Marquette Law Review

Volume 41
Issue 4 *Spring 1958*

Article 1

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MARQUETTE LAW REVIEW

Vol. 41 SPRING, 1958 No. 4

THE LIABILITY PHASE OF THE CARDIAC PROBLEM

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Whether there is liability under workmen's compensation acts or at common law for disability or death resulting from heart conditions depends ultimately upon the positional expertise of the judge who writes the final opinion in each particular case. Positional expertise is the variety derived from appointment or election rather than from professional education followed by specialized experience. While most people have zealotic opinions on most subjects about which they know nothing, such opinions are conversational rather than determinative. Sometimes, however, the performance of duties requires the sciolist to pronounce authoritative conclusions on problems which stump all experts in the specialized field. How do they do it? This is the type of question that should never be answered—at least, not in public. And sometimes the best answer is a counterquestion or two: Suppose one judge had a grandfather who died of a coronary occlusion at the age of eighty-five after shoveling some light snow, will that judge be intractably committed to the view that coronary occlusions invariably are the result of effort? And if another judge experiences a coronary occlusion while quietly enjoying his daily siesta, and then recovers to enjoy all nineteen holes of his daily round of golf, will he be committed permanently to the view that coronary occlusions are never caused by effort?

Recognition of the decisional processes in coronary cases is not denigration. Indeed, any expedient for the expeditious determination of the inexplicable is entitled to huzzas—perhaps even one hosanna. Controversies must be settled contemporaneously and in accordance with current concepts of right and justice. Because the affairs of the world cannot wait for absolute truth, postulates, half-truths, and evanescent truths must serve as substitutes; and when medical experts cannot agree on a subject, the only feasible method of obtaining determinations is to embrace the easily-acquired delusion that the mere legal authority to make the decision confers the sapience to make the correct decision.

To put it bluntly, most determinations of the existence of causal relationship between work and coronary difficulties are based on the

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application of *post hoc, ergo propter hoc* (after this, therefore because of it). Why this formula is applied in some cases and not in others is a mystery exclusively within the field of occultism. True, this formula is concealed—sometimes adroitly, usually abortively—in the purported application of one of the various contrapositive hypotheses which are propounded by leading cardiologists; and it is unimportant which hypothesis is applied as long as one is ostensibly applied. The ultimate correctness of any hypothesis is never as important as its utility.

So far as determining liability at common law or under workmen's compensation acts is concerned, there is no difference between heart conditions and lung or leg conditions. The difference is in administrative and judicial attitude, and not in the legal rules or the statutes as enacted by the legislatures. The requirements for compensation are usually: the occurrence of an accident or contraction of a disease; a causal relationship between work and accident or disease; being engaged in the performance of duties when the accident occurs or the disease is contracted.[1] These deceptively simple requirements bewail their responsibility for countless controversies, mountains (the Everest size) of testimony, and immeasurable swamps of administrative and judicial opinions.[2]

Whether an employee is the victim of an accident is an elementary problem for most people, but not for the courts. The trouble is that legislatures frequently use words incogitantly, and the courts have the onerous task of determining what the legislatures should have intended the words to mean—if any thought had been given to their meaning. That is why compensation acts ever since their enactment have been agitated by judicial juggling of the word *accident.* An accident has been defined as something unusual, unexpected and undesigned.[3] To illustrate some of the problems, a leg—a man's leg, because it's to be broken rather than admired—will be used as a stand-in for a highly controversial heart. If an employee slips on a well-greased floor of, say, a pretzel factory and breaks his leg, unquestionably he has suffered an accident: a painful, unnecessary accident which could have been avoided if the employer had used sense or sand, preferably both. Suppose, however, that a crate of pretzels is about to drop down an elevator shaft, and the employee, notwithstanding his realization that his leg will probably be broken, uses it to prevent the disintegrating casu-

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[1] See WIS. STATS. §102.03(1) (1955).

