

# Workmen's Compensation: Occurrence of Disability in Occupational Disease

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It is difficult to suggest any standards which the courts should adhere to in disposing of these cases. Nor can the problems of policy concerned be solved by suggesting that there are two rules, one permitting "recovery for fright" and the other denying that there can be such recovery, and suggesting, too, that each court must line up under one rule or the other. There are any number of different situations in which "fright" may appear, and these different situations require different adjustments. There can be no strict rule nor any liberal rule. No person brought into a case as a defendant ought to be, nor is he, responsible for every consequence which can or does follow as a result of his conduct. Factors such as convenience from the point of view of those concerned about the judicial process, punishment for those persons whose conduct has been selfish, and concern for the person who has been affected by this conduct, are matters which the judges consciously or unconsciously carry in their thoughts when disposing of these or any other tort cases. The bar may not like a particular disposition in a particular kind of case, but temporarily, at least, the bar must accept it for what it is, a choice of policy.

ADAM E. WOLF

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**WORKMEN'S COMPENSATION—OCCURRENCE OF DISABILITY IN OCCUPATIONAL DISEASE.**—The increased influx of cases in which the claimant alleges disability due to occupational disease, and particularly to that disease known as silicosis<sup>1</sup>, merits a serious consideration of the

enjoyment of her home and an unlawful entry was an invasion of such right. In *Jepps v. Jensen*, 47 Utah 536, 155 Pac. 429 (1916), recovery was allowed for injuries resulting from fright alone where the fright was caused by the wanton and willful acts of the defendant, though such acts were directed against the plaintiff's husband, and not against the plaintiff personally. Such conduct upon the part of the defendant took place in the home of the plaintiff. In *Alabama v. Baladoni*, 15 Ala. App. 316, 73 So. 205 (1916), the defendant shot a dog in the close proximity of the plaintiff's daughter. The plaintiff sustained a fright and physical consequences followed, for which she was allowed to recover. Nowhere throughout the opinion is there an indication that the plaintiff was frightened other than because of her own personal peril. In *Engle v. Simmons*, 148 Ala. 92, 41 So. 1023 (1906), defendant's employees entered the home of the plaintiff and rummaged around, without her permission and in her presence. The plaintiff was frightened and sustained physical injuries therefrom. Recovery was allowed upon the theory that the right invaded was that of the peaceful possession of the premises. See also *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59, 7 L.R.A. 619 (1890). In the case of *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141, a case strictly analogous to *Waube v. Warrington*, (Wis. 1935) 258 N.W. 497 (1935), a servant of the defendant negligently permitted a truck to coast down a hill. Mrs. Hambrook saw the truck coming around a curve, shortly after she had left her children at a point above the curve. She was not in any personal physical peril. She became fearful for the safety of her children, and upon inquiry was informed that a little girl had been injured. She went to the hospital and found that her daughter had been injured. She sustained a severe shock and consequent physical injury from which she died. The court assuming the existence of a duty, proceeded to view the case from the standpoint of proximate cause and permitted a recovery.

<sup>1</sup> Biennial Rep. Wis. Ind. Comm. (1932-34), 69. The report defines silicosis as "a disease of the respiratory tract caused by inhalation of deleterious dust in certain industries."

present status of the law which governs recovery of compensation under the Workmen's Compensation Act.<sup>2</sup> The long struggle for adequate protection for employees against both bodily injury and occupational disease is revealed in a review of the work of the courts and legislature during the past two decades.

It was early established that the injury for which compensation was to be paid under the Workmen's Compensation Act was only such as was incidental to and grew out of the employment.<sup>3</sup> The Act did not extend to injuries from exposure to hazard which was not peculiar to the industry or substantially increased by the nature of the services.<sup>4</sup> Neither would the courts extend the Act to include maladies which were not truly "accidental injuries."<sup>5</sup> There were indeed few courts which were willing to follow the lead of the Massachusetts and Wisconsin decisions in interpreting the various Compensation Acts to include diseases which were the result of the employment. The eastern court as early as 1913 decided that a "personal injury" as used in the act included any damage, injury, or harm which arose out of and in the course of the employment and which caused incapacity for work and took from the employee his ability to earn wages.<sup>6</sup> The Wisconsin court, in the *Vennen* case, allowed compensation to the survivors of an employee whose death was caused by typhoid fever contracted from drinking impure water furnished by the employer for the use of the employees. The reluctance of the court to make a broader interpretation of the Act was evidenced by its pointed distinction between disease resulting from accidental injury and a disease which results from an idiopathic condition of the system, not attributable to some accidental agency growing out of the employment. The latter class of diseases were held not to be within the contemplation of the statute. Justice Barnes, dissenting, expressed the then prevalent rule that no

<sup>2</sup> WIS. STATS. (1933) § 102.01, in which "injury" is defined as "mental or physical harm to an employee caused by accident or disease."

