

Workers' Compensation, Social Security Disability, SSI, and Genetic Testing

Kathryn J. Sedo

In addition to disability insurance purchased privately by individuals or employers, three other major types of disability insurance are available: Workers' Compensation, Social Security Disability Insurance (SSDI), and Supplemental Security Insurance (SSI). The first two, Workers' Compensation and SSDI, are available to individuals with work connections. The third, SSI, does not require a work connection.

I. Workers' Compensation

Workers' Compensation laws were initially passed to provide economic protection for workers and their families when a worker suffered an accident on the job resulting in an injury. The first laws passed were subject to court challenges based on their constitutionality. Ultimately courts approved the constitutionality of the Workers' Compensation laws rationalizing that the laws created a compromise whereby an employee gave up her right to sue for a tort recovery in exchange for the employer's agreement to pay benefits without regard to the cause of the accident.

Each state has its own Workers' Compensation law. Federal employees and railroad workers each have their own federal statutory system as well. State Workers' Compensation laws are enforced by state agencies, and disputes are litigated before administrative law judges and/or in the state court systems. Similar administrative and judicial systems are in place for federal and railroad workers. Different jurisdictions have slightly different provisions to their Workers' Compensation laws, and each state's courts also have different opinions on the laws' applications. Detailed

Kathryn J. Sedo, J.D., is the Clinical Professor at the University of Minnesota Law School.

below are some of the most common provisions found in Workers' Compensation laws.

Workers' Compensation benefits are provided to employees who suffer an injury, illness, disease, or death that arises out of and in the course of their employment. Thus the basic Workers' Compensation requirements and qualifications are the following: (1) an employment relationship and (2) an accident, injury, illness, disease, or death that (3) arises out of the employment and (4) in the course of the employment.

Benefits payable to an injured worker or her family include cash payments to the person injured, medical and rehabilitation expenses, death benefits, and dependent benefits. Cash payments to injured workers may include temporary total benefits, temporary partial benefits, permanent partial benefits, and permanent total benefits.

Temporary benefits, consisting of either temporary total or temporary partial benefits, are paid while the worker is recovering from her injury or disease. Temporary total benefits are paid during the time when the injured worker is unable to work at all and is recovering from her injury. Temporary partial payments are paid to injured workers who are (1) able to work (or return to work after a temporary absence when the worker could not work) and (2) making less than they did prior to the injury because they are unable to work full-time or unable to perform their previous higher paying work. In most states, these temporary benefit rates are set to make sure that the employee receives at least two-thirds of her income prior to the injury or disease (although some states now cap benefits amounts so that the highest paid workers can not receive two-thirds of their previous wages).

Once the employee has reached maximum medical improvement, temporary benefit payments end.

Many states pay permanent partial disability benefits depending on the severity of the impairment created by the work injury or illness. These benefits can be paid in a fixed lump sum or a weekly payment for a set number of weeks.

If an employee is permanently and totally disabled, she receives permanent total disability benefits. The benefit amount is a percentage of the employee's pre-injury wages, usually around two-thirds of pre-injury wages, up to a maximum amount varying from state to state. Often a time limit dictates how long an injured employee may receive these permanent total benefits.

Survivors of employees who die as a result of a work injury receive death benefits that are frequently a fixed amount set by statute. In addition, dependent benefits, based on a percentage of pre-injury earnings, may also be paid to survivors who were the worker's dependents at the time of death.

All medical expenses incurred by the injured worker are paid by Workers' Compensation. There is usually a rate schedule that doctors and other health care providers are paid for various treatments. Rehabilitation and retraining benefits for injured workers are provided as needed to get the injured worker employed once again.

Cash benefits for permanently disabled workers are coordinated with federal disability benefit programs (discussed below). Generally after a certain amount, future Workers' Compensation benefits are decreased by any government benefits received. Benefits for permanently disabled workers usually have a set time for which they are paid and/or terminate at retirement age when Social Security retirement benefits are available.