[2] The dangers of getting lost and permanently befuddled are so great that no practising lawyer should attempt prolonged excursions into these swamps. Rabid precedent hunters will ignore this warning—in fact, for them it probably comes too late.

[3] Vennen v. New Dells Lumber Co., 161 Wis. 370, 374, 154 N.W. 640 (1915); Bystrom Brothers v. Jacobson, 162 Wis. 180, 183-184, 155 N.W. 919 (1916); 58 AM. JUR., *Workmen's Compensation* §196 (1948); ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §37.20 (1952).

alty. The result certainly would not be unexpected, but does that prevent the incident from qualifying as an accident? And now suppose that the leg was a weak member—one that could break at the drop of a felt hat—and actually fractures in four places when the employee gently kicks a recalcitrant coarse-salt shaker. The kicking was intentional and hence not accidental, but the results were unintended: are results that are unintended or unanticipated sufficient to transform an incident into an accident? And finally, suppose a faithful drudge has been carrying 200-pound crates of pretzels eight hours a day, six days a week, for ten years without a gripe or a wince; then, on a usual day, while engaged in the usual work, a most unusual thing occurs—a leg breaks. Is there an "accident" when usual work suddenly causes some unusual result?

With the aid of vast quantities of verbiage, standard lubricant of juridical progress, most courts have finally reached substantial agreement. The general rule can best be stated in the words of Larson's Workmen's Compensation Law, a treatise of such outstanding excellence that some courts accept it as a substitute for legislative action:[4]

> "§ 38.00 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 claimant's usual exertions causes collapse from heart weakness, hernia and the like, the injury is held accidental. A very substantial minority of jurisdictions require a showing that the exertion was in some way unusual, or make other reservations, but this line of decision causes difficulty because of the constant necessity of drawing distinctions between usual and unusual strains. . . ."[5]

The mere fact that a leg—the same one acting as a stand-in for a heart—chances to break while the employee is at work does not obligate the employer to pay compensation. Liability is dependent upon the establishment of some causal relationship between the accident (or the severe results of the accident) and the employment[6]—and it is gratifying to observe compensation administrators assiduously striving to detect that essential relationship. The puzzling question is, How much is *some* causal relationship? Suppose the employment contributes nothing more than a fictitious straw, like the one accused—but never proved

[4] Constitutional, but only for courts of last resort!

[5] See, also, Wisconsin Power & Light Co. v. Industrial Comm., 268 Wis. 513, at 517, 68 N.W. 2d 44 at 46 (1955); Wisconsin Apleton Co. v. Industrial Comm., 269 Wis. 312, at 322-324, 69 N.W. 2d 433, at 438 (1955).

[6] 58 AM. JUR., *Workmen's Compensation*, §209 (1948); Rick v. Industrial Comm., 266 Wis. 460, at 465-466, 63 N.W. 2d 712, at 714 (1954); Hayes v. Industrial Comm., 202 Wis. 218, at 221-222, 231 N.W. 584, at 585 (1930). See: Samuel B. Horovitz, *The Litigious Phrase: Arising out of Employment*, 3 NACCA L. J. 15; 4 NACCA L.J. 19 (1949). See, also, Mr. Horovitz's INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS pp. 93-153 (1944).

guilty—of breaking a certain camel's back: is there sufficient causal relationship to impose liability upon the employer? Suppose the straw added by the employment was the flighty, cosmopolitan type that might land on the employee when at home watching television, or in the backyard mowing his lawn, or while bowling, fishing, or watching a baseball game: must the employer pay because the straw just chanced to land on the employee when at work?

