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OCCUPATIONAL DISEASE LEGISLATION

In the afternoon of July 15, 1936, in Bergen County, New Jersey, John Bollinger was operating a machine which turned out building blocks made of ashes, sand, and cement. In the performance of this work a certain quantity of the sand and ashes inevitably found its way into his shoes. John had a pigmented mole on his left foot, about half an inch in diameter, located on the outer aspect of his instep, just above the little toe. On that day he felt a severe pain in his left foot where the mole was located. It bothered him "real bad." After quitting work and when he was removing his socks, preparatory to taking a shower bath, the stocking was stuck to the mole and was stained with blood. "It just looked like a little scratch, a little spot—like the ashes irritated it a little bit." Later that evening, when he got home, his wife applied a home remedy to the affected part. This condition during the weeks that followed did not bother him sufficiently to cause him to "lose work" but about four weeks later the mole started "to ooze" and, upon the advice of his physician, he went to the Paterson General Hospital. The mole was then found to have developed into a malignant cancer and it was surgically removed. He remained in the hospital for three days. Six weeks later—during the interval he walked on crutches—another operation was performed upon the foot and leg as far as the groin.

Editor's Note:—This article represents an address by Kenneth Perry, Esq. prepared in collaboration with Robert Mortimer, Esq. and rendered to the New Jersey Self Insurers' Association at its annual meeting in October, 1939.

The Editors are of the opinion that the subject-matter is timely and of sufficient importance to warrant a publication of the address in complete form. The New Jersey Bar is aware of the need for more comprehensive legislation dealing with occupational diseases, and it is hoped that Mr. Perry's contribution may tend to assist in satisfying that need.

This operation was necessary because of objective evidence that the disease had spread. This time he remained in the hospital thirty-eight days. In January, 1937, he returned to work and was assigned to a light task "around the yard." On June 3, 1938 John died. The causation was undenied.

Were John's dependents entitled to compensation under the New Jersey Workmen's Compensation Act? The referee in the Bureau said "no." He found that the condition complained of was "purely occupational and not the result of an accident arising out of and in the course of employment." The judge in Common Pleas agreed. He found that John had not established "any compensable accident." On further appeal, the Supreme Court agreed with the two lower forums. It found that the injury "was not of accidental origin within the meaning of the statute, but rather should perhaps be classed as an occupational disease, for which no compensation has been provided by the act." But the majority of the judges of the Court of Errors and Appeals, deciding the ultimate appeal on May 23rd of this year, thought otherwise. They disagreed with all three lower forums on interpretation of the facts. They found that "the impinging of this sand and ashes on the mole constituted the application of traumatic force, if in this case that element be necessary to make out injury by accident under our statute." After reviewing our own earlier precedents and other American and English cases on how much or how little is necessary nowadays to satisfy the requirements of an "accident," the Court of Errors and Appeals used the following language: "But, be that as it may, we think that the requirement that the injury or death arises by accident, under our statute, is satisfied if the claimant discharges the burden of proving that the condition complained of, i.e., the injury or death, is related to or affected by the employment, that is to say, if but for the employment it would not have occurred. The exception to this principle is the case of occupational disease with which our statute deals as a separate matter. R.S. 34: 15-30 to 15-35. Hence where a workman suffers injury or dies because of a previous physical condition, it must appear that the mishap or fatality is related to or caused by the employment, and that it arose out of and in the course thereof. Death from disease alone *during* the employment will not suffice, but injury or death which on proofs that are sufficient and persuasive,

would not have occurred but for the services rendered in the employment, amount to injury by accident."[1]

John is dead. His case is closed. But the fat is in the fire. On September 5th of this year, in a case involving a diseased condition of the heart activated by extra exertion, the Bureau quoted the last sentence quoted above, followed the principle, and awarded compensation.[2] Is it the law of this State that *injury that would not have occurred but for the services rendered in the employment, amounts to injury by accident?*

Seldom is the written word, whether a constitution or a statute, so clear and comprehensive as to relieve the judiciary of the necessity for construction. In life, situations arise which are not contemplated by draftsmen. The time, place, circumstances, and even the political and economic philosophy of the judiciary may be important elements in judicial construction. Yet courts must construe in these instances, even though the decision may be accompanied by vigorous dissent of members of the court, may be subsequently declared erroneous and overruled, or may be followed by remedial legislation. I venture to suggest that when situations of this character affect industrial management, it will be to management's interest to address itself to the time, place, circumstances, and such legislative solution as it may think in the public interest.

