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Comments: Cardiac Cases Under the Wisconsin Workmen's Compensation Act

James F. Bartl

CARDIAC CASES UNDER THE WISCONSIN WORKMEN'S COMPENSATION ACT

INTRODUCTION

The tendency of modern day courts to become more liberal in their application of workmen's compensation provisions has reached alarming proportions. Perhaps this is more true in the area of cardiac cases than in any other segment of workmen's compensation law. How this propensity developed in Wisconsin and the problems it has produced are the subject of this article.

Workmen's compensation is a general and comprehensive term applied to and embracing those laws providing for compensation due to loss resulting from injury, disablement, or death of workmen through industrial accident, casualty, or disease, which possess the common feature or characteristic of providing such compensation otherwise than on the basis of tort liability. In effect, workmen's compensation not only provides benefits and medical care to victims of work-connected injuries, but also places the cost of these injuries ultimately upon the consumer by manipulating the pricing mechanism. Generally speaking, a typical workmen's compensation act has the following features: (a) the employee is immediately entitled to certain benefits upon suffering a "personal injury by accident arising out of and in the course of employment"; (b) negligence and fault are largely immaterial, in that negligence of the employee does not decrease his rights and the employer's freedom from fault does not lessen his liability; (c) recovery is limited to those individuals having the status of employee; (d) benefits to the employee include cash wage benefits and hospital and medical expenses; (e) the employee and his dependents give up their common law right to sue the employer for damages for any injury covered by the act; (f) there remains the right to sue third parties whose negligence caused the injury; (g) jurisdiction is typically in the hands of an administrative tribunal; and (h) the employer is required to insure his liability either through private insurance, a state fund, or self-insurance.[1]

Workmen's compensation has arisen out of the conditions produced by modern industrial development and the inability of common law tort liability to satisfy such needs. The causes of injuries in industry today are frequently obscure and complex and therefore often make it impossible to correctly ascertain the facts necessary to make an accurate judgment; this fact plus the expense and delay necessitated for such determination results, in effect, in the defeat of justice. Under such circumstances there is little doubt that the common law rule of tort liability for personal injuries arising out of the operation of industrial enterprises, coupled with the defenses of (a) assumption of risk, (b)

[1] I LARSON, WORKMEN'S COMPENSATION § 1.10 (1952).

contributory negligence, and (c) negligence of fellow servant, are outmoded and inadequate to cope with present day employment conditions.[2] The courts at common law determined the extent of the employer's responsibility for an industrial accident upon the basis of industrial conditions, a social philosophy, and an archaic attitude toward labor. The common law belief was built upon the economic theory that there was complete mobility of labor, that the workman was an agent who was entirely free and under no compulsion to enter into employment. The employee was expected to carry all the usual risks of his trade, plus any unusual risks of which he had knowledge.

Under the modern compensation acts the common law theory is abandoned and a right to recovery for all injuries incident to employment is given, with certain exceptions. The general purposes of modern workmen's compensation acts are:

(1) to improve the economic status of the worker;
(2) to remove the uncertainties attendant upon common law remedies;
(3) to transfer from the employee to the employer and subsequently to the consumer the burden of the expense of the economic loss due to the accident; and
(4) to improve employee-employer relations.[3]

The improvement of the economic status of the employee is of primary importance, as has been readily pointed out by Commissioner R. G. Knutson of the Wisconsin Industrial Commission.[4]

Germany, in 1884, was the first country to approve a modern compensation plan.[5] They adopted their system thirteen years before England, twenty-five years before the first American jurisdiction, and sixty-five years before the last American state. Although the American compensation system was modeled after that of Germany and later England, ours differs from the German plan in that the American employer contributes the entire amount to the fund whereas the employer and employee both contributed under Germany's system.

By the end of the nineteenth century, because of the coincidence of increasing industrial injuries and decreasing remedies, America was ready for a change in its compensation system, but it was not until 1911 that any workmen's compensation acts were passed which with-

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[2] These three defenses were the employer's at common law and they were religiously exercised by him to avoid any and all liability due to injuries of the employee while on the job.

[3] 58 AM. JUR. *Workmen's Compensation* § 2, at 575-76 (1948).

[4] At a symposium presented by the University of Wisconsin on May 9-10, 1961, commemorating the passage of the Wisconsin workmen's compensation law fifty years earlier, Commissioner R. G. Knutson, in presenting "An Administrator's Views on Workmen's Compensation in Action," said: "It should never be forgotten that workmen's compensation laws were passed primarily to benefit the injured worker and his dependents. . . ."