<sup>3</sup> *Hoenig v. Ind. Comm.*, 159 Wis. 646, 150 N.W. 996, L.R.A. 1916A 339 (1915); *Federal Rubber Mfg. Co. v. Havolic*, 162 Wis. 341, 156 N.W. 143, L.R.A. 1916D 968 (1916).

<sup>4</sup> *Ellingson Lumber Co. v. Ind. Comm.*, 168 Wis. 227, 169 N.W. 568 (1918).

<sup>5</sup> *Mcruz v. Pfister and Vogel Leather Co.*, Wis. Workm. Comp. Rep. (1914) 46; *Johnson v. Bauer Pottery Co.*, 1 Cal. Ind. Acc. Comm. Dec. No. 5 (1914) 11; *Fenton v. Thorley*, [1903] A.C. 443; *Broderick v. London City Council*, [1908] 2 K.B. 807, 15 Am. & Eng. Ann. Cas. 895 (1908); *Steel v. Cammel L. & Co.*, [1905] 2 K.B. 232, 2 Am. & Eng. Ann. Cas. 142 (1905); *Walker v. Lilleshall Coal Co.*, [1900] 1 Q.B. 48 (1900); *Liondale Bleach Dye & Paint Works v. Riker*, 85 N.J.L. 426, 89 Atl. 929 (1914), in which the court says that "where no specific time or occasion can be fixed upon as the time when the alleged accident happened, there is no 'injury by accident' within the meaning of the statute."

<sup>6</sup> *Johnson v. London Guar. & Acc. Co. Ltd.*, 217 Mass. 388, 104 N.E. 735 (1913) in which compensation was awarded for lead poisoning arising in the course of employment; *Stone v. Travelers Ins. Co.*, 1 Mass. Work. Comp. Cases 470 (1913), where pneumonia contracted as a result of wetting feet in a leaky boat was held a personal injury; *In re Hurle*, 217 Mass. 223, 104 N.E. 336 (1913); *Kalanquin v. Travelers Ins. Co.*, 2 Mass. Work. Comp. Cas. 748 (1914), which held death from "stone grinder's phthisis" caused by inhalation of grinding dust compensable; *Vennen v. New Dells Lumber Co.*, 161 Wis. 370, 154 N.W. 640, L.R.A. 1916A 273, Ann. Cas. 1918B 293 (1915).

diseases, even though the result of accidental injury, were meant to be compensated by the Act.<sup>7</sup>

The strict construction of the phrase "accidental injury" in the various statutes inspired many of the legislatures to extend the scope of the compensation acts to include awards for disability due to what has become known as occupational disease.<sup>8</sup> This legislative action led, in turn, to the present large volume of claims for compensation for disability due to occupational disease. Unlike ordinary accidental injuries, the time and place of which can usually be determined with ease by the Industrial Commission, occupational diseases have placed upon the courts the very difficult burden of attempting to justly award compensation to the incapacitated worker without unduly holding the employer and his carrier to liability. The difficulty presents itself in those cases where one employer is responsible for exposing the worker to the disease, while another employer subsequently may become liable at such time as the disability occurs.<sup>9</sup> The court has clearly expressed the Wisconsin rule in the *Zurich* case, holding that the "time of accident" within the meaning of the statute in occupational diseases is the time when the disability first occurs, and the employer in whose employment the employee is and his insurance carrier are liable for the total consequences of such disability. If the end result, therefore, is due to exposure already complete, such employer and such carrier are liable accordingly.<sup>10</sup> The decision points out that the statute is not aimed at exposure, but at disability, so that an accident or occupational disease which produces no disability is not compensable.<sup>11</sup>

<sup>7</sup> *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N.W. 485 (1914) where no compensation was awarded for disability due to lead poisoning, the court holding the poisoning to be a disease and not an accidental injury.

<sup>8</sup> WIS. STATS. (1933) § 102.35. The provisions of §§ 102.01 to 102.34, inclusive, are extended so as to include, in addition to accidental injuries, all other injuries, including occupational diseases, growing out of or incidental to the employment.