It is no doubt difficult to view dispassionately a proposal which of necessity will exact from industry, in the first instance at least, the price of whatever benefits it may bestow upon society as a whole. But, unless we are willing to question the fundamental principles of our present system of compensation for industrial injury by accident, I do not suppose that we can deny that occupational diseases should be made similarly compensable. The principles in support of a workmen's compensation law are equally applicable in support of an occupational disease law. Basic is the premise that disability or death caused by or resulting from employment is a part of the cost

1. *Bollinger v. Wagaraw Building Supply Co.*, 122 N. J. L. 512. 6 Atl. 2d 396 (E & A 1939). The opinion in the Supreme Court is reported at 121 N. J.L.606. 3 Atl 2d 810 (S. C. 1939).

2. *Moore v. City of Paterson*, 17 N. J. Misc. 262, 8 Atl. 2d 251 (W.C.B. 1939).

of production. Such cost is ultimately assumed by those who demand, in the sense of economic demand, that that commodity be produced, rather than by the social group as a whole. To obtain this end, it is necessary that the employer voluntarily assume, or be made to assume, the complete cost of such disability or death properly attributable to him.

Principles of the common law developed in, and adjusted to, a society which knew only small scale industry, failed to cope satisfactorily with the problems engendered by the industrial revolution. The employee individually was at a great disadvantage. He was in no position to match the legal talent of the employer. He faced defenses such as assumption of risk, the fellow employee rule, and contributory negligence. If he sued, the chances were against recovery. Loss of job was inevitable. Compensation depended for the most part upon the inclination of the employer. From available history it seems that the employer was not often so inclined. The employer did not pay. Some one had to assume the burden. It fell upon the general public as a whole through charities, public and private. Taxes to support public charities penalized industries not responsible. The burden became allocated to all commodities and was included in the prices of commodities generally. The entire purchasing public was forced to assume the burden which should be assumed only by those who demand and purchase a particular commodity the production of which has been accomplished at the price of labor injury.

The workmen's compensation laws were designed to remedy this situation by providing a system which would insure the allocation of the social cost of industrial injury to the particular industry and commodity involved. Concessions were made by both employers and by employees. I think that on the whole we will all agree that these laws were basically sound in principle, that they have "worked" in practice to the advantage of employer, employee and public. If industry should, and has found it advantageous to, assume the cost of a leg or a life lost by accident, it cannot be denied that industry should also assume the cost of a lung or a life lost because a man has of necessity been forced to breathe, over a period of years, silicate dust or poisonous fumes.

The objections advanced to comprehensive legislation on this subject, have not been addressed to the principle of occupational disease legislation but to "practical" difficulties in translating that principle into just and effective law.[3] The argument runs something like this: "Yes, we agree in principle with the desirability of occupational disease legislation, but the practical difficulties of devising and administering an effective law are insurmountable. Occupational diseases, with a few notable exceptions, are an unknown quantity medically. Remedial legislation of this type is liberally construed by the courts. Any attempt at a broad definition of occupational diseases will be mere conjecture at best, and, liberally construed, it will result in the assumption by the employer of general health and life insurance for the benefit of his employees. Under the guise of "occupational disease" we will be swamped with claims for compensation for all the diseases and physical infirmities to which man is heir. The cost of such legislation is therefore prohibitive. Furthermore, while accidents occur at some definite time so that the employer liable can be easily and definitely identified, diseases develop slowly and many years may intervene between first exposure and actual disability. During that period the employee may change employers many times. Which employer is to pay the bill when disablement actually occurs? If all are forced to contribute how much shall each pay? How can we fairly measure the contributions of each employer to the disablement? A man may become disabled long after his employment is terminated because of diseases contracted during employment, but which do not become apparent or disabling during that time. How long shall the employer remain under this potential liability? Also, the legislation would penalize the physically imperfect employee because the employer could hazard the employment only of the perfectly healthy. This possibility will increase employment maladjustment. In addition, we must remember that at the present time there are not many states which possess occupational disease legislation. Employers in our own state will therefore be at a competitive disadvantage with employers in those states which do not possess such legislation. Fur-

3. For an early summary of the usual arguments, see *Compensation for Industrial Diseases,* P. T. Sherman, 65 U. of Pa. L. Rev. 513 (1917).

thermore, once compensation for occupational disease is available, the employee is apt to become careless and negligent about exposure, thereby increasing the risk already present." These in substance are the objections expressed against occupational disease legislation.

Inasmuch as the objections expressed are confined to the practical difficulty of framing effective legislation and administering it efficiently, I have thought it advisable to review briefly the legislative and judicial history of the legislation in those states which have already taken the plunge. This may furnish some background for an examination of the recent legislation in Illinois and an understanding of the various objectives which the framers of the Illinois statute hoped to obtain.

