “positional-risk test.”16 Both of these tests provide a framework for determining what burden a worker bears in proving that his or her injury arose “out of and in the course of employment.”17 Under the positional-risk doctrine, a claimant only needs to prove a simple but-for causal relationship between his or her injury and an employment condition or obligation.18 Until recently in New Hampshire, such was the case whenever a worker without a preexisting condition sought compensation: “any work-related activity connected with the injury as a matter of medical fact is sufficient to show legal causation.”19

Increased-risk tests, on the other hand, impose a higher burden on claimants. When an increased-risk test is triggered, workers must show more than simply but-for causation; they must also show that the employment put them at greater risk for the injury suffered.20 Put simply, it is not enough for a worker to show that the injury occurred as a result of his or her presence at work, the worker must show that, with regard to the injury suffered, going to work was riskier than staying home.21 Though the Court’s opinions can be misleading—they tend to focus on the “degree of exertion” rather than the amount of risk presented by a work condition—it is clear that its substantial contribution test is merely an application of the increased-risk test to workers with preexisting health conditions.22 Though until recently workers generally operated under the burden of the positional-risk test and therefore needed only show medical causation, the dynamic changed when a worker had a preexisting condition. Like any other increased-risk test, the substantial contribution test requires “the employment [to] contribute something substantial to increase the risk of injury.”23

III. APPEAL OF MARGeson: SUBSTANTIAL CONTRIBUTION TEST MEETS A “NEUTRAL RISK” INJURY

Recently, the Court significantly altered the application of the increased-risk test in Appeal of Margeson, decided in July 2011.24 That case involved circumstances that had not come before the Court since the advent of the substantial contribution test: an injury that arose spontaneously and was not the result of workplace or personal risk factors. The claimant, James Margeson, sought compensation for a knee injury sustained while descending stairs at his workplace.25 The injury occurred while the claimant was carrying out his job duties, but there was nothing unusually hazardous or defective about the stairs.26

The Court’s decision made important changes to what appeared to be well-settled law. Firstly, it cast doubt over whether the substantial contribution test should be applied to injuries other than heart attacks and other stress-related injuries.27 Though the Court noted that since its inception the test has been applied broadly to any case involving a preexisting medical condition, the Court hinted that the test should have a more limited application since it was “intended to apply only to heart attacks and other stress-related injuries.”28 At first glance, this language might appear more significant than it really is. Though the Court hinted that the substantial risk test might have a more limited application in the future, the Court simultaneously expanded the application of the increased-risk test, as will be discussed below. Since the substantial risk test and the increased-risk test are only slightly modified expressions of the same rule, the confinement of the substantial contribution test will probably have little impact.

The second, and more important change made by the court is the expansion of the increased-risk test to what it identified as “neutral risk” injuries. Injuries caused by neutral risks are those injuries that are not clearly personal or employment-related in nature, as was James Margeson’s unexplained knee injury.29 Neutral risks cannot be attributed to risks of the workplace or to personal risks such as a preexisting medical condition.30 The Court decided that, in order to be compensable, a neutral risk injury must pass the increased-risk test, that is, it must be shown that the claimant’s job duties or environment exposed the employee to a greater risk of injury than would be encountered in ordinary life.31 Thus Margeson’s claim was remanded to the Compensation Appeals Board to determine whether his job responsibilities exposed him to a greater risk of injury than he would have encountered in non-employment life.32 Though the Court apparently makes a distinction between the increased-risk test put forth in Margeson and the substantial contribution test the difference between the two is essentially a matter of phrasing. Margeson adds a layer of complexity to an already confusing area of workers’ compensation law, but a careful reader of that opinion will note a hidden but important outcome: the compensability of neutral risk injuries has essentially been eliminated. This result is not obvious from the plain language of the opinion, but is inherent in the logic. On its face, Margeson requires claimants seeking compensation for neutral risks to meet the increased-risk test. More fully expressed, this means that injuries that are not attributable to employment conditions are not compensable unless the employee can attribute the injury to an employment condition. Obviously such a case will never arise; if a claimant could prove that an employment condition put him at risk, his injury would not be a “neutral-risk injury” in the first place. Thus Margeson has apparently eliminated compensation for neutral risk injuries; looking at that case alone, one must conclude that if a worker has an injury that was not contributed to by employment risk factors, then the injury is not compensable regardless of whether or not there was a personal risk factor involved.
IV. THE IMPLICATIONS OF MARGESON: ARE NEUTRAL RISK INJURIES REALLY NON-COMPENSABLE?

The elimination of neutral risk injuries from compensability may not seem like a radical shift. After all, why should an employer pay for an injury that was not caused by a risk of the workplace? But even if Margeson yields an intuitive result, it is nonetheless both surprising because it represents a break from precedent and important because it may have broader application than the Court implied.