[5] 1 LARSON, *op. cit. supra* note 1, § 5.10.

stood the constitutional test. The first compensation laws were declared invalid on the ground that it was a deprivation of property without due process of law to require an employer to make compensation to employees for injuries arising in the course of employment unless the injuries were attributed to some negligence imputable to the employer.[6] On May 3, 1911, Wisconsin became the first state to approve and put into effect a workmen's compensation law, and during that same year nine other states followed the precedent established by Wisconsin.[7] This legislation marked a new era in the law governing work injuries and spelled death for an antiquated approach to the problem of the injured workman, for constitutional squabbles, and for judicial obstacles to progress.[8]

ROLE OF HEART CASES IN WORKMEN'S COMPENSATION

In recent years heart cases have become a significant factor in workmen's compensation litigation. Statistics demonstrate that heart cases are presently an important segment of workmen's compensation and in all probability will continue to increase. More than seventy-five percent of persons above the age of fifty-five suffer from arteriosclerosis and the number of coronary occlusions now exceeds the million mark each year.[9] Thus, members of the work force in this age group are prime targets for heart disease, whether they be blue or white collar personnel. More shocking yet is the fact that one of every two workmen reaches the end of his life or his working days as a consequence of heart disease.[10]

In heart cases, as in any compensation claim, there are two basic requirements which must be satisfied before recovery is permitted. First, the injury or harm must be "incurred in the course of the employment." Secondly, and more important, the injury or harm must "arise out of the employment." The first requirement relates to the employee at the time of the accident and involves the determination of whether he is within the scope of his employment. The second requirement, the one which poses the most difficulty in heart cases, refers to the causal relationship between the employment and the injury. Basically the Wisconsin court agrees with other jurisdictions that before recovery will be permitted these two requisites must be present.[11]

[6] Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), which struck down the first New York act on March 24, 1911.

[7] WISCONSIN INDUS. COMM'N, REP'T. No. 31, WORKMEN'S COMPENSATION (1962). The other nine states to pass compensation acts in 1911 were California, Illinois, Kansas, Massachusetts, New Hampshire, New Jersey, Nevada, Ohio, and Washington.

[8] Riesenfield, *Forty Years of American Workmen's Compensation*, 7 NACCA L. J. 15 (1951). The constitutionality of the Wisconsin workmen's compensation act was upheld in Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911).

[9] Katz, *A Statement on Arteriosclerosis*, 19 MONOGRAPH (1959).

[10] MCNIECE, HEART DISEASE AND THE LAW 112 (1961).

[11] In Nash-Kelvinator Corp. v. Industrial Comm'n, 266 Wis. 81, 62 N.W. 2d

Before applying the requisite conditions of liability for heart cases, it is necessary to determine if a cardiac case in general is compensable under the Wisconsin workmen's compensation act, and the key to this inquiry is whether a heart case is encompassed within the meaning of the term "accident."[12] As previously noted, American jurisdictions adopted their compensation systems from the original British act and in so doing they borrowed the terminology "injury by accident" from that act.[13] In the English interpretation of the phrase "injury by accident," the word accident was to be used in its popular or ordinary sense rather than some arbitrary, legal, technical, or contractual meaning.[14] In 1915, the Wisconsin court accepted their present meaning of the term "accidental" to correspond with that adopted earlier by the British act.[15]

In most jurisdictions the greatest source of controversy centers around the problem of "accidental cause versus accidental result." The word "accidental" refers to an event which is unusual, not expected, and undesigned. It reflects an occurrence which is not within the foresight and expectation of an individual, resulting in a mishap proving to be injurious to the employee. Suppose an employee has for several years done nothing but lift one-hundred pound sacks, and one day while performing such operation he suffers a heart attack. Assuming that medical testimony confirms the fact that such heavy lifting did in fact cause the heart attack, was the unlooked for item or untoward event the cause or the effect? If it was the cause, that is, the external conditions immediately prior to the injury, no unexpected event can be shown. But if it is the result upon the individual that is unlooked for,

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567 (1954), the court said: "The two essential tests which must be satisfied to show liability on part of the employer under the Workmen's Compensation Act, are that the employee at the time of the accident was performing service growing out of and incidental to his employment, and that the injury arose out of employment. These are independent tests and must be satisfied by separate showing of proof." See also Wisconsin Power & Light Co. v. Industrial Comm'n, 268 Wis. 613, 68 N.W. 2d 44 (1955).