Unquestionably society should assume a part of the burden of individual misfortunes—perhaps that is why the avaiability of compensation acts sometimes tempts "liberal" administrators and courts to impose *society's* obligations upon *employers.* Excesses of liberalism are frequently nothing more than symptoms of acute selfishness: a callous indifference to ethical responsibilities in seeking that precious glow of self-satisfaction which results from vicarious charity. True, it might be appropriate for employers to furnish health and accident policies as fringe benefits; indeed, the time may be approaching when compensation acts should bow out to universal insurance coverage, but the substitution should await legislative action. Every time an employer is ordered to pay compensation in the absence of authentic causal relationship between employment and accident, compensation acts die a little. There should, then, be some *substantial* causal relationship between the work—or "the conditions of employment," to use the current *recherché* terminology—and the breaking of the leg. That does not mean that the employment must be the sole cause or even the actual cause; it is sufficient if the employment aggravates a preexisting condition or accelerates its development.[7] In order to constitute a legal cause, the employment must contribute something more than a trace.[8]

For illustrative purposes, a vulnerable back will be impressed into service as a substitute for that much-broken leg: if an employee sustains a slipped intervertebral disc while attempting to pick up a two hundred pound bale of paper, the work should logically be considered a causative factor; but if the disc chances to do its slipping while the employee is bending over to pick up a single sheet of 8 x 12 paper, the work effort is too insignificant to qualify as a causative factor. The determination of precisely when the insignificant turns into the substantial is a medico-legal problem, to be decided in each case by fact-finders with the assistance of medical experts. Inconsistencies are inevitable but not necessarily reprehensible—something that cannot

[7] LARSON'S WORKMEN'S COMPENSATION LAW §12.20; M. & M. Realty Co. v. Industrial Comm., 267 Wis. 52, at 63-64, 64 N.W. 2d 413, at 418 (1954).
[8] Schmitt v. Industrial Comm., 224 Wis. 531, at 535, 272 N.W. 486, at 488 (1937). See also, Merton Lumber Co. v. Industrial Comm., 260 Wis. 109, at 114, 50 N.W. 2d 42, at 44 (1951); Buettner v. Industrial Comm., 264 Wis. 516, at 520-521, 59 N.W. 2d 442, at 444 (1953).

be said of the efforts of administrators and courts to convince themselves that no inconsistencies exist.

The final requirement is that the accident occur in the course of employment. After an employee has reported for work, under the decided cases in many jurisdictions, it takes sheer genius—or incredible stupidity—to step outside the scope of his employment. He may eat, sleep, play ball, make personal telephone calls, play the role of good Samaritan, make equipment for his personal use, and still be performing service for his employer.[9] He may even, in some jurisdictions, collect compensation for injuries sustained in a fracas he started with a fellow employee.[10] There are limits, however: an employee who leaves his work and walks to the floor below for the purpose of attacking his foreman cannot collect for injuries received in the ensuing fight.[11] If the accident occurs at work, compensation is payable even though the consequences appear away from work, e.g., if employee gets hit on the head at work but manifests no signs of brain damage until he gets home, or if he comes in contact with mumps while at work and experiences the consequences while on vacation.[12]

And now the time has come for retiring the accommodating leg and bringing the controversial heart on the stage. The legal principles are the same whether a leg or a heart is involved, but there is a profound difference in the character of the available medical testimony—testimony in heart cases is based fundamentally, not on observation, but on postulation. Medical experts can ordinarily tell what happened to a leg and why; without a postmortem examination they can only surmise what happened to a heart, and even with such examination they can only speculate as to why. That's what makes all heart problems—sentimental or anatomical—so interesting: everybody enjoys guessing games, and the empirical guess of the layman may eventually prove nearer the truth than the scientific guess of the outstanding expert.

It really would be unfair, inaccurate, and presumptuous to suggest that medical experts in cardiac cases actually indulge in guessing; as a matter of scientific necessity, they testify in the light of the hypothesis which they currently espouse. And the truly great medical expert is not one who, having espoused a certain hypothesis, feels morally obligated to remain constant throughout his professional life.

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[9] See: LARSON'S WORKMEN'S COMPENSATION LAW ch. V, "Course of Employment: Activity"; American Motors Corp. v. Industrial Comm., 1 Wis. 2d 261, 83 N.W. 2d 714 (1957).

