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OCCUPATIONAL DISEASE UNDER THE NEW YORK WORKMEN'S COMPENSATION LAW

ROBERT J. CHOJNACKI*

THE New York Workmen's Compensation Law affords benefits to an employee, payable by or on behalf of his employer, if he is disabled by virtue of either (a) an injury arising out of and in the course of employment or, (b) an occupational disease. The term "injury" is statutorily defined quite simply as "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."¹ With reference to occupational disease, the law is considerably more detailed and one will find in section 3, subdivision 2, a fairly lengthy list of diseases denominated as occupational, paired with an equally lengthy list of industrial processes. The contraction of one of the listed diseases by an employee, attributable to his work in the paired industrial process, establishes entitlement to workmen's compensation benefits should the employee become disabled due to the disease.

In addition to the paragraphs listing specific diseases and industrial processes, there is one paragraph of a gen-

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¹ N.Y. WORKMEN'S COMP. LAW §2(7).

eric nature, paragraph 29, which reads simply: "Any and all occupational diseases."² The paired industrial process is stated as: "Any and all employments enumerated in subdivision one of section three of this chapter."³ The statutory terminology of paragraph 29 has been the subject of extensive and prolonged controversy over the question of its precise meaning. The most recent example of such controversy was the Court of Appeals' decision in *Paider v. Park East Movers*⁴ and *Snir v. J. W. Ways, Inc.*⁵ A divided Court ruled that two claims for workmen's compensation benefits on account of occupational disease should be dismissed despite the fact that there was clear and convincing proof that the contraction of the diseases was causally related to the employment. The majority held that more was required before a disease could be considered occupational, specifically that it also had to be shown that the disease was the result of a "distinctive feature of the kind of work performed by claimant and others similarly employed. . . ."⁶ The dissenting minority, however, felt that medical proof of causal relationship between the disease and the employment environment was sufficient basis for an award.

The conflict in views expressed in *Paider* is essentially over the question of whether a disease, to be considered occupational within the purview of paragraph 29, must be related, not only to the employment, but also to the particular type of work activity performed by the employee in that employment. Using the *Paider* fact situation as a basis for comparison, the divergent standards can be illustrated by two questions. The minority test can be expressed as follows: Is the tubercular condition a result of the claimant's work for Park East Movers? The majority test, on the other hand, could be stated in the following manner: Is the tubercular condition a result of the claimant's work as a truck driver for Park East Movers?

² N.Y. WORKMEN'S COMP. LAW § 3(2), para. 29.

³ *Id.*

⁴ 19 N.Y.2d 373, 227 N.E.2d 40, 280 N.Y.S.2d 140 (1967).

⁵ *Id.*

⁶ *Id.* at 380, 227 N.E.2d at 44, 280 N.Y.S.2d at 144.

It is the purpose of this article to attempt to delineate the precise meaning of the term "occupational disease" as that term is used in the Workmen's Compensation Law. It shall be necessary to consult those materials which illumine the legislative history of paragraph 29 and then study the interpretation of that statutory provision as reflected in the opinions of the courts. The article will then conclude with an analysis of the aforementioned materials.

However, before proceeding to the legislative and judicial materials, it might be helpful to survey the historical references to occupational diseases in order to place our current question in proper perspective. Concepts of occupational disease have deep roots in ancient history as far back as classical Greece. Socrates himself made some reference to the effect of occupations upon health when he is reported to have remarked on the undesirability of manual work.

What are called the mechanical arts, carry a social stigma and are rightly dishonoured in our cities. For these arts damage the bodies of those who work at them or who have charge of them, by compelling the workers to a sedentary life and to an indoor life, by compelling them, indeed, in some cases to spend the whole day by the fire. This physical degeneration results also in deterioration of the soul.⁷

More definitive connections between occupation and disease were perceived by some physicians of the Greek and Roman eras. The toxic effects of lead, for example, were known to these practitioners. Thus, Hippocrates, the father of medicine, in about 370 B.C., described a severe attack of colic attributable to lead poisoning in a man who extracted metals.⁸ Pliny, in the first century A.D., stated that lead poisoning was known in his day to exist among workers making lead products.⁹

Generally, however, the ancients ignored the diseases of occupations due to the deep social cleavage between the

⁷ XENOPHON, *ECONOMICUS*, as quoted in D. HUNTER, *THE DISEASES OF OCCUPATIONS* 9 (1957).

⁸ D. HUNTER, *supra* note 7, at 219.

⁹ *Id.*

aristocracy and the common workers. The practice of medicine at the time was limited to the aristocratic class, and the wealthy "citizens" of Greece and Rome, who alone frequented the medical practitioners, were not very likely to have contracted occupational diseases. The workers who had such diseases did not form any part of the clientele of the ancient physicians. Consequently, the occupational character of many diseases went unappreciated in ancient medicine.

It is not until the sixteenth century that there are any further significant references to occupational diseases. The first of these is found in *De Re Metallica*, a work by Georg Bauer, also known as Agricola. This individual was the official physician to the mining town of Joachimsthal in Bohemia in Central Europe. His work, published posthumously in 1556, dealt with all aspects of gold and silver mining. More pertinent to our topic, however, was the last part of the sixth book of this twelve volume treatise wherein Agricola describes the ailments of miners, particularly lung diseases:

[S]ome mines are so dry that they are entirely devoid of water and this dryness causes the workmen even greater harm, for the dust, which is stirred and beaten up by digging, penetrates into the windpipe and lungs, and produces difficulty in breathing and the disease which the Greeks called asthma. If the dust has corrosive qualities, it eats away the lungs, and implants consumption in the body. In the mines of the Carpathian Mountains women are found who have married seven husbands, all of whom this terrible consumption has carried off to a premature death.¹⁰

Agricola recommended purification of the air by ventilating machines in order to reduce the dust content. As perceptive as his observations were, however, he still did not have a clear grasp of the link between diseases and occupations generally.

Shortly after the publication of *De Re Metallica*, there appeared another work, entitled *Four Treatises*, by Theophrastus von Hohenheim, more popularly known as Para-

¹⁰ AGRICOLA, *DE RE METALLICA* (1556), as quoted in D. HUNTER, *supra* note 7, at 26-27.

celsus. He too was a town physician, though stationed at a mining town in Switzerland. He noted that miners frequently had "dyspnoea," cough and cachexia and that these conditions seemed to be associated with their work.¹¹ Despite the relative accuracy of his observations, he unfortunately turned to fanciful theories of alchemy to explain the causes of these conditions and hence substantially lessened the value of his work.