[12] WIS. STAT. ch. 102 (1961); see §§ 102.03 and 102.01 for "injury due to accident" and definition of the term "injury."

[13] See 1 LARSON, *op. cit. supra* note 1, § 38.10. Note from WIS. STAT. ch. 102 (1961) that Wisconsin's wording of the term "accident" in its act is slightly different and a modification of the original British terminology.

[14] The original English case from which the popular meaning of the word "accident" was adopted was Fenton v. Thorley, 89 L.T. R. (n.s.) 314 (H.L. 1903). See Bystrom Bros. v. Jacobson, 162 Wis. 180, 182, 155 N.W. 919, 920 (1916), and 1 LARSON, *op. cit. supra* note 1, §§ 37.20, 38.10. In the *Fenton* case the court said: "If a man, in lifting a weight, or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance, would be described as accidental." 89 L.T.R. (n.s.) at 315.

[15] See Venner v. New Dells Lumber Co., 161 Wis. 370, 374, 154 N.W. 640, 642 (1915), in which the court said: "The term 'accidental', as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury. . . . It contemplates an event not within one's foresight and expectation, resulting in a mishap causing injury to the employee."

that is, the effect upon the employee which followed from the fact that he lifted the sack, then surely the injury can be considered as accidental.[16]

It is evident that in Wisconsin the unlooked for or unforeseen event can be the result as well as the cause. The Wisconsin court points this out in *Bystrom Bros. v. Jacobson.*[17] Larson notes this as well when he says:

> The 'by accident' requirement is now deemed satisfied in most jurisdictions either if the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties. Accordingly, if the strain of the claimant's usual exertions causes collapse from heart weakness, back weakness, hernia and the like, the injury is held accidental.[18]

Once heart cases were found to be compensable, the issue of causation came to the forefront. To satisfy the statutory requirement that the injury must "arise out of the employment," the claimant must prove that the job activity caused the heart attack. Even though the injury—in our case the heart attack—was accidental, the causal relationship must still be shown; that is, the work, though usual and routine, must have caused or contributed to the bringing about of the heart attack.

Though the problem of causality is most troublesome in any workmen's compensation case, it is notably magnified in the area of cardiac cases due to the fact that most if not all forms of heart disease are progressive in nature and their characteristic symptoms frequently appear without warning after a long history of fine health. Throughout the medical profession there is widespread dispute as to the causality of heart disease and this further obscures an already hazy and controversial field.

Probably the most controversial cardiac cases involve those in which there is a gradual worsening of a degenerative condition. In some instances such a condition might reach a point where a mere slight effort would suffice to bring about death or disability. Consequently, management habitually contends that it should not be forced to bear the financial burden of such cases, because the worker might just as easily have had the attack while away from his employment.[19] The courts' tra-

[16] See I LARSON, *op. cit. supra* note 1, § 37.20.

[17] 162 Wis. 180, 155 N.W. 919 (1916). In that case the employee attempted to lift a cement block weighing approximately eighty pounds while in a sitting position, and in so doing strained the muscles in his right side. The court said: "The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was an external occurrence. . . . The undue strain was not forseen or expected. . . . There was, plainly, the physical causation spoken of in *Milwaukee v. Industrial Comm'n,* 160 Wis. 238, 246, 151 N.W. 247—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side."

[18] 1 LARSON, *op. cit. supra* note 1, § 38.00. See also §§ 38.20 and 38.30 and the footnotes therein referring to cases in Wisconsin and other jurisdictions which follow these doctrines.

[19] 29 NACCA L. J. 228 (1962-1963).

ditional reply to management's contention is the familiar tort argument that an employer takes an employee as he finds him. This view has long been adhered to by the Wisconsin court, which recently reiterated such position in the following statement:

> An employer takes an employee 'as is' and the fact that he may be susceptible to injury by reason of a pre-existing physical condition does not relieve the last employer from being liable for the workmen's compensation benefits if the employee becomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual.[20]

Courts have awarded compensation in numerous cases where the employment has "accelerated" the disease. These cases include various types of heart failure due to exertion, excitement, or other employment conditions promoting the failure of a heart which was already weakened but, absent the particular conditions of employment, might well have continued to function satisfactorily for an undetermined length of time.[21] However, so long as the effort from an employee's work accelerated an attack, the argument that the same injury might have occurred while the employee was at rest is no defense.