Like so much legislation of the type usually described as "social," occupational disease legislation orginated in Switzerland.[4] This first statute passed in the year 1877 listed certain specified diseases as compensable. This type of statute is now known as the "schedule" type. It is the type most prevalent in the United States today. It is the type which we now have in New Jersey.[5] In the early part of the present century, immediately following an English decision that a disease such as lead poisoning, progressively acquired over a long period of time, could not be said to be an injury "by accident" and was therefore not compensable under the English workmen's compensation law, England followed Switzerland's example.[6] Most of the European countries thereafter passed occupational disease legislation of the "schedule" type. The idea was not accepted so readily in the United States. At the present time statutory provision for the compensation of occupational diseases is made in only 22 states.

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4. For a brief history of occupational disease legislation, and a summary of its status in the United States up to the year 1937, see *Compensation of Occupational Diseases from a Legal Viewpoint*, William B. Rabinovitz, 12 Wis. L. Rev. 198 (1937).

5. R. S. 1937 34:15-30, 35.

6. The decision to which reference is made is that of *Steel v. Cammell Laird & Co.*, 2K. B. 232 (1905). The occupational disease statute was passed one year later, in 1906.

Prevailing legislation in these 22 states is of three general types. Most popular is the schedule type which makes compensable, under the workmen's compensation law, certain specified occupational diseases and excludes all others. Twelve states have statutes of this type.[7] The next most popular practice is to make occupational diseases, either with or without further definition of that term, compensable under the workmen's compensation law in addition to accidental injury. That solution has been adopted in eight states.[8] Statutes of this kind are usually called the "all inclusive" or "blanket" type inasmuch as they presumably cover all occupational diseases, whatever that term may mean. It is of course the experience of these states that is most interesting since there has been little or no attempt at statutory definition and consequently no predictable limits to administrative and judicial interpretation. Finally, and most recent, is the attempt to treat occupational diseases comprehensively in a statute separate and distinct from the workmen's compensation law. Both Illinois and Indiana have passed such statutes. The Indiana statute followed and was in substance identical with the Illinois law. Because the statute originated in Illinois, we may refer to the statutes in these states as the "Illinois" type.

The "schedule" type statutes by their very nature answer the principal objections to occupational disease legislation, namely, that it is impossible effectively to limit the scope of the coverage of an occupational disease statute, and that as a consequence the employer

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7. Arkansas, Delaware, Kentucky, Michigan, Minnesota, Nebraska, New Jersey, North Carolina, Pennsylvania, Rhode Island, Washington and West Virginia.

8. California, Connecticut, Massachusetts, Ohio, New York, North Dakota, Wisconsin. Massachusetts does not expressly treat occupational diseases by statute, but inasmuch as the Workmen's Compensation Act does not limit compensation to injury "by accident," providing merely that all "injury" be compensated, the courts have construed the word "injury" to include occupational diseases. See: *Madden's Case*, 222 Mass. 487, 111 N. E. 879 (1916), *Hurles Case*, 217 Mass. 223, 104 N. E. 336 (1914). New York, until the year 1935, possessed a statute of the schedule type, but in that year amended the act by adding to the list of compensable diseases the phrase "all occupational disease." Ohio followed the example of New York in May 1939. In Missouri the employer may, at his option, elect to be bound by the provisions of the Workmen's Compensation Act in reference to "occupational diseases." The term "occupational disease" is not defined. Rev. Stat. (1929) Sec.: 3304.

will be purchasing general health and life insurance for his employees. The scope of the act is clear and definite.[9] There is little room for judicial interpretation. But these statutes represent fundamentally an evasion of problems rather than a solution. They deal only with known diseases and in some cases the particular industries in which these diseases must occur to be compensable are specified. This may be better than no provision at all but it is a compromise and an admission of partial defeat. Once having accepted the principle of occupational disease legislation there should be an effort in drafting an effective statute to provide for all possible cases where compensation is socially and economically desirable. The statute should possess sufficient elasticity to provide for the unforeseen and the unexpected as well as the known and foreseen.

More serious however than the charge of evasion of the problem in principle, is the charge that the "schedule" statute have ignored available medical information as to the existence of certain occupational diseases. This charge, made in 1934 by a former chairman of the Wisconsin Industrial Commission, was supported by a statement that at that time not one of the "schedule" states provided compensation for silicosis or the various dust diseases.[10] This statement was apparently accurate at that time since all of those schedule states, of which there are seven, which now provide for silicosis, have made this provision only recently.[11] Also of significance in this regard is the Rhode Island statute passed in 1936 which lists as compensable 31 separate diseases, including frost bite, but makes no provision for silicosis or any of the serious dust diseases.[12] Four other states, of which New Jersey is one, still make no provision for the dust dis-

9. This is the argument most often advanced in support of the schedule type statute. See, for example, *Some Essentials of Occupational Disease Legislation* (1936) Henry D. Sayer; *The New Illinois Occupational Disease Act,* Thomas C. Angerstein, 3 John Marshall Law Quarterly 116 (1937).