[10] Horowitz, *Assaults and Horseplay under Workmen's Compensation Laws,* 41 ILL. L. REV. 311 (1946) and 12 LAW SOC. JR. OF MASS. 179 (1946).

[11] Vollmer v. Industrial Comm., 254 Wis. 162, 35 N.W. 2d 304 (1948).

[12] The statutory requirement is that the employee sustain an accident or injury while at work; there is no requirement that the consequences appear while at work. See, for example, WIS. STATS. §102.03(1) (1955).

The good expert, like the good doctor, is of the breed praised by Alfred North Whitehead in his dialogues:

> "One of the most advanced types of human being on earth today is the *good* American doctor."
>
> "Because in him science is devoted to the relief of suffering?
>
> "I would place it on more general grounds: he is sceptical toward the data of his own profession, welcomes discoveries which upset his previous hypotheses, and is still animated by humane sympathy and understanding."[13]

When medical experts testify differently as to the casual relationship between employment and disabling heart conditions, the divergence is not in veracity but in hypothesis. Any expert in the field of cardiology who testifies in accordance with his beliefs is honest and entitled to respectful consideration. No one has the omniscience to determine who is telling the truth when the truth is unascertainable. Hence the function of the jury, or judge, or administrator is not to pass upon the credibility of expert witnesses; it is, rather, to select and rely on the testimony which most nearly accords with the fact-finder's so-called common-sense medical views. The function of the attorney is to produce medical experts whose views support the attorney's medical views —and because of divergent medical opinions, there usually are competent, honest experts who will qualify.

When judges render opinions in doubtful cases, they are not obliged to indicate whether they believe their opinions sound to a reasonable judicial certainty or only to a judicial possibility—the opinions are determinative opinions even if a judge should candidly concede the possibility of incorrectness! The opinions of medical experts, however, are unacceptable in courts unless accompanied by avowals of the strength of their faith in the correctness of their opinions. If two medical experts are in perfect agreement, but one, who has strong convictions about most subjects, testifies to a reasonable medical certainty while the other, who habitually has views rather than convictions, testifies to a medical possibility, the opinion of the "strong conviction" expert will sustain a fact-finder's determination, while the opinion of the "view" expert will not.

Since each medical expert has his own opinion of the meaning of "reasonable medical certainty," "probability," "possibility," etc., it is virtually impossible for fact-finders to ascertain how much faith each expert really has in the soundness of his opinion. It is suggested that a realistic method of evaluating the strength of faith would be to require each medical expert to indicate how much he would bet on the correctness of his opinion. The following schedule is tentatively suggested:

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[13] DIALOGUES OF ALFRED NORTH WHITEHEAD, as recorded by Lucien Price p. 165 (Little, Brown and Company).

"I'll bet $5,000" equals "medical certainty"
"I'll bet $1,000" equals "reasonable medical certainty"
"I'll bet $500" equals "reasonable medical probability"
"I'll bet $100" equals "medical probability"
"I won't bet" equals "medical possibility"

A weakness of the proposed system is the absence of machinery for determining whether the expert wins or loses his bet, and the consequent danger of improvident betting. Of course, no determination by the fact-finders can establish the correctness or wrongness of opinion testimony; it can establish only the fact of its acceptance or rejection by the non-experts entrusted with the duty of deciding as best they can the merits of each particular controversy.

The opinions of the medical experts are seldom as violently divergent as they sound on the witness stand. If the question asked conveyed the same meaning to the various experts, and if they all concentrated on answering the precise question asked, a skillful interpreter might discover that the experts had employed different words—most of them sesquipedalian—to conceal identical opinions. Lawyers and doctors have many things in common, but language is not one of them. Each profession has its argot, its shibboleths, its abracadabras. The result is that doctors, finding an attorney's question entirely unintelligible, proceed to answer the question they hope was the one propounded. And the lawyer and the fact-finder remain perplexed and unenlightened —as they probably would be even if the question answered turned out to be the question asked. What is needed, of course, is some international service for clarifying questions and simplifying answers. Disagreements between medical experts would dwindle but fortunately not vanish—the disappearance of all disagreements between the experts would pronounce the doom of medical progress.