Most employers are required to provide Workers' Compensation insurance for their workers.¹ States have some coverage employer exemptions, the most common being exemptions for farm workers, domestic workers, family member employees, and employers with small numbers of employees. Employers purchase the insurance privately or through a state pool, and employees are not directly charged for this insurance.² In theory the insurance cost is passed on to the user of the goods or services provided by the employer.³

In order to be eligible to receive benefits, the worker must be an employee and not an independent contractor. Thus, the issue of employment status has generated much litigation. Originally, employers often argued that the injured individual was not an employee in an attempt to avoid payment. As the tort system evolved and tort damage awards became easier to obtain and larger in amount, the trend reversed; now the injured individual tends to argue that he or she was not an employee or the injury did not arise out of or in the

course of the employment, so that a tort suit may be brought.

Workers' Compensation laws generally do not define the term "employee" other than to say that an employee is a person in the service of another under any contract of hire, express or implied. Thus, courts have generally used the common law test called the "master/servant" or "control" test to determine whether an employment relationship exists.

The "master/servant" test used by courts may consider as many as ten factors when determining employment status. The first factor, and the most important under this test, is the extent of control which, by the employment agreement, the employer may exert over the details of the work. Other factors include the length of time the work is performed, the method of payment (by the job or by the hour), the skill required, who supplies the instrumentalities, tools and place of work, whether the worker has a distinct occupation or business, and the intent of the parties. The right to control the work details is the primary consideration when making an employment determination, thus the test has also come to be known as the "control" test.

Criticism of using a test developed centuries ago in order to determine a master/servant relationship for tort purposes (i.e., when a stringent test was developed to protect masters from judgments against them because of their servants' actions) has resulted in another test being used by courts. The courts have reasoned that the social purpose for Workers' Compensation is different than that for tort recovery and developed a second test, called the "relative nature of the work" test.

The "relative nature of the work" test is in some senses an economic reality test. The nature of the work provided by the worker as it relates to the regular business of the employer is examined. Any worker whose services form a regular and continuing part of the cost of the product and whose method of operation is not an independent business (that could provide a means of insuring his activities) is considered an employee under this test.

Once it is determined that an employment relationship exists, then it must further be determined whether or not a compensable accident, injury, illness, or disease has occurred. Originally the Workers' Compensation laws covered only accidents, not diseases or illnesses. Throughout the years the definition of "accident," which can be thought of as an unexpected occurrence, has been stretched to include unexpected results from an activity. This makes it possible, for example, for illnesses or gradual injuries to be compensated even though they do not fit the usual definition of "accident."

Over time, occupational diseases, such as asbestosis and black lung disease, became compensable and almost all Workers' Compensation statutes were amended to add this coverage. If the disease can be shown to be a direct result of employment and is related to the employment, then it is compensable. Thus a nurse with tuberculosis (TB) contracted from a patient has an occupational disease, but not a secretary contracting TB from another secretary in an office.

Eligibility and benefits may be different for occupational diseases than for other injuries or illnesses. Determining if the condition is an occupational disease, an accident, or an illness can be difficult in some cases. A short statute of limitation period for making Workers' Compensation claims may preclude coverage for certain diseases that take a long time to manifest.⁴

Mental illness coverage varies from state to state, but all states cover mental illness resulting from work-related physical injury or which results in a physical injury. Approximately two-thirds of states provide coverage for a stand-alone mental illness, assuming that it can be shown that the employment was a contributing factor.⁵

In addition, to qualify for Workers' Compensation, the injury, illness, or disease must also arise out of and in the course of the employment, meaning that it occurs while the employee is performing her job or is in a place where her job reasonably requires her to be.

The "arising out of" standard is generally considered a causation standard, meaning that the injury or disease must be causally related to the employment. Different jurisdictions use different risk standards. Proximate cause is not required in any jurisdiction. The most common standards used are either: (1) that the employment caused an increased risk of the injury to the employee as compared to the general public, or (2) the cause of injury was an actual risk of the employment. A substantial minority of jurisdictions uses a positional risk test, that is, the injury is compensable if the conditions or obligations of the employment put the employee in the position in which she was injured.