It was in the seventeenth century, however, that the major work on occupational disease was produced by Bernardino Ramazzini, a Professor of Medicine in Italy. Ramazzini, because of his extensive work in the area, has been called the Father of Occupational Medicine, and his work, *The Diseases of Tradesmen*, first published in 1700, is considered the fundamental treatise in the field of occupational diseases. His interest in these diseases was stirred one day when he observed a laborer at work cleaning a cesspit. The laborer was working at an unusually rapid pace and Ramazzini, noting this, stated:

I pitied him on account of the cruel nature of the work and asked him why he toiled so feverishly and did not try to avoid exhaustion by working at a slower pace. Whereupon the poor fellow lifted his eyes up out of the pit, fixed them upon me and said: 'No one who has not tried it can imagine what it costs to spend more than four hours in this place. It is as bad as going blind.'¹²

Ramazzini thereafter resolved to inquire into the working conditions of manual laborers and to particularly observe any disease frequently associated therewith. He studied the work and health of, among others, miners, bakers, coppersmiths, chemists, mirror makers, stone cutters and, of course, cleaners of cesspits. His research bore fruit, as witness the following observations on the diseases of gilders:

We all know what terrible maladies are contracted from mercury by goldsmiths, especially by those employed in gilding silver and

¹¹ D. HUNTER, *supra* note 7, at 29.

¹² B. RAMAZZINI, *THE DISEASES OF TRADESMEN* (1700), as quoted in D. HUNTER, *supra* note 7, at 32.

copper objects. This work cannot be done without the use of amalgam, and when they later drive off the mercury by fire they cannot avoid receiving the poisonous fumes into their mouths, even though they turn away their faces. Hence craftsmen of this sort very soon become subject to vertigo, asthma and paralysis. Very few of them reach old age, and even when they do not die young their health is so terribly undermined that they pray for death.¹³

As a result of his inquiries, Ramazzini revised the Hippocratic art of medicine by asserting that a physician should thoroughly examine sick worker-patients and, to the questions recommended by Hippocrates, to be asked of a patient, should add one more — “What is your occupation?”¹⁴

Ramazzini's contribution, as important as it was to seventeenth century medicine, became even more important to nineteenth century English physicians when the Industrial Revolution began in England. It was they who had to make effective use of his insights and in addition develop some of their own to cope with the health problems brought about by large scale manufacturing. One of the English physicians involved in the new practice of industrial medicine was Charles Turner Thackrah, who centered his activities in Leeds. He published the first treatise in English on occupational diseases in 1830 with a larger second edition put forth in 1831. In the second edition he outlined his intentions in writing the book:

Most persons, who reflect on the subject, will be inclined to admit that our employments are in a considerable degree injurious to health: but they believe, or profess to believe, that the evils cannot be counteracted, and urge that an investigation of such evils can produce only pain and discontent. From a reference to fact and observations, I reply, that in many of our occupations, the injurious agents might be immediately removed or diminished. Evils are suffered to exist, even when the means of correction are known and easily applied.¹⁵

¹³ *Id.* at 274.

¹⁴ *Id.* at 34.

¹⁵ C. THACKRAH, *THE EFFECTS OF ARTS, TRADES AND PROFESSIONS ON HEALTH AND LONGEVITY* (1832), as quoted in D. HUNTER, *supra* note 7, at 118.

Thackrah recommended means of significantly reducing the incidence of pulmonary tuberculosis among tailors and of lead poisoning among pottery workers. He also wrote of dust diseases which affected the lungs of miners and metal grinders, pointing out the difference in the effect upon health of dry mining and dry grinding as distinct from wet mining and wet grinding. In dry mining, for example, performed in mines where the surrounding rock is sandstone,

the minute particles of rock formed by blasting or the pickaxe are kept in a dry state within the sandstone mine, forming . . . an atmosphere of dust, which the miner is constantly inhaling. Miners rarely work for more than six hours a day, yet they seldom attain the age of forty.¹⁶

Thackrah found a high incidence of pulmonary diseases among miners and commented on the apparent association between dust inhalation and tuberculosis. The work of Thackrah was influential in aiding the advocates for Parliamentary action to control the health hazards of various occupations.

In reviewing the references to occupational disease found in history, one cannot help noting that the medical concept of occupational disease evolved upon the basis of clinical observations of the frequent incidence of certain diseases among workers in certain occupations. This high incidence together with the fact that the diseases were contracted almost exclusively by workers in those trades and generally not contracted by persons unconnected with those trades led gradually to the concept of diseases which were associated by way of causation to occupations. The association became so clearly recognized that in many instances there was a formal identification of the disease with the occupation, such as:

brassfounder's ague, chimney-sweeps' cancer, divers' paralysis, glass-blowers' cataract, grocers' itch, hatters' shakes, housemaids' knee, knife-grinders' phthisis, miners' nystagmus, painters' colic, tailors' callosities, woolsorters' disease and writers' cramp.¹⁷

¹⁶ *Id.* at 119-20.

¹⁷ D. HUNTER, *supra* note 7, at 195.

From the foregoing, it can be readily seen that the diseases considered occupational are not only commonly associated with certain trades but are in fact most often exclusively associated with those trades. J. H. Lloyd indicated his view of the concept of a disease of occupation by stating that he limited his paper to "a description of those injurious effects or diseases that are direct, characteristic, and indisputable."¹⁸ Thus, he declared that the bronchial catarrh of a street car driver, the anemia of many ill-paid artisans, which is caused rather by poor food, and bad lodgings than by the pursuit of their trade . . . will not be described. To describe all such affections, which may be due to other causes, such as poor hygiene, vicious habits, infectious processes, and even heredity, and to strain a point to ascribe them to the various trades, would stretch this paper beyond all reasonable limits.¹⁹

Lloyd's writing contains language that is still in contemporary use, such as the terms "characteristic" and "indisputable." Moreover his concept is in accord with the earlier references made to occupational diseases, references which invariably associated peculiar physiological conditions with particular "dangerous" trades to the exclusion of other causes.