To consider one word that seems to relish the creation of chaos in medico-legal controversies: *precipitate,* a word that should be considered indecent when used in any trial or hearing involving liability for heart damage. The vice of the word is its incurable waywardness as a conveyer of ideas. The dictionary definition is "to hasten the occurrence of." Each expert, however, uses the word to express a personalized meaning.[14] When a medical expert testifies that the work precipitated the coronary occlusion, he probably does not mean that the work caused it, but he may mean precisely that—or the fact-finder might conclude that is what he meant. Now, while an accident or work-effort that accelerates the occurrence of a coronary occlusion may be sufficient for the imposition of liability, that is not true when the acceleration is hypothetical, trivial, piddling.[15] Nor is it true when there

[14] He may even use it to mean "to make it manifest," the meaning ascribed to the word by a prominent lawyer in a symposium published in the January, 1958, issue of an attractively bound, but neverthless praiseworthy, law review.
[15] See note 8 *supra.*

are droves of so-called precipitating factors, and it is impossible to pick on any particular one as deserving the selection as scapegoat. If, for example, a workman has a lunch consisting principally of saturated fats, receives a telephone call from his wife about a tree getting into the way of the family car, lifts a hundred-pound casting, detects an ominous scowl on his foreman's face: what mortal can say which one of these, if any, was entitled to the blame for the coronary occlusion that occurred that afternoon at four o'clock? And what mortal can say that the occlusion, which probably would have occurred at three minutes after four regardless of the various suspected precipitating factors, actually occurred three minutes earlier because of the factor selected pendente lite as the scapegoat? And still, those are the types of questions medical experts are expected to answer!

Another word that generates confusion when uttered by doctors in the presence of lawyers is *accident.* Possibly the word—like too many other words—also creates confusion when uttered by lawyers in the presence of doctors. Anything unusual that occurs in the human body is properly described by physicians as an accident. If a workman has a coronary occlusion while at work, the medical expert may testify that he suffered an accident at work; this testimony, however, has no bearing on the question of whether there was any causal relationship between the work-effort and the occlusion. Fact-finders (because of their legal backgrounds), juries (because nobody takes the trouble to tell them otherwise), and judges (because of their positions) naturally assume that an accident is something exogenous and hence something somebody ought to pay for. Because so many intelligent people suffer from atrophy of listening ability, explication of the medical usage would be difficult, perhaps impossible; it would be more feasible to induce medical experts to drop the word from their witness stand vocabulary—it has only three syllables and hence they'd never miss it.

Two little words that medical experts strive not to use on the witness stand are *yes* and *no.* The reluctance to uttering these words is not a consequence of professional aversion to monosyllables. Nor is it due to ignorance or obstinancy, as insensate lawyers sometimes insinuate; it is due to professional ethical standards which tolerate no compromise with expediency. Respect for a doctor's intellectual integrity should restrain any attempt to harass him into denuding his opinion of significant qualifications or transmuting hypotheses into established scientific facts. The medical expert can properly answer yes or no to the question of whether in his opinion the coronary occlusion was due to the work effort; if he answers yes or no to the question of whether the coronary occlusion was due to the work effort, he may still qualify as an expert witness but not as a medical expert. And still, administrative bodies and courts enthusiastically hail the "yes-or-no"

variety of expert, because opinions acquire a smug appearance of soundness when ostensibly based upon the unequivocal testimony of some doctor—any doctor, in fact. It is, perhaps, fortunate that recitals of unequivocal testimony sometimes becloud bizarre misinterpretation of medical testimony and destroy all traces of word-stuffing of witnesses' mouths.