The causation issue gets more complicated because not all risks that a worker encounters are employment-related. When employment-related risks combine with neutral or personal risks, difficulty arises in determining whether compensation should be paid. An example of a neutral risk is an "act of God," for example, a tornado or a hurricane or a stray bullet that hits an innocent bystander on the street. An employee in the course of his or her employment caught in a tornado or hit by a stray bullet is usually provided compensation.

Injuries or diseases arising out of personal risks or conditions are not considered caused by employment unless the employment substantially contributes to the risk or aggravates the injury. Thus, pre-existing conditions of the employee do not disqualify a claim for benefits if the employment aggravated, accelerated, or combined with a pre-existing disease or condition to produce the death or disability for which compensation is sought. Examples might include exertion at work that causes heart failure in an already weak heart, or an individual with a seizure disorder injured by a fall at work from a height because of a seizure. In some jurisdictions, the aggravation by employment of a pre-existing condition results in compensation being paid only for the percentage of disability attributable to the work injury or accident.

The problem of whether an injury, illness, or disease can be produced by the action of the employment conditions on the individual's own individual allergy, hypersensitivity, or pre-existing disease or susceptibility arises on occasion. A majority of jurisdictions have held that the individual allergy, disease, susceptibility, or weakness is immaterial if the particular employment conditions, in fact, caused the disability, following the rule that an employer takes an employee as she finds them. For example, consider an individual who smokes and who also is exposed to cotton fibers at work. These cases are sometimes called "dual causation" cases. When this individual develops emphysema, the determination of causation is difficult. Most courts have found that the pre-existing disease or condition or co-existing activity does not prevent compensation as long as the employment was a contributing (or in some jurisdictions, a substantially contributing) factor. As mentioned above, some jurisdictions may decrease the benefits paid by the amount that the pre-existing condition is considered to have contributed to the injury, illness, or disease.

II. Genetic Testing Issues in Workers' Compensation

Two obvious concerns arise with regard to Workers' Compensation laws and genetic testing. The first concern involves the use of genetic testing once an injury has occurred and/or a disease has already manifested itself. The second occurs when pre-employment genetic testing is required.

First, the use of genetic testing to determine the existence of pre-existing conditions or susceptibilities once an injury has occurred or disease has manifested is extremely problematic because it undermines at least two of the basic underlying principles of Workers' Compensation policy: (1) the payment of benefits is made without regard to fault, and (2) the

employer takes the worker as she finds him or her. The latter principle has already been eroded by laws apportioning the employee's disability benefits among more than one employer or insurer and by laws under which the employee's Workers' Compensation benefits are reduced to pre-existing conditions that are not genetically related. If employers (and their insurers) can reduce or eliminate the benefits paid to employees who are found to be susceptible to certain diseases or conditions through genetic testing, this will further erode the basic principle that the employer takes the worker as she finds her. If employers are to be allowed to use (and possibly require, as discussed below) genetic testing to reduce or eliminate benefits, then this would seriously undermine one of the basic principles of the entire Workers' Compensation system. For this reason, it is imperative that the use of genetic testing to determine eligibility for benefits or the amount of benefits not be allowed as it violates one of the policy justifications underpinning the entire system.

A related problem may occur if injured employees are required to undergo examination and testing by the employer/insurer's doctor as a condition of eligibility for benefits. As part of this examination, the employee could be asked to undergo genetic testing. Generally, if the employee refuses to cooperate with examination and testing, then benefits are withheld. Requiring employees to undergo such testing to receive benefits raises grave moral issues. Laws and state rules must be written to assure that employees have choice with regard to genetic testing without jeopardizing their benefit entitlements. Employees will surely suffer if employers are allowed to require such testing as a condition of receipt of benefits and then can reduce benefits based upon the results.

Requiring and using genetic testing also raises privacy issues regarding the information obtained. It would almost be impossible to keep such information private in an adversary proceeding. Thus, for many reasons, requiring genetic testing should not be allowed at all, nor should it be used to reduce or eliminate benefits.

Second, pre-employment testing can be required despite the Americans with Disabilities Act (ADA), although it cannot be used to deny employment unless the testing shows that the applicant cannot do the job or would be harmed by the job. The issue of allowing the employee, as opposed to the employer, to determine his or her own risk tolerance should a genetic sensitivity to a disease or injury be discovered must be addressed. Since SSDI or SSI benefits would not be payable to someone under current law who merely tested genetically sensitive (discussed below), allow-

ing employers alone to make the decision might render an individual unemployable but not disabled for Social Security purposes and therefore unable to support herself.