The historical concept of occupational disease therefore, was of a disease which was peculiar to a certain occupation and associated with that occupation in a well-recognized, frequent and generally exclusive manner. Furthermore, the disease was causally linked to an individual occupational activity, *i.e.*, mining, and was a hazard to all workers doing that type of work regardless of the particular employer. It was particular trades that were dangerous, and the risk attendant upon the practice of those trades came to be clearly foreseeable, though not necessarily preventable.

In view of the increasing medical awareness of the occupational cause of some diseases, it is not very surpris-

¹⁸ J. H. Lloyd, *The Diseases of Occupations*, in 3 TWENTIETH CENTURY PRACTICE, AN INTERNATIONAL ENCYCLOPEDIA OF MODERN MEDICAL SCIENCE BY LEADING AUTHORITIES OF EUROPE AND AMERICA 318 (T. Stedman ed. 1895), as quoted in U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, OCCUPATIONAL DISEASES 323 (1964).

¹⁹ *Id.*

ing to find social agitation for governmental action to deal with the problem. That governmental action, when eventually taken, was in the form of legislation.

LEGISLATIVE HISTORY

Although this article is concerned, strictly speaking, only with the import of Section 3, Subdivision 2, Paragraph 29 of the Workmen's Compensation Law, antecedent legislation, both in New York and elsewhere, provide a conceptual background for a review of the enactment of the present paragraph 29.

Legislation concerned with the granting of benefits to employees disabled by virtue of occupational diseases originated in nineteenth century Europe. The first nation to protect its workers against economic loss due to industrial diseases was Switzerland where, in 1877, a Federal Act established the concept of employer liability for both industrial accidents and industrial diseases. Section 5 of that act read in part:

The Federal Council shall also specify those industries the exercise of which demonstrably and exclusively gives rise to specific dangerous diseases, to which liability as defined for accidents shall extend.²⁰

The term "exclusively" was subsequently changed to read "exclusively or substantially."²¹ In 1887 the Federal Council prepared a list of forty-five substances which, when used in industry, might cause specific occupational diseases. Subsequently, benefits were experimentally extended to employees disabled due to conditions "caused by work without the intervention of harmful substances,"²² but only if the conditions could be attributed with certainty to the work.

²⁰ Switzerland, The Federal Act of 1877, § 5, as quoted in AMERICAN PUBLIC HEALTH ASSOCIATION, OCCUPATIONAL DISEASE LEGISLATION, REPORT OF THE COMMITTEE ON STANDARD PRACTICES IN THE PROBLEM OF COMPENSATION OF OCCUPATIONAL DISEASES 4 (1931) [hereinafter cited as OCCUPATIONAL DISEASE LEGISLATION].

²¹ *Id.*

²² OCCUPATIONAL DISEASE LEGISLATION, *supra* note 20, at 6.

Other European countries thereafter provided benefits for occupational disease; first Germany in 1883, then Austria in 1887. In 1900 Spain provided coverage for all bodily lesions experienced by workmen during the course of or in consequence of their work. The employer was held responsible for any "events happening" because of the fact of or during the exercise of the occupation or work.²³

The British Workmen's Compensation Act, originally passed in 1897,²⁴ afforded coverage only for "personal injury by accident arising out of and in the course of the employment. . . ." ²⁵ Compensation for occupational diseases was first included in 1906 when the Act was substantially amended ²⁶ to provide that should a workman be disabled due to a disease set forth in the schedule annexed to the act

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement . . . whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease . . . were a personal injury by accident arising out of and in the course of that employment. . . .²⁷

The schedule annexed to the act also had a list of industrial processes corresponding to the listed diseases. Contraction of a listed disease by a workman employed in the process gave rise to a presumption of causal relation between the disease and the process. The schedule of diseases and processes could be extended to cover new ailments and exposures by simple administrative order.²⁸ It was specified, however, that the section on occupational diseases did not apply to a disease if it were "a personal injury by accident within the meaning of this Act."²⁹

Following passage of the British Act, agitation for workmen's compensation legislation became increasingly

²³ *Id.* at 23.

²⁴ 60 & 61 Vict., ch. 37 (1897).

²⁵ 60 & 61 Vict., ch. 37, § 1(1) (1897).

²⁶ 6 Edw. 7, ch. 58 (1906).

²⁷ 6 Edw. 7, ch. 58, § 8(1) (1906).

²⁸ 6 Edw. 7, ch. 58, § 8(6) (1906).

²⁹ 6 Edw. 7, ch. 58, § 8(10) (1906).

effective across the Atlantic Ocean in both the United States and Canada. In New York the pressure for establishment of a system of workmen's compensation benefits resulted in the appointment of a Commission in 1909 to study the effectiveness of the laws on employer's liability. This Commission, popularly known as the Wainwright Commission, filed a report in 1910 containing recommendations for the passage of a workmen's compensation act. The report urged statutory imposition of liability on employers for "personal injury by accident arising out of and in the course of employment . . . caused to any workman. . ." ³⁰

The proposed act did not in any way provide coverage for occupational disease. The Commission explained this omission in a brief section of the report. Because of the relative inaccessibility of this report, the author herewith sets forth the Commission's comments at length as they are contained in the report under the heading "Industrial Diseases":

The Commission has considered the question of industrial or so-called 'occupational' diseases, but makes no recommendation for legislation in that regard. This is for several reasons. It is quite true that the worker incapacitated by industrial disease is as much the inevitable result of modern industry as carried on to-day as the worker injured by industrial accident—and as much a concern to society, but it is a task of extraordinary difficulty to decide with any certainty in any particular case that a disease is the result of the employment. The social distress of industrial disease was graphically brought out before the Commission. . . . But as clearly indicated the action by the State most needed at the moment is not caring for those who are sick, but preventing sickness and industrial disease by vigorous inspection and use of proper precautions and proper hygiene. For instance the installation and use of proper blowers and ventilating appliances in the stone cutting and metal buffing trades would go far to eliminate consumption as a trade disease in those occupations. The law of the State of New York as it now stands gives to the Department of Labor broad powers to deal with this situation (save in its lack of appropriation for sufficient inspection) and that Bureau is endeavoring to cope with it. We do not however recommend any legislation on this subject since it is not clear that it falls