10. See Fred M. Wilcox, *The Schedule Fraud in Occupational Disease Compensation,* 24 Am. Labor Legis. Rev. 119 (1934).

11. Arkansas, Kentucky, Michigan, North Carolina, Pennsylvania, Washington, West Virginia, Ohio and New York, with statutes of the schedule type in form, but not in substance, make special provision for silicosis.

12. Rhode Island Gen. Laws (1938) Ch. 300, Art. VIII, Sec. 2.

eases concerning which there is presently a great deal of reliable medical information.[13] Legislation of this type lends itself conveniently to the pressure of interested groups for exemption since the result of their efforts is not written into the statute expressly but is discernable only after an examination of those diseases for which compensation is provided in the ultimate enactment. Experience suggests that an effort has been made to limit the list and add a new disease only after some glaring inadequacy arouses public pressure for amendment.[14] The uncompensated injury or death of some large group of employees in a particular industry, is occasionally the price of legislative concession. In addition, some states have also experienced technical difficulties with statutes of the schedule type, especially where the statutes specify not only the disease but the occupation or process in which the disease must occur in order to be compensable. Thus a New York Court was forced to hold that an employee in a fur factory could recover for aniline poisoning if he were engaged in the actual dyeing of furs, but not if he were poisoned while handling the furs after they had already been dyed.[15]

The "schedule" statutes are therefore open to criticism because of their omissions in many cases, and also for failure of compensation where their specific language is not elastic enough to cover the unforeseen or unusual one. These disadvantages outweigh the

13. Delaware, Nebraska, New Jersey, Minnesota.

14. The number of diseases compensable in the schedule states vary from one (silicosis) in West Virginia to thirty-one in Rhode Island and Michigan. But Rhode Island makes no provision for silicosis. Minnesota, with a list of twenty-three compensable diseases, likewise makes no provision for silicosis. The legislature of Pennsylvania, in passing a schedule type as recently as 1937, listed only twelve general types of diseases as compensable. The Nebraska statute limits compensation to the diseases peculiar to the industries of metal refining, smelting, and battery manufacturing. Kentucky makes provision only for diseases resulting from the inhalation of gas and "bad air" found in mines, although silicosis may be compensable if both employer and employee agree that they will be bound by the Workmen's Compensation Act in reference to such disease. New Jersey lists only ten diseases as compensable.

15. *Sokol v. Stein Fur Dyeing Co.*, 216 App. Div. 573, 216 N. Y. S. 167 (1926).

admitted advantage of definiteness and facility of interpretation and application.

A brief examination of the definition of the term "occupational disease" developed judicially in two states in which the "all inclusive" type statutes are in force will demonstrate that some objections are largely without foundation in fact.[16] I have selected New York and Connecticut because they are representative in general of those states possessing statutes of this type, and because the issues involved have been most clearly raised in recent cases in those states. The courts have been essentially conservative and have rather narrowly circumscribed the area of permissible recovery.

In the year 1935 the New York Legislature amended its workmen's compensation act by adding at the end of its schedule of compensable occupational diseases the term "all occupational diseases."[17] There was no definition by statute. The question was left completely to the judiciary. It is the situation of a broad and undefined term presented for interpretation to a liberal judiciary.

The decision in the first case presented indicated that the scope of recovery might be very broad; but that case did not reach the higher court and the second case, which did, denied the principles suggested in the earlier case. This first case involved a claim for pulmonary tuberculosis by a clerk in a wholesale meat market.[18] It was alleged and proved that although he usually worked in a normal temperature it was necessary for him to enter a cold storage room from ten to thirty times a day. He became ill after several months of this, was forced to quit the job, and later developed

16. In an article, *Compensation for Occupational Diseases*, 7 Tenn. L. Rev. 19 (1928) Mr. George S. Beers, referring to the opposition encountered by the Workmen's Compensation Acts when they were first proposed, said "The same conservatism has manifested itself in the case of every enlargement of the scope of the compensation principle. It has been said that there was no stopping place between compensation for occupational diseases and complete health insurance. That one tends to run into another cannot be denied, *and yet experience has shown that there is a real line of demarcation.*" (Italics ours.)