Pre-employment testing is also problematic at this time because genetic testing is in its infancy. Not all relationships between genes and diseases or conditions have yet been discovered, thus adversely impacting individuals who have already discovered conditions. In addition, there is currently no good evidence about how long a condition or disease might take to manifest itself even if susceptibility is discovered. For these reasons, it would be prudent to enact legislation making it clear that genetic susceptibilities discovered as a result of a mandatory pre-employment test cannot be used to prevent Workers' Compensation claims for injury and disease in the future once the employer and worker enter into an employment relationship. It might also be prudent to enact legislation giving the employee the final decision as to how much risk she is willing to take once a susceptibility to an injury or disease has been discovered.

III. Social Security Disability Insurance

Social Security Disability Insurance is available to qualified individuals who are unable to engage in any substantial gainful activity. In order to qualify, the individual has to have 20 quarters of work coverage⁶ and be disabled – that is, have an impairment or combination of impairments making the individual unable to engage in substantial gainful activity. The benefit amount depends on the individual's wages prior to the onset of disability, and the benefits continue as long as the individual is disabled or until she reaches the age when retirement benefits can be accessed. Medical benefits are also provided as well as benefits for dependents of the individual with a disability.

The process of obtaining benefits is cumbersome. First, one applies at the local Social Security Office. Once it is determined that the individual has a sufficient work connection to be eligible (that is, the proper number of credits), then the file is passed to a state agency, to determine whether the disability criteria are met. Each state has its own disability determining agency and inconsistent determinations are not uncommon.

To be considered disabled, an individual must have an impairment or a combination of impairments that are expected to last for a continuous period of not less than 12 months, may result in death, or that prohibit that individual from engaging in substantial gainful activity.⁷ An individual shall be determined as disabled only if his physical or mental impairment(s) are so severe that he is not only unable to do his previous

work, but cannot (considering his age, education, and work experience) engage in any other kind of substantial gainful work that exists in the national economy, regardless of whether such work exists in the immediate area in which she lives or whether a specific job vacancy exists for her, or whether she would be hired if she applied for work. For purposes of this determination, work that exists in the national economy is work that exists in significant quantity, either in the region where such an individual lives or in several regions of the country.⁸ Thus, disability under the Social Security definition is the result of a medical condition and not the result of unemployability (that is, no one will hire the individual).

The determination is made through a five-step sequential process.⁹ First, it is determined whether the individual is currently engaged in substantial gainful activity. The definition of what constitutes substantial gainful activity is tied to earnings. Currently, if an individual makes less than \$800 per month, she is not considered to be engaged in substantial gainful activity.¹⁰ If the individual is not engaged in substantial gainful activity, the second step is to determine whether or not the individual has an impairment or combination of impairments that are severe. An impairment is severe if it significantly limits one's physical or mental ability to do basic work activities. Basic work activities are the abilities and aptitudes necessary to do most jobs. These include: (1) physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) use of judgment; (5) responding appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes in a routine work setting.¹¹ If the impairment or combination of impairments is found to be severe, then the inquiry moves to step three. If they are not severe, then the individual is not disabled for Social Security Disability purposes.

Step three determines whether the individual meets or equals a set of medical listings.¹² The Social Security Administration created these listings through its rule-making authority. If an individual's condition meets or equals a listing, then the individual is presumed to be disabled. There are two sets of listings, one for adults and one for children. The listings are divided into 13 parts dealing with various areas of the body and mind. Specific symptoms and signs for various illnesses and conditions are contained in the listing. If the symptoms and signs meet a listing, the inquiry ends, and the individual is found to be disabled. If the symptoms and signs do not meet or equal a listing, then the inquiry moves to step four.

Step four determines if the residual functional capacity of the individual is such that she could return to past relevant work, i.e., work performed within the last 15 years. Residual functional capacity is what a claimant can still do despite her limitations. Physical, mental, and non-exertional impairments are considered. If an individual can still perform past relevant work, then the individual is not disabled. If the individual cannot perform past relevant work, then the inquiry moves to step five.