³⁰ WAINWRIGHT COMMISSION ON EMPLOYER LIABILITIES, FIRST REPORT 52 (1910).

within the scope of our powers, but our next report on prevention of accident will touch upon this related subject.³¹

The Second Report, issued on April 20, 1911, did not in fact make any mention of industrial disease and hence we are left with the foregoing as representing the substance of the Commission's views. -

The New York Legislature, acting on the basis of the Commission Report, passed legislation in 1910³² setting up a system of workmen's compensation which provided coverage solely for "personal injury by accident arising out of and in the course of employment."³³ When the statute was declared unconstitutional by the Court of Appeals in 1911 in *Ives v. South Buffalo Ry.*,³⁴ an amendment to the New York Constitution granting power to the Legislature to enact laws imposing liability upon employers to pay compensation for injuries suffered by employees because of their employment was proposed by the Legislature and adopted by the people in November, 1913 by a vote of approximately 500,000 to 194,000. The new amendment, originally section 19 of article I (subsequently renumbered article I, section 18) did not make any specific mention of occupational diseases.

The Legislature hastily passed an act in December, 1913³⁵ establishing a scheme of workmen's compensation benefits. However, in view of the fact that the newly adopted constitutional amendment by its terms did not become effective until January 1, 1914, there was serious doubt as to the constitutionality of this statute. Consequently the Legislature re-enacted the statute in March, 1914³⁶ in a slightly amended form and that act formed the basis of our present Workmen's Compensation Law. Coverage under the law was again limited to "accidental personal injury sustained by the employee arising out of

³¹ *Id.* at 66.

³² Laws of New York, 1910, ch. 674.

³³ Laws of New York, 1910, ch. 674, § 217.

³⁴ 201 N.Y. 271, 94 N.E. 431 (1911).

³⁵ Laws of New York, 1913, ch. 816.

³⁶ Laws of New York, 1914, ch. 41.

and in the course of his employment. . . .”³⁷ The only reference to disease in the statute is found in the definition of “injury” wherein it was stated that the term includes not only accidental injuries but also “such disease or infection as may naturally and unavoidably result” from such injuries.³⁸

It is not surprising that New York did not include industrial diseases within the purview of its compensation law at that time, for although a number of states had passed compensation acts by 1914, no state afforded coverage for occupational disease. It was not until 1918 that California first extended the ambit of its workmen’s compensation act to include occupational disease.³⁹ Connecticut and Wisconsin followed suit in 1919.⁴⁰

The movement to include occupational disease under workmen’s compensation also had effect in New York. For example, at the 1915 Constitutional Convention, there were serious efforts made to provide workmen’s compensation benefits for employees disabled by occupational diseases. At that Convention, a number of proposals were introduced to amend the Constitution so as to specifically provide authorization to the Legislature to cover occupational diseases under workmen’s compensation. These proposals received favorable consideration and one was reported out by the Convention Committee on Industrial Interests and Relations on August 9, 1915, with recommendation for adoption by the Convention. The Committee’s report stated:

Although it may be that illness from an occupational disease is a subject for compensation under the present constitutional provision for workmen’s compensation, that is not certain. This will make it certain. . . .

The same arguments apply for compensation for occupational diseases as apply for compensation for injuries for accidents. Occupational diseases may be due either to the substances with which

³⁷ Laws of New York, 1914, ch. 41, § 10.

³⁸ Laws of New York, 1914, ch. 41, § 3(7).

³⁹ OCCUPATIONAL DISEASE LEGISLATION, *supra* note 20, at 61.

⁴⁰ *Id.*

workmen have to do, or to the conditions under which they must do their work. The substances which are injurious to workmen are the metals, particularly lead, certain acids and soots. Of the conditions of work which lead to disease, the best known is the so-called 'bends,' the disease of the sand-hog or caisson-worker. It would be for the Legislature to enumerate the diseases for which compensation would be given.⁴¹

When the reported measure was given consideration by the Committee of the Whole on the floor of the Convention on September 2, 1915, a fair amount of debate took place. Mr. Parsons, Chairman of the Committee on Industrial Interests and Relations led off by asserting:

We know not only that accidents happen in industry but we know that in certain industries certain diseases come as the result of the occupation. . . .

There are in the metal working trades and in under-ground, under-water work, caisson work, very well recognized occupational diseases, which on the average are practically certain to occur. The object of this amendment is to make it possible for the Legislature to include such of those as it shall select in the scheme for providing workmen's compensation, on the theory that they are unavoidable and that therefore the industry should bear the expense.⁴²

Mr. Aiken also spoke in support of the measure. He asserted that the principle of workmen's compensation, that employees and employers should share any loss of wages due to the employment, applies

logically with more force to a disease which can be directly traced to an occupation in which a man is engaged than it can to accident, because a good many accidents happen which may not have a direct connection with the occupation; but in the case of an occupational disease there is always a direct connection between the disease and the employment.⁴³

At the conclusion of his remarks, Mr. Aiken engaged in a short colloquy with another delegate, Mr. Byrne, wherein Mr. Byrne inquired:

⁴¹ Report of the Committee on Industrial Interests and Relations Relative to Several Proposed Amendments, reprinted in DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, Doc. No. 38, at 2 (1915).

⁴² 4 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION 3937 (1915).

⁴³ *Id.* at 3939.

Does not this really only apply to those diseases which naturally come from a certain class of work like that of bends in the tunnels?⁴⁴

Mr. Aiken replied: "That is the main intent of this proposition."⁴⁵ Other speakers, both for and against the proposition, echoed the same sentiment concerning the nature of occupational disease, with one remarking that under the measure "diseases remotely connected with the work such as tuberculosis are not compensated. . . ."⁴⁶

At the conclusion of the debate, the Committee of the Whole voted to report the proposed amendment favorably to the Convention, the presiding officer noting that the motion was "manifestly carried."⁴⁷ The Convention subsequently approved the amendment for inclusion in the proposed constitution by a vote of 125 to 17.⁴⁸

The text of the amendment proposed by the 1915 Convention would have only slightly altered the wording of the 1913 amendment then in effect, by providing for the payment of compensation "for injuries to *or occupational diseases* of employees or for death of employees resulting from such injuries *or diseases*. . . ."⁴⁹

The 1915 Convention determined to submit its work to the people as a "single package" and as the entire package was defeated at the election of 1915, the specific wording on occupational diseases did not find its way into the Constitution.