17. McKinney's Consol. Laws, Book 64, Art. 1, Sec. 3.

18. *Bishop v. Comer and Pollock, Inc.*, 251 App. Div. 492, 297 N. Y. S. 946 (1937).

tuberculosis. He was able to introduce medical testimony to the effect that his ailment could have been produced by the nature of his work. The Industrial Board, however, denied his claim upon the ground that he was not suffering from an occupational disease. The Appellate Division of the Supreme Court reversed this finding of the Board stating merely that the employee need only show that he was suffering from a disease that he had contracted during employment. The worst fears of the opponents of occupational disease legislation appeared substantiated. Evidently the door had been opened for all manner of claims for compensation for the ordinary diseases of life allegedly contracted during employment. However the decision was by a split court with two of five justices dissenting strongly. The dissenting opinion pointed out that the statute did not provide compensation for all *diseases* contracted during employment but only for *occupational diseases* contracted during employment. Thus it was pointed out the employee must show first that he is suffering from an occupational disease, whatever that may be, and secondly, that such occupational disease was contracted during his employment. Therefore the opinion went on, it is necessary that the judiciary develop a definition of the term "occupational disease."

This dissenting opinion was substantiated by the court of last resort of New York in the first case which the latter court considered under the new amendment.[19] In this case the claimant was a cashier in a moving picture theatre. She worked in an outside booth heated by a small electric heater which she could turn on and off as she wished. She claimed that the alternate heat and cold "caused blotches to appear on her legs and her feet to become numb and weak." She made application for compensation for occupational disease as well as for an accident which she claimed resulted when she fell because of this diseased condition. The Industrial Board found in her favor and this decision was sustained by the Appellate Division on the basis of its decision in the tuberculosis case, namely, that she had a disease and that it was contracted in

19. *Goldberg v.* 954 *Marcy Corporation*, 276 N. Y. 313, 12 N. E. 2d 311 (1938).

employment. The court of last resort, however, reversed this decision and found for the respondent insofar as his liability for occupational disease was concerned.

The court pointed out that the statute covered only occupational diseases and not all diseases, maintaining that the latter contention would in substance make the workmen's compensation act the equivalent of life and health insurance. The court then proceeded to frame a definition of the term "occupational disease" during the course of which it pointed out:

1. "Such disease (occupational disease) is not the equivalent of a disease resulting from the general risk and hazards common to every individual, regardless of the employment in which he is engaged."

2. "Compensation is restricted to disease resulting from the ordinary and generally recognized risks incident to a particular employment." This statement is extremely limiting. The test is one of *foreseeability*, confining the statute not only to occupational diseases known at the present time, but also confining known occupational diseases to those particular industries only in which they have heretofore appeared.

3. "An occupational disease is one which results from the nature of the employment and by nature is meant not those conditions brought about by the failure of the employer to furnish a safe place to work." This statement is interesting not only because it follows a similar rule previously laid down by the Connecticut Court, but because if carried to its logical extreme, this rule might require a holding that *only those diseases are truly occupational which cannot be prevented after the installation of the most efficient safety equipment known; that only those diseases are truly occupational which cannot be prevented and which science and industry have not yet learned how to eliminate.* This is an extremely conservative position. In support of its statement of this rule the court cited earlier cases in which this posi-

tion was taken.[20] The applicability of these earlier cases to the situation might easily have been questioned. The earlier cases were all decided under situations where it was necessary to define the term "occupational disease" as narrowly as possible in order to broaden the scope of the workmen's compensation act.[21]

The Connecticut court has also adopted what might be termed the "impossible to prevent" test. The case in point involved a claim for pulmonary tuberculosis.[22] The claimant alleged that she had contracted the disease in the defendant's dress factory. The Industrial Commission found that the factory conditions were very bad, that the room in which the claimant was forced to work was crowded and poorly ventilated, that the claimant was required to work extremely long hours, that several other employees were suf-

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20. *Seattle Can. Co. v. Dept. of Labor and Industries*, 147 Wash. 303, 265 P 739 (1928), where it was said, "As we understand it, an occupational disease is one which is wholly due to causes and conditions which are normal and constantly present and characteristic of the particular occupation; that is, those things which science and industry have not yet learned how to eliminate." *Industrial Commission of Ohio v. Roth*, 98 Ohio St. 34, 120 N. E. 172 (1918), where the court said, " . . . . and the fact that the accident might easily have been avoided readily distinguishes it from an occupational disease, for notwithstanding the fact that more than two centuries ago occupational diseases had become so well known as to justify their treatment in a separate volume in the medical literature of that day, nevertheless, science has been unable to discover any positive means and methods of prevention." *Gay v. Hocking Coal Co.*, 184 Iowa 949, 169 N. W. 360 (1918); *McNeeley v. Asbestos Co.*, 206 N. C. 568, 174 S. E. 451 (1934). Other conservative decisions cited, which did not make special reference to the "safe-place-to-work" rule, were *Victory Sparkler Co. vs. Francks*, 147 Md. 368, 128A 635 (1925); *Lovell v. Williams Bros., Inc.*, (Mo. App.) 50 S. W. 2d, 710 (1932)

21. Most of the states originally patterned their Workmen's Compensation Acts after the English Act, and provided for compensation for "injury by accident." Consequently the courts tended to follow the English decision that an occupational disease was not an injury "by accident" and therefore not compensable under the Workmen's Compensation Act. As a result, in order to broaden the scope of the Workmen's Compensation Acts it became necessary to limit, as much as possible, the meaning of the term "occupational disease."