Due to the peculiar nature of heart disease, there is more than a mere possibility that in many instances industry is in fact footing the bill for injuries which are not really work-connected. This latter point poses a very real problem and encourages many employers to maintain that the workmen's compensation system is not capable of coping with cardiac cases. The fate of cardiac cases under workmen's compensation will largely depend upon the ability of the courts to formulate a clear-cut rational approach so that such cases may be adequately litigated.

In determining the compensability of cardiac cases, courts generally will apply either the "usual" or the "unusual" strain doctrines. The "usual" strain rule permits recovery even though the cardiac attack has arisen by the performance of an employee's normal or ordinary duties and functions. Jurisdictions adhering to this view believe that the workmen's compensation provisions should be libeerally construed. Before recovery is permitted under the "unusual" strain doctrine, a claimant must prove that he was subjected to some irregular strain or exertion in addition to that of his normal duties and thereby rebut the inference that the heart ailment was due to natural causes.[22] The theory underlying the latter belief is that the compensation acts were not

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[20] M. & M. Realty Co. v. Industrial Comm'n, 267 Wis. 52, 63, 64 N.W. 2d 413, 418 (1954). This position was reiterated in Green Bay Warehouse Operators, Inc. v. Industrial Comm'n, 19 Wis. 2d 11, 119 N.W. 2d 435 (1963).

[21] See 1 LARSON, *op. cit. supra* note 1, § 12.20.

[22] See *id.*, §§ 38.00 at 516, 38.60-64 at 543-56; MCNIECE, *op. cit. supra* note 10, at 5, 6; Comment, *Heart Attack as Compensable Injury*, 11 CLEV.-MAR. L. REV. 200-02 (1962).

intended for the indemnification of all injuries causally related to employment, but only for those injuries which were accidental in cause.

One of the problems in applying the "unusual" strain test is that it is commonly superimposed upon the causality requirement. In reality, if the heart attack is causally related to the employment the "unusual" strain test should then be utilized, but it should not be adopted as a crutch or excuse when the court is not satisfied with the proof of the causal relationship in a particular fact situation.[23]

The few courts that remain attached to the "unusual" strain rule have construed it strictly. One such jurisdiction has said that to follow the "usual" strain rule is equivalent to the conversion of the workmen's compensation acts into health insurance.[24] The American Heart Association formed a committee to study the relationship of strain to heart disease, and in 1962 this committee made the following recommendation:

> In view of the multitude of factors influencing the constantly changing physical status of a cardiac patient, especially one suffering from coronary disease, it is recommended that an unusual strain for the given individual be the only acceptable injury recognized as aggravating, or revealing, underlying cardiac disease.[25]

The fact that such a prominent and influential organization in the medical field has cast its support with the "unusual" strain rule may well signify the beginning of a retreat by the courts from the "usual" strain doctrine.

Another causation problem in cardiac cases is the confusion resulting from the discrepancy between the medical and the legal meaning of the term causality. The doctor is trained in the scientific approach to reach the etiology of an injury, whereas the lawyer's function is not that of identifying influences toward harm which may be found in pathology, but rather that of identifying influences toward legal responsibility for harm which may be found in the habits and behaviors of the society surrounding man.[26] The attorney need not search among the microbes to find the peg which is most deserving to shoulder the burden of the liability.

CARDIAC CASES IN WISCONSIN

The Wisconsin court declared in 1916 that a strain or exertion in one's employment producing physical injury to the employee would be compensable. In setting down this principle which is still followed today,

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[23] See Woods, *The Heart Attack Case in Workmen's Compensation*, 16 ARK. L. REV. 214 (1962).
[24] See Victor Wine & Liquor, Inc. v. Beasley, 141 So. 2d 581 (Fla. 1962).
[25] See 26 COMMUNITY SERVICE AND EDUCATION COUNCIL (1962).
[26] For an excellent discussion of the complexities in causality between the medical and legal professions, see Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEXAS L. REV. 630 (1953).

the court stated that "a physical strain which produces an injurious physical result constitutes an accident in the sense that that term is used in the act."[27] This precept has been consistently applied by the court in cardiac cases despite the presence of a pre-existing heart condition or some related deficiency.