The efforts made at the 1915 Convention in support of occupational disease coverage were continued at the sessions of the Legislature. Proposals for both constitutional amendments and ordinary legislation were introduced in 1916, 1919 and 1920. It was at the 1920 session of the Legislature that action was finally taken with respect to the inclusion of occupational diseases under the Workmen's Com-

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 3940.

⁴⁷ *Id.* at 3951.

⁴⁸ *Id.* at 4119-20.

⁴⁹ *Id.* at 4240 (emphasis added).

pensation Law. A statute was enacted⁵⁰ providing workmen's compensation benefits for employees disabled by virtue of any one of twenty-three specified diseases termed occupational. The schedule of enumerated diseases included a list of corresponding industrial processes⁵¹ and if an employee, employed in a process mentioned in the schedule contracted the listed corresponding disease, the disease was presumed to be due to the nature of the employment.⁵² The new law, which became Article 2-A of the Workmen's Compensation Law, specifically did not preclude an employee from recovering benefits with respect to any disease which was "an accidental personal injury" under the original law.⁵³

What is especially noteworthy about the 1920 session is not so much what the Legislature did as what it did not do. At this same session, bills were introduced which would have expanded occupational disease coverage beyond that which was actually enacted. One bill would reportedly have amended the Workmen's Compensation Law by expanding the definition of compensable injuries to include "occupational diseases arising out of the nature or character of the employment, regardless of accident."⁵⁴ Another would have included in the definition of compensable injuries "all diseases and illnesses caused arising out of and in course [sic] of employment."⁵⁵ Neither bill was reported out of committee. The Legislature apparently was not then affording *general* coverage of all occupational diseases.

Subsequent to 1920, substantial efforts continued to be made to include all occupational diseases within the scope of coverage under the Law. Governor Alfred E. Smith requested such legislation in his Annual Messages from 1925 through 1928. His 1926 message contained the most extensive comments. There he argued:

⁵⁰ Laws of New York, 1920, ch. 538.

⁵¹ Laws of New York, 1920, ch. 538 § 49-a.

⁵² Laws of New York, 1920, ch. 538 § 49.

⁵³ Laws of New York, 1920, ch. 538 § 49-b.

⁵⁴ N.Y. LEG. RECORD AND INDEX 51 (1920).

⁵⁵ *Id.* at 159.

On general principles all diseases arising out of and in the course of employment should be made compensable There is no reason to believe that such an extension of coverage would involve any considerable increase in the total cost of compensation. The more common occupational diseases are now specifically covered in our law or have been held compensable within the definition of accidental injuries, so that to cover all diseases due to occupation, as all accidental injuries due to occupation are covered, would not entail any undue burden on industry.⁵⁶

Governor Franklin D. Roosevelt and Governor Lehman urged similar enactments in Annual Messages from 1929 to 1935. Despite these promptings by the various chief executives, none of the bills introduced during the span of years from 1921 to 1934 ever passed one house, and most were not even reported out of committee. The only enactments adopted by the Legislature were by way of the addition of specific diseases to the schedule.

Despite this record of failure, the expectations of proponents of general coverage were not diminished. A committee of the American Public Health Association had predicted as early as 1931, that "[t]he New York schedule eventually will probably be enlarged to include what amounts nearly to complete coverage for occupational diseases."⁵⁷ In 1934 the Legislature gave an indication that it might indeed be moving toward passage of a general coverage statute when the Senate passed a bill which reportedly provided compensation "for disability or death of any employee resulting from any occupational disease."⁵⁸

It was in 1935, however, that general coverage was achieved and the equivalent of the present paragraph 29 enacted. In his Annual Message on January 2, 1935, Governor Lehman recommended to the Legislature "extension of the workmen's compensation law to embrace all occupational diseases as well as accidents."⁵⁹ A number of bills were introduced to effect this purpose, one of which was a bill sponsored by Assemblyman Francis J. McCaf-

⁵⁶ 1 N.Y. LEG. DOC. No. 3 at 25 (1926).

⁵⁷ OCCUPATIONAL DISEASE LEGISLATION, *supra* note 20, at 65.

⁵⁸ N.Y. LEG. RECORD AND INDEX 6 (1934). See Senate Int. No. 45.

⁵⁹ 1 N.Y. LEG. DOC. No. 3 at 14 (1935).

frey, Jr., put in on January 2, 1935.⁶⁰ A copy of the bill as originally introduced is not presently in the Bill Jacket and hence the actual text is not available.

The bill as passed by both houses and laid before the Governor for signature read in part as follows:

Section 1. Subdivision two of section three of chapter eight hundred and sixteen of the laws of nineteen hundred thirteen . . . is hereby amended by adding at the end of such subdivision, in columns one and two, a new subdivision twenty-eight, to read as follows:

28. Any and all occupational diseases 28. Any and all employments enumerated in subdivision one of section three of this chapter. Nothing in group twenty-eight of this subdivision shall be construed to apply to any case of occupational disease in which the last injurious exposure to the hazards of the disease occurred prior to September first, nineteen hundred thirty five.⁶¹

While the bill awaited Governor Lehman's action, its sponsor sent a letter to the Chief Executive urging approval of the bill. In it, Assemblyman McCaffrey stated:

As far back as 1920, an occupational disease statute was passed which took the form of the schedule plan of enumerated occupational diseases. It has been the feeling of those interested in this subject that the law should be broadened so as to make for a more equitable result in cases of employees whose disabilities were not of the accidental injury type but rather of the occupational disease type.⁶²

Governor Lehman approved the bill on March 26, 1935, and it became law.⁶³ In connection with his signing of the measure, the Governor filed the following memorandum which reads in part as follows:

This bill provides that a workingman and his dependents may be protected under the Workmen's Compensation Law for any and all occupational diseases incurred by a worker. . . . This measure finally consummates the original intent and spirit of the Workmen's Compensation Law. Not long after enactment, the Workmen's Compensation Law was amended to cover certain enumer-

⁶⁰ 1 N.Y. ASSEMBLY JOURNAL 27 (1935). Assembly Int. No. 20.