The final inquiry is whether there are any jobs that exist in the national economy in substantial numbers which the individual can perform. Once again the Social Security Administration created a set of rules to make this determination. These rules, often called grids, take into account physical ability, age, education, and job skill level to determine whether a finding of disability is warranted. If the individual has a non-exertional impairment (e.g., mental illness or allergies), then the grids are not controlling and other vocational advice (usually in the form of an expert) must be obtained.

If the individual disagrees with the initial determination by the state agency, she can request a redetermination by the same agency. If the redetermination is still not favorable, the individual can request a hearing before an administrative law judge (ALJ). Decisions of the ALJ can be appealed to a federal Appeals Council and ultimately the federal courts.

There are provisions for revisiting a disability determination at a later time to see if the person's condition has improved or whether medical or vocational advances have occurred that make the person no longer disabled.

IV. Supplemental Security Income

Supplemental Security Income (SSI) is a form of insurance for the disabled that is not based on a work connection. The definition of disability is the same as for SSDI benefits, that is, inability to engage in any substantial gainful activity because of a severe impairment that is expected to last no less than 12 months or result in death. The process for application and determination of disability is the same as for SSDI benefits, except that instead of determining that the proper number of work credits exists, a determination of financial hardship is made. Only individuals with little or no income and very few assets qualify for SSI. Children are eligible for SSI as well as adults with not enough work credits to qualify for SSDI. Benefits are a fixed sum, and medical benefits are also available.

V. Genetic Testing and SSDI and SSI

With regard to the impact of genetic testing on SSDI benefits and SSI, there are two main concerns. First, the Social Security Act states

if you are applying for benefits and do not have a good reason for failing or refusing to take part in a consultative examination or test which we arrange for you to get information we need to determine your disability or blindness, we may find that you are not disabled or blind.

Thus applicants might be required to undergo genetic testing to obtain or keep their benefits. This raises the same privacy issues for SSDI and SSI applicants as for Workers' Compensation claimants. The individual's privacy rights concerning genetic information must be protected. This issue is even more important for children whose parents might wish to prove their eligibility for benefits and thus agree to the genetic testing. The results of these tests could follow the children throughout their lives and have negative impact on their ability to find work, as well as label them disabled for the rest of their lives.

Second, provisions of the Social Security Act, like most other legislation, are subject to political considerations. The Act already precludes disability benefits for individuals when alcoholism or drug addiction would be a contributing factor material to the commissioner's determination that the individual is disabled.¹³ Other conditions determinable by genetic testing could similarly be legislatively excluded based on political or moral considerations.

VI. Conclusions

Serious privacy issues are raised by the requirement for and/or use of genetic testing in the context of disability claims, for Workers' Compensation, SSDI benefits or SSI. In addition, the use of genetic testing information to eliminate or reduce benefits seriously undermines basic principles supporting public policies' compromises that underpin the Workers' Compensation system and the Social Security system. These concerns suggest that genetic testing not be allowed to reduce benefits and that genetic testing not be required as a condition for receiving benefits. Appropriate legislation should be enacted to address these issues.

References

1. Some large employers are allowed to self-insure. Many states also have pool insurance available for employers unable to obtain private insurance.
2. Many argue, however, that wages are lower as a result of this type of expense.
3. This theory does not work very well for non-profits or government employees.
4. If the disease does not manifest before the statute runs out, then the worker is out of luck in many jurisdictions.
5. See discussion below on dual causation.
6. Fewer quarters are required if the individual is under the age of 31.
7. 42 U.S.C. 423(d)(1)(A) and 1382c(a)(3)(A).
8. 42 U.S.C. 423(d)(2)(A) and 1382c(a)(3)(B).
9. 20 C.F.R. 404.1520.
10. There is a slightly different rule for persons employed in sheltered workshops.
11. 20 C.F.R. 404.1521.
12. The listings are created based on body part. Currently there are adult and children listings and each set has 13 parts.
13. 42 U.S.C. 423.