The relationship between coronary disease and work effort is a problem exclusively for doctors; whether that relationship, as described by the medical expert whose opinion the fact-finder chooses to rely upon, constitutes *causal* relationship in the technical legal sense is a problem for lawyers. It is, however, almost as difficult for lawyers not to trespass into medical fields as it is for doctors not to stray into legal fields—or should it be called a tie, as a matter of professional comity? There is this difference, however: no one consciously requests medical opinions of lawyers; doctors, however, when on the witness stand are habitually asked legal questions disguised in elaborate medical trappings, with the overt intent of inducing the doctors to decide the merits of the controversy.

Two fruitful sources of heart cases that require administrative or judicial attention are insurance policies and workmen's compensation acts—the last mentioned source has recently started to produce with prodigality that threatens the extinction of compensation acts.[16] The prodigality, incidentally, is not a result of advances in medical science, but rather of legal skill and pertinacity. In the insurance policy cases the legal problem is usually whether the something or other was the cause of the heart damage,[17] and frequently whether that something or other was the sole cause of heart damage.[18] The solution is a result, ordinarily, of applying the rules of proximate cause; but there is a tendency to scrape from "proximate cause" its prodigality of verbal barnacles by the simple expedient of defining it as "substantial factor."[19]

Heart cases in the compensation field have become so multitudinous as to defy collation.[20] They'd probably defy collation regardless of

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[16] Based on the number of heart cases listed in the 1955-1957 Topical Index of WORKMEN'S COMPENSATION REPORTER (Commerce Clearing House, Inc.), the cases reaching the courts per year have just about doubled in the past ten years—and only a small percentage of controversies decided by administrative bodies ever get into courts.

[17] For example: Eschweiler v. General Accident & Life Assur. Corp., 136 F. Supp. 717 (E.D. Wis. 1955), *aff'd*, 241 F.2d 101 (7th Cir. 1957).

[18] Examples: Gerber v. Wloszczynski, 188 Wis. 344, 206 N.W. 206 (1925); Herthel v. Time Ins. Co., 221 Wis. 208, 265 N.W. 575 (1936). See: Annot., 56 A.L.R.2d 800 (1957), "Heart attack following exertion or exercise as within terms of accident provision of insurance policy."

[19] See discussion in Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W. 2d 29 (1952). See, also, Colla v. Mandella 1 Wis. 2d 594, 85 N.W. 2d 345 (1957).

[20] For collections of heart cases, see SCHNEIDER'S WORKMEN'S COMPENSATION, §1387 (3rd ed.); Case notes, 9 N.C.C.A. (N.S.) 335 and 28 N.C.C.A. (N.S.)

number, for each case achieves uniqueness—each is a law unto itself. The determination of the case by the fact-finders depends on which particular expert they conclude most nearly reflects their medical views on the day—perhaps hour—of decision. In the courts the determination of the case ordinarily depends on whether the record made before the fact-finders contains any evidence sustaining the findings; but if the reviewing court considers the findings too divergent from its personal medical views, it may interject some alchemic legal principle and thereby achieve a question of law—which somehow authorizes the reviewing court to substitute its own findings of fact. And if the inferences drawn by the fact-finders differ from those the court wishes to draw, those inferences may be extirpated by the simple expedient of calling them illogical, whereupon the reviewing court may substitute its own inferences. Many opinions in heart cases, some holding and some denying liability, may be read with profit and stimulation. However, some of the opinions connecting heart damage with employment fairly ooze *gliberality*—a combination of glibness (95%) and liberality (5%).

Unpredictability of the results does not preclude some discussion of the procedure in compensation claims based on damaged hearts. If the claimant has the burden of establishing his claim when based on a damaged leg, he likewise has the burden of establishing his claim when based on a damaged heart. Probably most courts and administrative agencies would aver, even asseverate, that the nature of the injury does not modulate the requirements—another illustration of the dimming effect of sympathy and emotion on the powers of perception. Whether the administrative findings must be supported by "some evidence," "some credible evidence," "some substantial evidence," "some evidence unexplained" (the acme of awkward tests!), "the weight of evidence," etc., has been the subject of interminable judicial logomachy. The test actually applied seems to be whether there is sufficient evidence in the record so that judicial conscience is not outraged by the fact-finder's conclusion. The discrepancies in results are probably due to the tendency of some judicial consciences to outrage more readily than others.