⁶¹ Assembly Print No. 2582; Bill Jacket, Laws 1935, ch. 254.

⁶² Letter from Francis J. McCaffrey, Jr. to Governor Herbert H. Lehman dated March 21, 1935; Bill Jacket, Laws 1935, ch. 254.

⁶³ Laws of New York, 1935, ch. 254.

ated occupational diseases. Since then many other specific occupational diseases have been individually brought within the scope of the law.

Underlying the Workmen's Compensation Law is the principle that the risk of injury in a hazardous employment is a social risk and the resultant loss to the employee should not be borne by the injured employee. It has been generally agreed that an employee should be protected not only against injury from an accident but also against physical injury or incapacity from a disease which has grown out of his employment.

I am glad to approve this bill which rounds out the Workmen's Compensation Law. . . .⁶⁴

The information covered in this review of the legislative history of paragraph 29 permits some helpful conclusions. It has been seen that when occupational disease legislation first was enacted in Europe, the statutes, especially the British Act, required a close connection between the disease and the type of work performed by the employee. We noted further that it appeared to be the consensus of the 1915 Constitutional Convention delegates who participated in the debate on an occupational disease proposal that occupational diseases were understood to be diseases which were unavoidable and almost certain to occur as a result of the occupation and that diseases remotely connected to the occupation, such as tuberculosis, were not considered compensable. When occupational diseases were first covered in 1920, the coverage was limited to twenty-three specified diseases growing out of twenty-three specific industrial processes. During the period 1921-1934 the only changes made legislatively were additions to the list of specific diseases. In view of these factors, it can be seen that the legislators were adhering to the historical concept of occupational disease, that of a disease identifiable with a trade or occupation.

The most significant evidence on the question of legislative intent, however, is to be found in the course taken by the bill introduced at the 1935 session of the Legisla-

⁶⁴ Memorandum of Approval, March 26, 1935, reprinted in PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN 324-25 (1935).

ture which was enacted and ultimately became paragraph 29 as we know it today. Particular reference should be made to the amendment of the bill on February 14, 1935 by its sponsor. Although the text of the bill as originally introduced on January 2, 1935 is not presently available, the original draft can be reconstructed with the aid of the final version adopted by both houses. Utilizing the page and line numbers of the amendment as recorded in the Assembly Journal,⁶⁵ it may be determined that the bill in its original form read "any and all disabling diseases and disabling illnesses." The amendment changed this to "any and all occupational diseases" and the bill passed in this form.

Considering the bill as introduced, it is observed that the words "disabling" were not very material since the Law as it then existed, especially section 39, already provided that compensation benefits were payable when an employee was disabled due to disease. Hence the bill as introduced meant to cover simply all diseases and illnesses. Of course the matching industrial process, "Any and all employment . . ." added the requirement that such diseases or illnesses be connected with employment. Such, however, would have been the only requirement.

The amendment consequently narrowed the extent of the general coverage by using the term "occupational diseases" which had historically meant diseases clearly identified with particular trades. The foregoing compels the conclusion that the Legislature when it enacted what is now paragraph 29 did not intend to cover diseases which merely arose out of the employment but rather only those diseases that were directly traceable to the nature of the occupation engaged in by the employee.

⁶⁵ "Mr. McCaffrey moved to amend as follows:

Page 2, line 3, strike out the word 'disabling' and insert the word 'occupational.'

Page 2, line 4, strike out the words 'and disabling ill.'

Page 2, line 5, strike out the word 'nesses.'

1 N.Y. ASSEMBLY JOURNAL 512 (1935).

JUDICIAL INTERPRETATION

The Court of Appeals has passed upon cases where construction of paragraph 29 of the statute was directly involved and over a thirty-year period has repeatedly discussed the meaning of the statutory terminology. In the process of making these decisions the Court has formulated a clear definition of occupational disease.

Within only a few years after the passage of the paragraph covering any and all occupational diseases, the Court of Appeals had occasion to pass upon its meaning. The first interpretation of the statutory language by the Court came in *Goldberg v. 954 Marcy Corp.*,⁶⁶ decided in 1938. That case involved a claim made by a cashier in a movie theatre with respect to a condition of her legs and feet. The claimant's duties encompassed the sale of admission tickets while seated in a booth located in the street outside the theatre lobby. The booth was heated by an electric heater which the claimant could turn on and off. The claimant alleged that the alternate heat and cold caused blotches to appear on her legs and also caused a numbness in her feet. She made complaints about these conditions to her employer who referred her to a physician. While on her way to an appointment with the physician, the claimant fell, allegedly due to the weakness of her feet, and fractured an ankle. The Workmen's Compensation Board made an award predicated upon both occupational disease and accidental injury. The appellate division affirmed with one dissent.

The opinion of the Court of Appeals, written by Judge Finch, first considered the occupational disease aspect of the case. He observed that the contention had been made on behalf of the claimant that the addition of paragraph 28 (now paragraph 29) in 1935 had extended compensation coverage to any disease arising out of and in the course of employment just as the statute covered any accidental injury arising out of and in the course of employment. This

⁶⁶ 276 N.Y. 313, 12 N.E.2d 311 (1938).

contention, said Judge Finch, would, if granted, convert workmen's compensation into the equivalent of life and health insurance. He indicated that the context of the statute, wherein the "any and all" provision followed an extensive listing of specific diseases peculiar to the listed occupations and processes, suggested that the last provision be construed in the same sense as the earlier ones. The Court then formulated its definition of the concept of occupational disease as follows:

Thus 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, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general. Thus compensation is restricted to diseases resulting from the ordinary and generally recognized risks incident to a particular employment, and usually from working therein over a somewhat extended period. Such disease is not the equivalent of a disease resulting from the general risks and hazards common to every individual regardless of the employment in which he is engaged.⁶⁷

The Court noted that the occupation of handling cash and theatre tickets obviously could not have caused the numbness of claimant's feet and therefore the condition was not caused by the nature of the employment. The award, therefore, could not be sustained on an occupational disease theory.⁶⁸

The *Goldberg* decision laid down a basic standard that was cited with approval ten years later in *Harman v. Republic Aviation Corp.*⁶⁹ There, the claimant, a foreman's assistant, worked in a tool shop where he was required to read blueprints and do layout work. His duties brought him into contact with a co-worker named Humphrey who did the same sort of work. The two men talked over the

⁶⁷ *Id.* at 318-19, 12 N.E.2d at 313.