22. *Madeo v. I. Dibner & Brother, Inc.*, 121 Conn. 664, 186 Atl. 616 (1936).

fering from the same disease, and that the claimant had contracted the disease in the defendant's plant and consequently awarded compensation. The court reversed upon the grounds that the claimant was not suffering from an occupational disease. In defining the term "occupational disease" the court said: "To constitute an occupational disease the disease must be a natural incident of a particular kind of employment, one which is likely to result from that employment because of its *inherent* nature. It does not include a disease which results from the peculiar conditions surrounding the employment of the claimant in a *kind of work which would not from its nature be more likely to cause it than would other kinds of employment carried on under the same conditions.*" (Italics ours). The latter portion of this definition approaches what I have termed the "impossible to prevent" test. It may also rule out compensation for the ordinary diseases of life since of course they usually result from the conditions under which an employment is conducted rather than because of the inherent nature of the employment itself. This conclusion in turn seems substantiated by an earlier Connecticut case in which the Connecticut court held that pneumonia contracted by an employee of the State Highway Department during the course of his winter employment was not compensable as an occupational disease.[23]

The Connecticut court has also dealt with the case of the hypersensitive employee.[24] In this case an employee in a brass factory filed a claim for lead poisoning. It was admitted that some lead fumes were present but it was contended that they were present only in harmless amounts. The court held that evidence to the effect that there were no known cases of lead poisoning in the same kind of work would be relevant since this might show whether the disease would "naturally" result from a particular kind of employment. This decision, it seems, not only rules out compensation for the hyper-sensitive employee but is in accord with the apparent New

23. *Galuzzo v. State,* 111 Conn. 188, 149 Atl. 778 (1930).

24. *Glodenis v. American Brass Co.,* 118 Conn. 29, 170 Atl. 146 (1934).

York rule already discussed to the effect that even a blanket statute would cover only known occupational diseases known to be prevalent in particular employments.

A brief examination of recent experience in the states of New York and Connecticut demonstrates that there is little likelihood of an extreme judicial interpretation of an "all inclusive" occupational disease statute, and that the fear that judicial interpretation would convert the compensation state to a life and health insurance statute is largely ungrounded. We have seen that ordinary diseases of life are apt to be excluded or at least looked upon with great suspicion, that the term is likely to be confined to diseases already known through the use of the formula that the disease must be "generally recognized as incident to a particular employment," and that the court have shown some inclination to favor or adopt what I have termed the "impossible to prevent" rule which rule is of course extremely conservative and limiting.

That the courts can be entrusted with broad definition of occupational disease is perhaps demonstrated even more forcibly by available cost data. Such data, it must be admitted, is not extremely recent but there is no reason to suppose that such costs have increased greatly in the last few years. In the year 1931 a committee of the American Public Health Association published a report showing the proportion of the total cost of workmen's compensation attributable to occupational disease claims.[25] While the states there listed possessing statutes of the "all inclusive" type showed cost figures generally above those of the states possessing statutes of the "schedule" type, not one of them showed an occupational disease cost figure exceeding 2% of total compensation paid. Wisconsin, over a 14 years period, which included 4 depression years in which the number of claims prompted by job losses were extremely high, has shown an average occupational disease cost of only 2.4% to total

25. *Report of Committee on Standard Practices in the Problem of the Compensation of Occupational Diseases,* Industrial Hygiene Section, American Public Health Association, (1931).

compensation costs.[26] As early as 1929 the low cost figures in the states possessing "all inclusive" statutes lead to the adoption of a resolution favoring the passage of such statutes as opposed to the "schedule" type by the International Association of Industrial Accident Boards and Commissions,[27] and while it is true that occupational disease claims have increased in the State of New York since the passage of their "all inclusive" statute, such claims still constitute a very small portion of total compensation claims.[28]

The Illinois statute became effective in 1936. It suggested that the statutes then in force left much to be desired, and that many of the usual objections to occupational disease legislation could be satisfactorily met. It recognized that definitions then in use were not satisfactory, and that even satisfactory definitions must be developed slowly by the judiciary as cases arise. Limits of employer liability were established with elasticity.

The practice of incorporating occupational disease legislation into the Workmen's Compensation Act was abandoned. The statute is an entity separate and distinct from the Workmen's Compensation Act. It is the joint product of representatives of industry, labor, and Government.[29]

The most important section of the Illinois law is that section in which the term "occupational disease" is defined.[30] It is here that the

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26. See Wilcox, op. cit., 121.