<sup>9</sup> *Schaefer and Co. v. Ind. Com.*, 185 Wis. 317, 201 N.W. 396 (1924), wherein the commission found that three successive employers had contributed to the exposure, and attempted to apportion the liability according to the terms of the exposure. The court held that an employer for whom the employee was not working at the time his disability occurred was not liable; *Employer's Mutual Liability Insurance Co. v. McCormick*, 195 Wis. 410, 217 N.W. 738 (1928); *Falk Corp. v. Ind. Comm.*, 202 Wis. 284, 232 N.W. 542 (1930); *Michigan Quartz Silica Co. v. Ind. Com.*, 214 Wis. 492, 253 N.W. 167 (1934).

<sup>10</sup> *Zurich Gen. Acc. & Liability Ins. Co. v. Ind. Com.*, 203 Wis. 135, 233 N.W. 772 (1930). Here the worker's first disability appeared in 1920, after eight years of exposure. He worked again in 1921, but became disabled for six months in 1922. In Aug. 1923, his employer transferred him to outside work, where he continued to Oct. 1927, at which time he became a patient at Muirdale Sanitarium, suffering from tuberculosis, with death resulting in 1929. The commission found that there was no danger from the outside work, but that pneumoconiosis was contracted and resulted in disability prior to 1926, holding the 1923 attack a new attack, not a recurrence. The Zurich Co. was the insurance carrier prior to 1926, and was held liable for partial disability, total disability, and death benefits to the widow.

<sup>11</sup> *Zurich Gen. Acc. & Liability Ins. Co. v. Ind. Comm.*, 203 Wis. 135, 148, 233 N.W. 772, 777 (1930), cited note 10, *supra*; *Kimlark Rug. Corp. v. Ind. Comm.*, 210 Wis. 319, 246 N.W. 424 (1933); *Bergeron's Case*, 243 Mass. 366, 137 N.E. 739 (1923).

In many cases the exposure results in only partial disability, with subsequent recurrence of the disease under a new employer. The rule adopted to govern these instances holds that if the disability is partial and there is recovery followed by subsequent exposure and disability, the commission must determine whether such subsequent disability arose from a recurrence or is due to a new onset induced by the subsequent exposure. Where the subsequent disability is due to a new onset of the disease, the employer and the carrier at the time the total disability manifests itself are liable. Where, on the other hand, there is no contributing subsequent exposure and the disability is merely a recurrence of the old disease, the employer in whose employment the worker is when the recurrence takes place is not liable, nor is his insurance carrier.<sup>12</sup> The *Zurich* case provides adequately for protection where the employee is actually disabled by disease under the first employer, holding the insurance carrier at the time the employer received notice of partial disability liable therefor and for subsequent total disability due to a return of such disease.<sup>13</sup> But where there is no actual disability under the first employer, and, though disability does appear under a second employer who, however, in no way caused, aggravated, or accelerated such disability by reason of the employment, the law provides no compensation.<sup>14</sup> Where, in such cases, the commission finds that the second employer did contribute to the cause of the occupational disease, although the facts indicate that the first employment very materially exposed the employee, the burden of compensation is placed upon the second employer.<sup>15</sup> In the *Nordberg* case, the court explains that in those instances where there was no compensable injury under the first employment, it is not necessary for the commission to determine whether the present disability is a mere recurrence of a former attack or a new onset. In order to make such a determination essential or appropriate, it was necessary for the record to disclose a prior attack resulting in complete disability. The latter showing is material for the purpose of placing the liability upon the proper employer.<sup>16</sup>

<sup>12</sup> *Outboard Motor Co. v. Ind. Comm.*, 206 Wis. 131, 239 N.W. 141 (1931). The employee here for twenty-six years worked for various grinding companies, inhaling silica dust throughout that period. The defendant company was the last employer, but for only 260 hours. The last employment, wet grinding, exposed him very slightly to dust. Medical testimony showed that he had pneumoconiosis before, and that tuberculosis developed on his second last job, causing the disability which appeared in his last employment. The commission placed liability on the defendant company but the court excused them on the ground that the breakdown was a mere recurrence of a disease which had previously disabled him.

<sup>13</sup> *Zurich Gen. Acc. & Liability Ins. Co. v. Ind. Comm.*, 203 Wis. 135, 148, 233 N.W. 772, 777 (1930), cited note 10, *supra*.

<sup>14</sup> *Hayes v. Ind. Comm.*, 202 Wis. 218, 231 N.W. 584 (1930); *Kannenberg Granite Co. v. Ind. Com.*, 212 Wis. 651, 250 N.W. 821 (1933), in which the court states that the "question of whether a short period of second employment contributes to the end result, though a delicate question for the fact finding body, is yet one for the commission in the first instance, and its conclusions cannot be disturbed here if any evidence can be found in its support."; *Massachusetts B. & I. Co. v. Ind. Com.*, 211 Wis. 52, 247 N.W. 343 (1933).