⁶⁸ The Court found, however, that the fall suffered by the claimant was due to the weakness of her feet which was in turn related to her employment, and that therefore she sustained an accidental injury. The Court unanimously affirmed the award, but solely on the theory of accidental injury.

⁶⁹ 298 N.Y. 285, 82 N.E.2d 785 (1948).

same telephone, conferred together and generally worked only a few feet apart. Humphrey had tuberculosis and after awhile the claimant became afflicted with the disease. The Board made an award for occupational tuberculosis and the appellate division affirmed by a divided vote.

In an opinion by Judge Fuld, the Court of Appeals unanimously reversed the decisions below and dismissed the claim. Noting that it was clear that the claimant had contracted the disease from Humphrey, the Court nevertheless stated that communicable diseases caught from fellow employees were not occupational diseases. Approval of the award here, in Judge Fuld's view, would transform workmen's compensation into health insurance (a view reminiscent of Judge Finch's remarks in *Goldberg*). Granting that such a course of action might be socially desirable, the choice for adoption of such a remedy rested with the legislature, not the courts.

The opinion went on to state:

When the legislature, in 1920 . . . added Article 2-A to the Workmen's Compensation Law, it granted coverage only for 'occupational diseases,' not, as it might have, for *communicable diseases* or for *any and all diseases arising out of and in the course of employment*. Clearly, the legislature did not make compensation benefits for diseases as inclusive or as broad as those for accidental injuries. Thus, if a workman suffers an injury, he has but to show . . . that his injury arose 'out of and in the course of employment.' If, however, an employee is disabled by disease, he must go further and prove that his disablement was the result of an 'occupational disease.'⁷⁰

The Court then commented at length on the concept of occupational disease as follows:

[T]he disease is not covered unless it is 'occupational,' and the word 'occupational,' subjected to careful consideration, has taken on well-defined meaning. An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one which is commonly regarded as natural to, inhering in, an incident and concomitant of, the work in question. There must be a recognizable link between the disease and

⁷⁰ *Id.* at 287-88, 82 N.E.2d at 786.

some distinctive feature of the claimant's job, common to all jobs of that sort.⁷¹

Noting that tuberculosis was not the natural result of the claimant's job, the Court observed that the hazard which subjected claimant to the disease was Humphrey. "Any one . . . in any field of work, in any occupation or employment . . . may contract tuberculosis, given a fellow worker already ill with that disease."⁷² The Court concluded by stating that no peculiarity of claimant's occupation induced the disease but rather it resulted from a general risk common to all individuals regardless of employment. The Court had again enunciated a definition of occupational disease requiring a close association between the disease and the occupational activity of the employee, and in fact, in the course of its opinion, not only cited *Goldberg* with approval but actually quoted from the definition of occupational disease formulated in the opinion therein.

Within a year the Court again had occasion to consider the import of what is now paragraph 29. In *Champion v. Gurley*,⁷³ an inspector of surveying instruments filed a claim for compensation benefits alleging that he had contracted a thrombophlebitis condition as a result of constantly jumping down from a raised platform upon which his desk was temporarily located for a period of four to six weeks. An award by the Board for occupational disease which had been affirmed by the appellate division was reversed by the Court of Appeals. The opinion by Judge Dye found that the thrombophlebitis condition here

was not a natural incident of the occupation of inspector of surveying instruments nor can it be deemed a condition to which all instrument inspectors were commonly exposed by reason of that particular occupation. The incident described as responsible for the onset of the disease was limited to the claimant's personal, individual situation due to the temporary location of his desk on a platform. Thrombophlebitis is not a natural, common, incidental, normally to be expected, disease unavoidably resulting from the

⁷¹ *Id.* at 288, 82 N.E.2d at 786.

⁷² *Id.* at 290, 82 N.E.2d at 787.

⁷³ 299 N.Y. 406, 87 N.E.2d 430 (1949).

occupation of instrument inspector. . . . The medical testimony affords causal connection, but this of itself does not supply proof adequate to establish the thrombophlebitis suffered by the claimant here as an occupational disease within the accepted definition of its meaning. . . .⁷⁴

Another major case decided by the Court of Appeals on this issue was *Detenbeck v. General Motors Corp.*⁷⁵ The claimant was an inspector in the employer's salvage department whose duties included the periodic collection of engine cases weighing 176 pounds each as well as the removal of barrels of bushings weighing over 100 pounds each. This required considerable bending and lifting and after awhile claimant began to feel pain in his back and spine. Despite medical attention he was eventually disabled from further work. Detenbeck, however, had a congenital defect and weakness in his spine and there was evidence that the work would not have affected normal persons. The Board awarded compensation for occupational aggravation of a pre-existing condition and the appellate division affirmed.

The Court of Appeals, by a vote of four to two, reversed the decisions below and dismissed the claim. Judge Van Voorhis, writing for the majority, noted that the evidence and the findings below indicated that the nature of the work alone would not produce the claimant's disability in normal workers. In fact, the work simply amounted to the ordinary wear and tear of life which happened to aggravate an infirmity that the claimant had been born with.

The Court stated that the rule regarding occupational *disease* was not the same as that for industrial *accidents* since in the latter instance, a disability is compensable even though it would not have occurred unless the employee were predisposed to it by virtue of some already existing condition. After citing *Goldberg*, *Harman* and *Champion*, the majority then applied the principle enunciated in those cases to aggravation claims:

⁷⁴ *Id.* at 408, 87 N.E.2d at 431.

⁷⁵ 309 N.Y. 558, 132 N.E.2d 840 (1956).