27. *Occupational Disease Legislation in the United States,* (1936) Bulletin No. 652, U. S. Bureau of Labor Statistics, p. 4.

28. *Annual Reports of the Industrial Commissioner,* 1935, 1936, 1937, 1938. In 1936, of a total of 2,879 appeals granted by the Industrial Board, 44 involved occupational disease claims. In 1937, of a total of 3,347 appeals, 86 involved occupational disease claims, and in 1938, of a total of 3,577 appeals, 116 pertained to occupational diseases.

29. According to a member of the drafting committee, a selected group representing government, industry, and labor, met regularly for several months. This group considered all problems of substance. Their decision was then referred to a selected committee of lawyers, likewise representing all interested groups. This "drafting committee" translated the general decision into proper statutory language.

scope of employer liability is stated. It is an extremely simple definition capable of fair and practical application. An occupational disease, under the Illinois law, is any disease which cannot be classified or described as an "ordinary disease of life to which the general public is exposed outside of the employment."[31] There is no attempt at definition or limitation of the term "ordinary disease of life." Diseases common to the public generally, such as pneumonia, tuberculosis, cancer, tonsilitis, colds and contagious diseases, are presumably not compensable under the terms of the Illinois act, even in the presence of proof that such diseases were contracted during employment. There is one exception to this rule. An ordinary disease of life may be compensable if "it follows as an incident of an occupational disease." The purpose of this exception is to provide for the case of an employee who has contracted silicosis or some such occupational disease, not yet advanced to the point of disablement, but who as a result of that silicosis or occupational disease contracts and is actually disabled by tuberculosis or some other or-

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30. Section 6. "In this Act the term 'Occupational Disease' means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the said diseases follows as an incident of an occupational disease as defined in this section.

"A disease shall be deemed to arise out of the employment, only if there is apparent to the rational mind upon consideration of all the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

31. There has been some argument to the effect that the Illinois Act as drafted is not perfectly clear on this point. However, although such arguments have been heard at the bar, neither the Commission nor the courts have as yet made any statement in reference to this contention.

dinary disease of life. Such an employee may recover compensation even though the actual disabling disease is an ordinary disease.

This definition of occupational disease represents a practical compromise. It might be argued that in some cases the ordinary diseases of life, if contracted in employment, should be made compensable. For example, perhaps we should compensate for pneumonia contracted by outside workers such as power linemen and others forced sometimes, in cases of emergency, to work in extreme weather conditions. On the other hand, general health, and habits, and personal exposure outside and inside of the employment may be large contributing factors. It is extremely difficult to draw, in advance, general statutory language which will segregate the burdens resulting from the employment itself from those resulting from the employee's personal conduct. The Illinois compromise may be the best yet found.

Under the Illinois law then the first question must be—"Is the claimant suffering from a disease which may be classified as an 'ordinary disease of life'?" If the answer to this question is in the affirmative the petition is dismissed. If the answer is in the negative, the employee has established the first half of his case. He has proved that he is suffering from an occupational disease. He must now prove in addition that such occupational disease arose out of the employment which he is seeking to charge.

The act is unique in that it contains a lengthy definition of the term "arise out of the employment." This practice is, I believe, to be desired. It provides a statutory guide for the judiciary, though the definition is in terms sufficiently general and elastic to include the unusual case. This definition provides that an occupational disease, in order to be compensable, need not necessarily have been foreseen but only that the disease in retrospect have a rational connection with the employment. Recovery is not limited to cases presently known or "generally recognized" to be occupational.

Unfortunately, as I have been informed by Mr. Frank Peregrine, a member of the Chicago bar and of the Committee which drafted the Illinois act, neither the Illinois Commission nor the Illinois Court

has yet advanced an opinion concerning the scope of this important section of the law.[32]

Under the Illinois Act the employer must be prepared to pay for all diseases, excepting ordinary diseases of life, which can rationally be traced to the employment. The next important question for the employer is—"Which employer is to pay the bill when several of us may have contributed to the disability?" This question is answered by Section 25 of the Illinois Act. This section provides that the employer in whose employment the employee was last exposed to the hazard of the disease in question, for any time however short, must pay the entire compensation bill.There is one exception to this rule, however, in the case of the two diseases silicosis and abestosis. In the case of either of these diseases the last employer is liable in whose employment the employee was last exposed to the hazards of the disease over a minimum period of 60 days. Thus, for example, if an employer were to hire an employee who one day later became disabled from lead poisoning, and the employee had been employed for that one day in an occupation in which the hazard of lead poisoning existed, that employer would pay the entire compensation bill even though the disablement was actually caused by previous employment over a period of a number of years. In cases of silicosis and abestosis however the employer who last had the man for a period of at least 60 days must pay the compensation bill.