Margeson marks a significant break from precedent. Prior to that opinion, a claimant only faced the burden of the increased-risk test when he or she had a preexisting condition that triggered the substantial contribution test. If the claimant had no preexisting condition, any work-related activity connected with the injury as a matter of medical fact is sufficient for purposes of proving legal causation. It was enough for the employee to merely show that the employment put the employee in the place where the injury occurred. This approach was similar to at least a few other jurisdictions. Margeson could sound the death knell for the positional risk test because claimants must now show that their employment increased the risk of the injury suffered.

What also makes Margeson significant is how broadly it might be applied. Most of the opinion’s discussion only contemplates a small class of neutral risk injuries—unexplained injuries that are neither attributable to the employee nor to the workplace. But what about explained injuries that are neither attributable to the employee nor to the workplace? Margeson could easily be interpreted as imposing the increased-risk test for a number of neutral-risk injuries mentioned in the opinion itself: injuries caused by lightning strikes, being bitten by a poisonous insect, or being shot by a stray bullet. Even many of those that might balk at the outcome of Margeson might balk at the outcomes that result. If a worker is bitten by a poisonous spider while sitting at his desk, should not it be enough to say that the employee’s work put him in the position to suffer that injury? Should the worker really have to prove that the workplace was, vis-à-vis spider bites, a more dangerous place to be than a non-work environment? Prior to Margeson, the question would have been simple: the employee merely had to show that the employment put him in the place where the insect bite occurred, and it did not matter whether or not the workplace was more dangerous than other environments.

After Margeson, the answers appear to have changed. Though the opinion’s discussion focuses on unexplained falls, it presumably applies to the entire class of neutral risk injuries, and it will no longer be enough to say that the employment was the factual cause of an explained neutral risk injury. It should be noted, however, that this is an area subject to debate, and the Court will likely have an issue to resolve in a future case.

In light of Margeson, claimants and their representatives must be acutely aware of how their burden of proof has changed. Since the increased-risk test’s application to neutral risk injuries is new to New Hampshire, claimants should look to other jurisdictions that apply the increased-risk doctrine. A look at a case from Illinois illustrates how an injury from a stray bullet can be compensable by using the testimony of a police officer to show that the neighborhood in which the employee worked was a high-crime area. A case involving a lightning strike illustrates how a claimant can satisfy the increased-risk test by proving that he was working at a high altitude and in a building which exposed him to an increased risk of being struck by lightning. For an injury suffered as a result of a workplace assault, one Oklahoma case stresses the importance of proving that the attack by a third person was not motivated by personal animosity but resulted from a chain reaction precipitated by work activity. These and other factually-related cases can provide guidance to claimants with novel cases.

Although even before Margeson, it was good practice for claimant’s attorneys to tie their clients’ injuries to work conditions as closely as possible, now it is probably a requirement. Margeson casts a dark shadow over all preceding cases that applied the positional risk test and allowed compensation for injuries upon a mere showing that they were medically caused by the worker’s employment. The increased risk test, first ushered into New Hampshire via Steinberg and the substantial contribution test, have assumed greater importance in the state’s workers’ compensation law.

ENDNOTES

1. Daniel R. Lawson is a 2011 graduate of the UNH School of Law and the school’s Daniel Webster Scholar Honors Program.

compensation benefits.

7. See Steinberg, 400 A.2d at 1168.
8. Steinberg, 400 A.2d at 1166.
9. Id.
10. Id. at 1165.
11. Id. at 1168 (citing 1B A. Larson, Workmen’s Compensation Law § 42.21 (1978)).
13. Id. at 477.
14. Id.
15. Id. It should be noted that the court’s “twenty pound weight” hypothetical is limited to the case of a worker whose ordinary duties do not include lifting. Id.
16. Larson’s Workers’ Compensation Law § 3.01 (2009).
17. Larson’s Workers’ Compensation Law § 3.01 (2009).
18. Larson’s Workers’ Compensation Law § 3.05 (2009).
19. Redimix, 969 A.2d at 477.
21. Redimix, 969 A.2d at 477.
23. Redimix, 969 A.2d at 477 (emphasis added).
25. Id.
26. Id.
27. Id. at 4.
28. Id.
29. Id. at 2.
30. Id.
31. Id. at 4.
32. Id. at 5.
34. Id.
35. Id.
36. In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit, 759 P.2d 17, 21 (Colo. 1988) (deciding that the positional risk test should apply to neutral-risk injuries).
37. In re Margeson, No. 2010-633, slip op. at 1 (N.H. July 21, 2011). Though the Court sets forth a more inclusive definition of a “neutral risk injury” earlier in the opinion, it later seems to consider neutral risk injuries of unexplained origin. Id. (“Because neutral risk injuries result from some unexplained cause not directly attributable to either the employee or employer . . .”).
38. Redimix, 969 A.2d at 477, 478 (Ill. App. 1st Dist. 2009).

About the Author

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