Claims involving cardiac cases can be distinguished on the basis of the relative importance which the court or administrative tribunal attaches to (1) the pre-existing condition of the claimant; (2) the type and degree of strain involved (whether it was physical, emotional, or a combination of the two, and whether the court applied the "usual" or "unusual" strain tests); and (3) the expert medical testimony. These three items will be of prime consideration in analyzing the Wisconsin cases in the field of heart law.

A. Cardiacs Without Pre-existing Heart Defect

Where there is not a pre-existing heart condition, Wisconsin cases have been decided upon the degree of physical strain involved and, to some extent, the expert medical testimony of physicians. In *George C. Whalen,*[28] a case before the Industrial Commission in 1947, compensation was awarded to a game warden who pursued two violators on foot for two hundred yards before apprehending them. An argument with the violators followed during which the warden was threatened. All of these factors contributed to the emotional excitement of the warden, who shortly thereafter suffered a heart attack. Medical experts admitted the possibility of an attack of the warden's type caused by such exertion and excitement, but the Commission held that in view of the exertion and extreme excitement, which were immediately followed by symptoms and disabilities diagnosed as an infarct, it was reasonably probable that the injury was derived from such activity. The court placed little significance upon the medical testimony but rather was more impressed by the facts. Unfortunately, it has often become the habit in cardiac cases for the courts and commissions to grant recovery on the basis of an appealing fact situation while expert testimony of the medical profession falls upon deaf ears. In deciding the case the Commission failed to mention either the "usual" or "unusual" strain doctrines, but it is quite evident that an opposite result would have been reached had the warden walked rather than run the two hundred yards.

In a later case, *Paul Schultz,*[29] the court similarly allowed recovery

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[27] Bystrom Bros. v. Jacobson, *supra* note 14. This principle was cited again in Wisconsin Power & Light Co. v. Industrial Comm'n, 268 Wis. 513, 68 N.W. 2d 44 (1954) and Wisconsin Appleton Co. v. Industrial Comm'n, 269 Wis. 312, 69 N.W. 2d 433 (1955).

[28] Wisconsin Indus. Comm'n, Feb. 7, 1947. If there had been a notable delay between the exertion and the attack, quite possibly recovery would have been denied.

[29] Wisconsin Indus. Comm'n, Feb. 29, 1952.

to an assistant engineer who, after assembling a step ladder, received a sharp blow from the ladder as it fell to the ground and thereby suffered burning pains in his chest and arms. His condition was diagnosed as myocardial infarction caused by a partial coronary occlusion. Previous to this accident the claimant had been examined and found to be in excellent health without any signs of a heart ailment. The normal work activities of the claimant did not usually include such duties as assembling ladders and was of a considerably less rigorous nature. It was the determination of the Commission that such physical exertion in procuring and assembling the ladder did constitute unusual stress and strain for the claimant, which provoked the heart condition. Here the Commission applied the "unusual" strain doctrine and failed to consider that in reality the injury may have stemmed from the blow on the chest by the falling ladder, in which case the determination of the degree of strain would be of no importance.

In *State v. Industrial Comm'n*,[30] the court abandoned the "unusual" strain doctrine in allowing recovery to a game warden. The claimant had worked strenuously for several minutes attempting to remove a beaver dam embedded in the ice of a stream, became ill, and minutes later died from a heart attack. Previous to this time the warden was in good health and had been accustomed to similar work in his routine duties. Medical testimony was of the opinion that the decedent had a damaged heart prior to such attack, but went on to say that if the decedent had not been engaged in such strenuous work there was little reason to believe that he would have died at this time. Though the court failed to mention the "unusual" strain doctrine, it is evident that such doctrine would not apply in this case because the decedent was engaged in an activity which for him was not unusual. Realistically, the facts of the case would more properly lend themselves to the application of the "usual" strain test in light of the fact that recovery was awarded to the decedent. Certainly the medical testimony in some degree supported the court's finding, but no doubt the court was equally persuaded by the fact that the attack and resulting death followed immediately after performing the strenuous activity.