In some jurisdictions presumptions have been created by legislatures or contrived by courts in regard to injuries or death occurring during the course of employment.[21] Presumptions, however, vanish in the

10, "Compensability of death or incapacity from cardio-vascular conditions and diseases"; Annots., 19 A.L.R. 110 (1922), "Workmen's compensation: death from heart disease"; Annots., 28 A.L.R. 204 (1924) and 60 A.L.R. 1299 (1929), "Workmen's compensation: injury or death to which pre-existing physical condition of employee contributed"; 1 LARSON'S WORKMEN'S COMPENSATION LAW pp. 519-531. For a Wisconsin compensation case involving a fatal heart attack, see State v. Industrial Comm., 272 Wis. 409, 76 N.W. 2d 362 (1956).

[21] See LARSON'S WORKMEN'S COMPENSATION LAW §10.33; Peterson v. Industrial

presence of any evidence.[22] Hence, the mere determination that death was due to a coronary occlusion might be sufficient evidence to eliminate the presumption that death was caused by the employment, and place upon the claimant the burden of proving the causal relationship.[23] It must be recognized, however, that the conferring of validity on presumptions is one of the perquisites of courts of final jurisdiction.

While ordinarily claims for disability or death due to disease or injury require the support of medical testimony,[24] in limited fields courts have, out of deference to the expert knowledge of the administrative agencies, upheld awards without medical testimony.[25] In some cases awards have been upheld on the basis of the sequence of events.[26] And in a recent case where the industrial commission dismissed an application based on death from coronary occlusion on the ground that no medical testimony had been presented, the courts remanded the case with directions to formulate an award.[27]

In summary, then, legal liability for disability or death from heart damage depends on—well, what does it depend on?

Comm., 269 Wis. 44, at 48-49, 68 N.W. 2d 538, at 540 (1955); WIS. STATS. §102.03(1)(f) (1955), which creates a presumption that employees who are required to travel are deemed to be performing services at all times, but there is no presumption in the present law that injuries arise out of the employment. See Rick v. Industrial Comm., 266 Wis. 460, at 464-465, 63 N.W. 2d 712, at 714 (1954).

[22] Scholz v. Industrial Comm., 267 Wis. 31, at 41b-41c, 64 N.W. 2d 204, 65 N.W. 2d 1 (1954). See, 20 AM. JUR., *Evidence* §162 (1939).

[23] See McCormack v. National City Bank of New York, 303 N.Y. 5, 99 N.E. 2d 887 (1951).

[24] Voelz v. Industrial Commission, 161 Wis. 240, at 242-243, 152 N.W. 830, at 831 (1915); Merton Lumber Co. v. Industrial Comm., 260 Wis. 109, at 118, 50 N.W. 2d 42, at 46 (1951); 58 AM. JUR., *Workmen's Compensation* §433, 435, 438 (1948).

[25] LARSON'S WORKMEN'S COMPENSATION LAW §59.51; Marathon P. M. Co. v. Industrial Comm., 203 Wis. 17, 233 N.W. 558 (1930) (occupational hernia). See, also, McCarthy v. Sawyer-Goodman Co., 194 Wis. 198, 215 N.W. 824 (1927) (compensation denied where all medical testimony indicated hernia was traumatic).

[26] Teal v. Potash Company of America, 60 N.M. 409, 292 P.2d 99, 102 (1956); Nash-Kelvinator Corp. v. Industrial Comm., 253 Wis. 618, at 624-625, 34 N.W. 2d 821, at 822 (1948); LARSON'S WORKMEN'S COMPENSATION LAW §79.51, 79.52.

[27] Industrial Commission v. Havens, ——— Col. ———, 314 P.2d 698 (1957). The commendable feature of this case is the dissent.