<sup>15</sup> *Nordberg Mfg. Co. v. Ind. Com.*, 210 Wis. 398, 245 N.W. 680 (1933).

<sup>16</sup> *Nordberg Mfg. Co. v. Ind. Com.*, 210 Wis. 398, 402, 245 N.W. 680 (1933), cited note 15 *supra*.

The present status of the law, then, allows compensation for disability which occurs only while the relation of employer and employee exists.<sup>17</sup> What constitutes disability has been reiterated by the court in the recent *North End Foundry* case as "any condition of a man's body which makes him less resistant to attacks of disease and impairs his vitality. It is not necessary that the disability be of such a kind or extent that the person subjected be aware of it, that it in any way impair bodily functions or manifest itself in other ways. The term is applied to all subsequent phases from which the subject suffers until it has reached a stage where it impairs his ability to carry on his normal bodily functions, at which point he is said to be physically disabled."<sup>18</sup> The court previously, in the *Employers' Mutual v. McCormick* case, stated the reason why it was necessary to hold disability to occur when the subject was no longer able to perform services thus: "Unless the date when the employee is disabled from rendering further services be taken as the date which determines liability, it will be very difficult to administer the Workmen's Compensation Act so far as disability resulting from occupational disease is concerned. The protection of the rights of both the employer and the employee requires that liability be fixed as of that date. If liability must be determined as of the date when the disease had its inception, the employee would be under the necessity of giving notice of every slight ailment, which might be the incipient stage of some occupational disease that might cause disability at some more or less distant future."<sup>19</sup> The question of proper notice would obviously also prove difficult were no fixed date of disability determinable.

The only apparent miscarriages of legislative intent, namely those cases where an employee is left helpless because he was not disabled while under a first employer, with the second employer being excused because the nature of the second employment did not give rise to the disease, and those cases where a second employer, though apparently not to blame for the employee's disability which was caused by exposure of previous employments, is held liable, are properly attributable to the legislature itself. Time after time the courts have vigorously decried the legislature's failure to make special provision for determining when disability should be deemed as having arisen. In the *Nordberg* case the court pointedly remarks: "We take this occasion to emphasize again, as we have many times in the past, that the right to compensation for occupational disease hangs on a slender thread, in view of the very cursory statutory provisions upon which that right must rest. It has required no little judicial ingenuity to save the right in many cases where the legislature seemed to intend compensation to be paid. It is realized full well here that most any time judicial ingenuity will be baffled, and there may come a time when a worthy employee must go uncompensated because of the failure of the legislature to grapple with the subject in a specific and definite way."<sup>20</sup> Similarly, in the *North*

<sup>17</sup> *North End Foundry Co. v. Ind. Com.*, (Wis. 1935) 258 N.W. 439; *Galancy Malleable Iron Co. v. Ind. Com.*, (Wis. 1935) 258 N.W. 445.

<sup>18</sup> *North End Foundry Co. v. Ind. Com.*, (Wis. 1935) 258 N.W. 439, 445.

<sup>19</sup> *Employers' Mutual L. Ins. Co. v. Ind. Com.*, 195 Wis. 410, 414, 217 N.W. 738, 740 (1928), cited note 9, *supra*.

<sup>20</sup> *Nordberg Mfg. Co. v. Ind. Com.*, 210 Wis. 398, 403, 245 N.W. 680, 682 (1933).

*End Foundry* case, the court describes the difficulty of finding a workable rule without the aid of the legislature, saying that "it was in the interest of employees as well as employers that some definitive interpretation be given to the statute. Probably all experienced persons know that there is a hazard in the so-called dusty trades but, like a soldier in the army, each one thinks he may escape. Authority could be found in the books for holding the statute unworkable because too indefinite. If the whole statute were condemned upon that ground, then the right to compensation would be lost to many persons where it was admittedly due." And further, "the rule was adopted for the reason that the fundamental idea of the Workmen's Compensation Act is to award compensation for a wage loss suffered either by disability, partial or total, permanent or temporary. Unworkable features of the statute have been pointed out in numerous cases, and no one realizes more than does this court that its clarification is a matter of great difficulty. It has been indicated in a number of cases that the power to remedy the situation rests solely with the Legislature; that the court when it has laid down its interpretation has gone as far as it can go in the performance of its judicial functions."<sup>21</sup>

It is obviously the duty of the legislature to clarify this situation so as to place the cost of injury or disability on some one of the employers on the theory that such compensation is properly chargeable against a part of the cost of industrial activity and production.

AARON HOROWITZ.

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<sup>21</sup> *North End Foundry Co. v. Ind. Com.*, (Wis. 1935) 258 N.W. 439, 442, 443.