In 1958, the Commission in *Dorothy E. Sheahan*[31] once again awarded recovery to an individual suffering a fatal heart attack while performing his routine duties. This time a fireman collapsed minutes after entering a burning building, following his response to a fire call. Medical testimony was to the effect that death succeeded a coronary insufficiency as a result of the physical stress and smoke inhalation. The suddenness of the attack while performing duties as a fireman, coupled with the favorable medical testimony, were the factors which sufficiently impressed

[30] 272 Wis. 409, 76 N.W. 2d 362 (1956).
[31] Wisconsin Indus. Comm'n, Oct. 20, 1958.

the Commission to allow compensation. In this instance the decedent had been employed in his capacity as a fireman for nearly twenty-five years, so there is an implication of public policy behind the Commission's finding.

In *Herbert C. Petersen*,[32] the Commission in 1961 was faced with a case involving both emotional and physical strain. A school teacher was confronted with a fire in the school yard which she unsuccessfully fought, subsequently calling the fire department. The teacher was an extremely emotional and excitable person, and under the circumstances became gravely frightened and upset. As a result of such she became ill with a myocardial infarction which ultimately caused her death. Once again, medical testimony sustained a finding of the examiner that the infarction was caused by the decedent's emotional excitement and physical activity. After this decision it is questionable as to how the Commission will decide a cardiac case involving only emotional strain. In the *Petersen* case, the Commission was not faced with this precise issue. Most jurisdictions in the absence of physical exertion will not permit recovery for emotional strain by itself, for fear of opening the flood gates to such litigation in the cardiac area. However, a handful of jusdictions have permitted recovery for purely emotional strain in cardiac cases and, as yet, few of the often feared perplexities have arisen.[33]

Any semblance of a pattern or trend which had been established by the Commission and the courts in cardiac cases where there was no pre-existing heart condition was shattered by the later 1961 case of *Clara M. Schmoll*.[34] The decedent was a forest ranger and was checking a smoke report. In so doing he traveled by car for a distance and then walked less than one-quarter of a mile into a heavily wooded area, where he collapsed and died. The death followed the attack almost immediately and there was no indication of any pre-existing heart condition. Medical testimony was to the effect that decedent's death resulted from a coronary occlusion. The Commission dismissed the case on the basis that decedent did not sustain an injury arising out of the employment. It is troublesome indeed to see how the forest ranger in this case differs from the game wardens in the *Whalen* and *Industrial Comm'n* cases, or the fireman in the *Sheahan* case, each of whom was awarded compensation. Surely, it was just as much a routine duty of a forest ranger to enter a heavily wooded area to check out a fire report as it was for a fireman to enter a burning building in response to a fire

[32] Wisconsin Indus. Comm'n, March 17, 1961.

[33] In particular, such liberal minded jurisdictions as New York, Mississippi, and Michigan have permitted compensation in situations where mental shock was received in course of one's work due to emergencies, arguments, or reprimands. For cases in these and other jurisdictions, see McNIECE, *op. cit. supra* note 10, at 30-33, and footnotes therein.

[34] Wisconsin Indus. Comm'n, March 3, 1961.

alarm. The Commission made a complete about face without any feasible explanation. It would seem that if the Commission has decided that an "unusual" strain doctrine is now to be applied and an employee must perform strenuous duties outside his normal scope before recovery will be granted, it should expressly state this and not hide behind such reasoning as was advanced in this instance.

Further evidence that the Commission is moving toward the "unusual" strain rule in cases where there is no pre-existing injury to the heart was borne out by *Anna Wendt.*[35] In that case the decedent was employed as a laborer, and on the date in question was performing work other than his normal activity. He was required to operate at a more rapid and constant pace, which required more than the usual amount of exertion for him. During such activity the decedent was bothered by pain and other discomforts in his chest. He became unable to continue with his employment duties, was hospitalized, and died shortly thereafter from a coronary occlusion. The Commission awarded recovery, stating that the injury was sustained while performing services in the course of his employment and that such injury arose out of the employment.

Summary

It appears that Wisconsin has come full cycle since the *Whalen* case. Will the Wisconsin court and the Industrial Commission require an unusual or abnormal strain even where the claimant is performing some strenuous activity in his normal or routine duties, or will they merely require such exertion where the claimant, as part of his customary duties, is not exposed to what may be termed strenuous physical exertion? To clarify the area for all concerned it would be commendable if the court would adopt an "unusual" strain doctrine, set out a standard to measure what constitutes unusual strain, and adhere to this doctrine in all heart cases where there is no evidence of a pre-existing heart injury or defect. Without such guideposts cardiac litigation under workmen's compensation will continue to drift haphazardly in a stormy sea of confusion.