This may seem an extremely arbitrary rule. It is. However it is a practical solution of a difficult problem. The statutes of some states,

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32. It may be interesting to note that the definition employed in the Illinois Act was largely borrowed from a definition drawn by Chief Justice Rugg in *McNicol's Case* 215 Mass. 497, 102 N. E. 697 (1913). Under usual principles of judicial construction, the Illinois courts might with propriety consider the decisions of the Massachusetts court as available precedents. The Massachusetts decisions have, in turn, been rather "liberal," *Madden's Case* 222 Mass. 487, 111 N. E. 379 (1916) heart disease; *McPhee's Case* 222 Mass. 1, 109 N. E. 633 (1915) pneumonia; *Johnson's Case* 279 Mass. 481, 181 N. E. 761 (1932) chronic bronchitis. However, the Illinois courts are also bound by the statutory language, already noted, which exempts from compensation the "ordinary diseases of life."

as for example the recent Michigan statute, passed in 1937, provide for apportionment of the bill on a strictly time basis between all contributing employers.[33] This solution was, I am told, considered and rejected by those who drafted the Illinois Act.[34] First of all, the Illinois solution has the advantage of definiteness. It therefore has worked to decrease troublesome litigation. Legal advice can be sure and confident. There is seldom doubt as to which employer is liable. Secondly, it obviates the great practical problem of potential risks carried over a long period of time and long after employment is ended. Although perhaps not of prime importance to this group, it has worked to enable exact adjustment of insurance risks. And what is perhaps even more important, under the Illinois rule the employer is not called upon to defend claims where because of the passage of time it may be impossible to collect credible evidence of non-liability. I have been told that Illinois employers and insurance companies in general now favor this rule, and that in practice it has worked to apportion liability fairly. If one is careful in considering possible employees the chances are about even between getting caught for a liability not rightfully his and escaping from a liability which he has caused. The rule necessitates careful examination of employees

33. Comp. Laws (1929) Mason's 1937 Supp. Ch. 150, Sec. 8485-9. Rhode Island has also adopted this solution. Gen. Laws (1938) Ch. 300, Art. VIII, Sec. 8.

34. The solution adopted in the Illinois Act is found in the Statutes in Arkansas (Acts of Arkansas 1939, Act 319, Section 14), in Pennsylvania (Purdon's Pa. Stats. Ann. Title 77, Sec. 1109) and in North Carolina (N. C. Code 1935, Ch. 133-A, Sec. 8081-6). This result was also reached in Wisconsin, in the absence of a statutory provision, by judicial decision. *Schaefer & Co. v. Industrial Commission*, 185 Wis. 317, 201 N. W. 396 (1924). And it is also, apparently, the law in New Jersey,through judicial decision. *Textileather Corporation v. Great Indemnity Company* 108 N. J. L. 121, 156A 840 (E & A 1931). In this case it was held that the insurance company carrying the risk at the time at which disability occurred was liable for the compensation. The Court said "The legislature must have intended that compensation should be determined—when the disability or death occurred, *and at no other time.* Otherwise the whole plan would prove ineffective. . . . . The legislature provided for compensation when the disability occurred after exposure in the employer's business. The employer's liability was fixed *as of that time* and so also the insurance carrier's obligation was assumed as of that date. Had the legislature intended otherwise it would have so said." (Italics ours.)

who are to be placed in positions where hazards are known to exist.

Some of the other more important questions settled by the Illinois law, include definitions of disablement, limitations upon the time within which disablement must occur after last exposure, and limitations upon employer liability for medical benefits in incurable cases or where any attempt at alleviation or cure may require a number of years.

Under the Illinois law an employee is considered disabled when, because of occupational disease, he is unable to earn *full* wages at the work in which he was engaged when last exposed to the disease, or *equal* wages in other suitable employment.[35] Laying aside one difficult practical matter of proof, which can never be settled by statute, this test seems fair. Thus, enforced loss of time, or diminution of wage rate, constitutes disability.

In order that the employee recover compensation he must prove that such disablement occurred within one year following the last day of exposure, except again in the two cases of silicosis and abestosis which, because of their slowly developing nature, need result in disablement only within three years after the last day of exposure.[36] Following disablement the employee must give the employer liable notice as soon as practicable and must file his application for compensation within one year.

Some time or money limitation upon medical benefits for which an employer is liable is, of course, of extreme importance. Some occupational diseases, as for example silicosis complicated with tuberculosis, may be as a practical matter incurable or at least require years of treatment for alleviation. The general provision to the effect that the employer is liable to furnish such medical aid as is necessary to reasonably effect a cure would in these cases be an extreme burden, more onerous than the compensation itself and would also be of extreme nuisance value. Although perhaps justifiable in principle, the burden would be impossible in practice. The Illinois Act there-

35. Section 5.

36. Section 24.

37. Section 8 (a).