B. Cardiacs With Pre-existing Heart Defect

Further complications arise when the claimant who suffers a fatal or crippling cardiac had a pre-existing heart defect or injury. Since medical science is not certain what percentage of the new injury arose from the pre-existing condition and what portion from the claimant's employment, it is incumbent upon the court to establish rules which may be applied to resolve this dilemma.

In 1934, the Wisconsin court in *Malleable Iron Range Co. v. Industrial Comm'n,*[36] awarded compensation to an employee despite his pre-

[35] Wisconsin Indus. Comm'n, Feb. 23, 1962.
[36] 215 Wis. 560, 255 N.W. 123 (1934).

existing condition. The decedent was afflicted with arteriosclerosis in an advanced stage and suffered a rupture while helping pull a jack up an incline. A thrombosis developed, lodged in his lung, and thereby caused the employee's death. In allowing recovery the court said:

> The evidence leaves no room for doubt that the artery was extremely brittle and the rupture produced with less pressure or exertion than would have been required to cause it in a person of normal condition. This fact, however, does not prevent the rupture from being the result of Grant's work.[37]

Thus it was established that if the requisite conditions of liability under the workmen's compensation act were fulfilled, the fact of a pre-existing condition would not preclude recovery.

It must not be overlooked that even before recovery will be permitted in a cardiac case where there is a pre-existing condition, there must be proof of an accident. In *Schmitt v. Industrial Comm'n*,[38] the court denied recovery to an employee who was advanced in age and suffering from numerous ailments which are normally attributed to old age. Compensation was denied on the basis that there was no accident; nor were any of the employee's ills attributed to an occupational disease. Rather, the court said that the claimant was merely suffering from a general degenerative condition. Therefore, the court never considered extending the doctrine set down in *Malleable Iron Range*.

It might be well to point out that no cardiac award has ever been made by the court on grounds that such cardiac condition was an occupational disease. For recovery based on an occupational disease, it must be shown that the employment caused, aggravated, or accelerated the disease.[39] Due to the numerous factors involved and the nebulous nature of heart injuries in general, the aforementioned proof could well hinder any recovery based on this theory. The court has never candidly ruled out the possibility of recovery in cardiac cases on the theory that it is an occupational disease, but judging from statements made by the court, such possibility appears remote if not hopeless.[40]

Again in 1951, in the case of *James C. Christensen*,[41] compensation was awarded to an employee who was suffering from a pre-existing

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[37] *Id.* at 562, 255 N.W. at 124. The court went on to say that the showing of a fortuitous event in conjunction with performing ones work plus the fact that this had an open and immediate relation to the work which caused the injury, brought the case within the workmen's compensation act.

[38] 224 Wis. 531, 272 N.W. 486 (1937). Here the claimant was 72 years old, and worked only eight months for the employer before he was forced to quit due to trophic ulcers of both feet, diabetes, myocardial degeneration, and general arteriosclerosis.

[39] Hayes v. Ajax Rubber Co., 202 Wis. 218, 231 N.W. 584 (1930).

[40] See Andrzeczak v. Industrial Comm'n, 248 Wis. 12, 20 N.W. 2d 551 (1945); Zabkowicz v. Industrial Comm'n, 264 Wis. 317, 58 N.W. 2d 677 (1953); and Cutler-Hammer Inc. v. Industrial Comm'n, 5 Wis. 2d 247, 92 N.W. 2d 824 (1958).

[41] Wisconsin Indus. Comm'n, Nov. 11, 1951.

heart condition. Medical testimony held that this fact, coupled with the work effort and the existing weather conditions, was sufficient to cause the applicant's eventual collapse and injury. However, there was no medical testimony to the contrary and the Commission conceded that opposing medical testimony could quite conceivably have altered their ultimate decision. Although the Commission did not go so far as to say that they were adopting one of the strain doctrines, they did point out that the work effort was a significant factor in addition to the circumstances under which the work was performed. Not to be overlooked in cases of pre-existing heart injury is the importance of medical testimony, because frequently the factual matters may be in conflict and to resolve those disputes in arriving at its final determination, the court will be compelled to rely on expert medical testimony.

In *Wisconsin Power & Light Co. v. Industrial Comm'n*,[42] the court impliedly put its stamp of approval on the Commission's greater reliance upon medical testimony in heart cases where there was evidence of a pre-existing condition, when it awarded recovery to an employee for death resulting from the rupture of a congenital aneurysm in a cerebral blood vessel. Medical testimony pointed out that the heavy lifting which the employee was subjected to in the performance of his duties increased his blood pressure, thereby causing the rupture. In allowing recovery the court referred to the similarity this case had with the *Malleable Iron Range* case.[43]

In none of the cases involving a pre-existing heart condition has the court expressly mentioned either the "usual" or "unusual" strain doctrines. However, in *Wisconsin Appleton Co. v. Industrial Comm'n*,[44] a case which involved a back injury and which on its facts was closely related to cardiac cases with a pre-existing heart condition, the court utilized language indicative of the "usual" strain doctrine. In that case an employee who had a previous history of back problems had been performing heavy lifting in the scope of his normal employment functions. The stresses and strains in his bending and his lifting of weights in the usual routine manner brought about an "acute episode," requiring an operation. In citing the *Wisconsin Power & Light Co.* case, the court said that "it is not essential that the exertion producing the disability be out of line with the ordinary duties of the job in order that the disability be compensable."[45] It must be conceded that this statement by

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[42] 268 Wis. 513, 68 N.W. 2d 44 (1955).

[43] The court, in referring to the *Malleable Iron Range* case, said: "That case, medically and legally is so similar to the one now before us that we feel obliged now to reach a similar conclusion. According to the most recent text to which we have been referred, we are not alone in this view." 268 Wis. at 517, 68 N.W. 2d at 47. See also 1 LARSON, *op. cit. supra* note 1, § 38.20, at 519.

[44] 269 Wis. 312, 69 N.W. 2d 433 (1955).

[45] *Id.* at 322, 69 N.W. 2d at 439.

the court is all-inclusive, and certainly for a determination of that particular case such a broad and all encompassing statement was not necessary. However, the court has never retracted nor qualified the scope of this statement in subsequent cases. In cardiac cases previous to the *Wisconsin Appleton Co.* case, the court failed to mention either of the strain doctrines and yet recovery was permitted in these cases despite the fact that the attack occurred while the employee was performing his routine duties. This adds further strength to the contention that the court did intend their statement to apply to cardiac cases where there was a pre-existing heart condition. If such is the situation, it appears that the court will grant compensation in these cardiac cases so long as the medical testimony clearly substantiates the probability of the causal relationship, irrespective of whether such duties were merely the routine functions of the employee, provided that all other elements for recovery under the workmen's compensation act are present. However, the reliability of such argument will be doubtful until this precise question is brought before the court for judgment.

In its latest case, *Johnston v. Industrial Comm'n*,[46] the court refused recovery to an employee of a municipality who, after slipping while attempting to replace a manhole cover, fell and became lodged in the manhole and later suffered a cerebral thrombosis. Here too, the applicant had a pre-existing heart condition but the medical testimony differed as to what actually led to the attack in question. After one of the medical experts made conflicting statements as to the cause of the injury to the heart and stated that any statement made by him as to what prompted the injury would be mere speculation, the court held that in consequence of claimant's inability to meet his burden of proof recovery could not be granted.

Summary

In attempting to reach a conclusion based upon those cardiac cases where the claimant was subject to a pre-existing heart condition, there are few proven principles on which to rely. The court in this area has consistently adhered to medical testimony where possible, especially if such testimony is able to establish to a reasonable probability that the heart injury did relate to the employment, even though both the employer and employee knew of the pre-existing deficiency. It also appears that the court is more receptive to the application of the "usual" strain doctrine in this area, and in most instances once the causal relationship is established, the court has put little or no emphasis upon the degree of strain involved. Where there is a pre-existing condition, as compared to a cardiac case without such pre-existing deficiency, there is less likelihood that the determination will be grounded exclusively on the factual situation.

[46] 3 Wis. 2d 173, 87 N.W. 2d 822 (1958).

Despite these few generalizations, no definite standard has been established or consistently applied in this area. No doubt there is greater opportunity for an employee with a pre-existing heart condition to take advantage of the workmen's compensation provisions through spurious claims than for one who is not the possessor of such a pre-existing trait. This factor alone should prompt the establishment of a criterion or norm by which such claims may be litigated. The development of any formula will depend upon a process of trial and error, and the time is now ripe for the inception of such a development.

JAMES F. BARTL