An employee who is physically handicapped may contract an occupational disease more easily because of his weakened condition, but the test of what is an occupational disease is the same whether the employee is decrepit or in normal health. There must be a recognizable link between the disease and some distinctive feature of the claimant's job. This test is not met where disability is caused by an aggravation of a condition which is not occupational in nature. If an employee contracts an occupational disease, he is not to be prejudiced by reason of a pre-existing illness or defect, but neither is he to be preferred over other employees by creating a different class of compensable disabilities for his benefit.⁷⁶

In the dissenting opinion, Judge Froessel found that the bending and lifting of heavy weights required of the claimant was a hazard in excess of the hazards attending employment in general. He felt that the *Goldberg, Harman and Champion* cases were not applicable since in each of those cases the disabilities were not the result of the nature of the employment but rather related to temporary conditions involving the place of work. Other cases, such as *Buchanan v. Bethlehem Steel Co.*⁷⁷ and *Townsend v. Union Bag & Paper Corp.*,⁷⁸ controlled. There, awards for occupational aggravation of pre-existing non-occupational conditions were affirmed. He concluded by saying:

The present appeal does not present the case of an ailment merely happening on the employer's premises. There is no issue of causal relationship between claimant's condition and his work. It is true that he had a congenital malformation in his back, but that had never caused him trouble before his present employment. The nature of his work caused the present disablement.⁷⁹

Detenbeck marks the first time that the Court split in a major case involving concepts of occupational disease. It is important to remember, however, that both the majority and minority agreed that the disabling disease or condition must proceed from the nature of the work, with the majority insisting that the occupation be the *sole* cause

⁷⁶ *Id.* at 562, 132 N.E.2d at 842-43.

⁷⁷ 278 App. Div. 594, 101 N.Y.S.2d 1011 (3d Dep't), *aff'd*, 302 N.Y. 848, 100 N.E.2d 45 (1951).

⁷⁸ 282 App. Div. 968, 125 N.Y.S.2d 360 (3d Dep't 1953), *aff'd*, 307 N.Y. 710, 121 N.E.2d 537 (1954).

⁷⁹ 309 N.Y. at 567, 132 N.E.2d at 846.

whereas the minority felt that the occupation need only be a contributing cause.

The most recent decision by the Court of Appeals on occupational disease came in two related cases which were considered together: *Paider v. Park East Movers*⁸⁰ and *Snir v. J. W. Mays, Inc.*⁸¹ In the *Paider* case, the claimant, a truck driver for a furniture moving company, filed a claim for occupational tuberculosis. He alleged that in the course of the performance of his duties which consisted of loading, hauling and unloading furniture, he was assigned a helper, one Smith. Unfortunately Smith was afflicted with tuberculosis. For approximately eight or nine months, Paider and Smith worked together in close proximity spending a good deal of the time riding together in the cab of a company truck. During foul or cold weather the cab windows were kept closed. Smith coughed during this entire period and eventually Paider too began coughing. It was then discovered that Paider had tuberculosis. Medical proof attributed the contraction of the disease to the exposure in the truck cab with Smith.

The Board made an award for occupational disease finding that the truck cab "was an instrument in bringing claimant in contact with and exposing him to a co-worker who had tuberculosis. . . ." ⁸² The appellate division unanimously reversed the Board's decision,⁸³ noting that "exposure to tubercular patients is an occupational hazard of the nurses engaged in their care and treatment; but is not ordinarily an incident of, and certainly is not peculiar to the occupation of truck driver. . . ." ⁸⁴ The Court of Appeals affirmed denial of the claim.

Before considering the Court of Appeal's decision in *Paider*, it would be helpful to review its companion case, *Snir v. J. W. Mays, Inc.* This case involved a claim for benefits made by a cashier in the giftware department of

⁸⁰ 19 N.Y.2d 373, 227 N.E.2d 40, 280 N.Y.S.2d 140 (1967).

⁸¹ *Id.*

⁸² 29 Workmen's Compensation Board Court Decisions 45, 48 (1966).

⁸³ *Paider v. Park East Movers*, 25 App. Div. 2d 62, 267 N.Y.S.2d 12 (3d Dep't 1966).

⁸⁴ *Id.* at 62, 267 N.Y.S.2d at 13.

a department store, who worked for a period of four months at a cash register located in an area where, due to the malfunctioning of an air conditioning duct, she was subjected to a continuous draft of very cold air on the back of her neck and her right side. This caused a chronic myositis involving the muscles of her neck and right shoulder which was linked, by medical evidence, to the constant draft of cold air. The facts had been stipulated by both sides, the only question being whether they were sufficient to establish an occupational disease within the meaning of the law.

A Board Panel found, by a two to one vote, that claimant was disabled due to occupational disease and made an award. The majority found that as a result of the forced circulation of cold air on claimant's neck area she developed the myositis condition and that there was a recognizable link between the claimant's condition and her employment since "air condition [*sic*] systems presently are a distinctive feature of modern department stores generally. . . ." ⁸⁵ The dissenting member simply observed that there was no occupational disease established within the meaning of the law. Upon appeal by the employer, the appellate division affirmed the award by a vote of three to two. The majority found the basic cause of the disablement was the claimant's physical presence in the area at a cash register located in a direct line between two air conditioning outlet ducts. This "positional risk" was "distinctive of claimant's job, as it would be in the case of every other employee who should work at the same cash register" ⁸⁶ and therefore the disease was occupational in nature. The dissenting minority viewed the ruling as an unwarranted extension of the definition of occupational disease as outlined in the *Goldberg, Harman* and *Detenbeck* cases and took the position that the cold air draft was not a distinctive hazard of claimant's occupation.

⁸⁵ 29 Workmen's Compensation Board Court Decisions 465, 473 (1966).

⁸⁶ *Snir v. J. W. Mays, Inc.*, 26 App. Div. 2d 752, 753, 272 N.Y.S.2d 300, 301-02 (3d Dep't 1966).

The Court of Appeals denied the claim in both the *Paidier* and *Snir* cases. The majority opinion was written by Judge Scileppi who referred at the outset to the definition of occupational disease in *Goldberg*. The Court found that in the *Snir* case, the claimant was not subjected to an ailment necessarily an incident of work as a cashier.

Cashiers as a class are not hired with the expectation that the work will be performed in front of a cold air ventilator. . . . [I]t cannot be said that the cold blasts from the air conditioning were 'common' to all cashiers' jobs; rather it was the place to work, not the work itself, that was responsible for claimant's illness.⁸⁷

With regard to the *Paidier* case, the majority quoted from *Harman* and pointed out that in this case the hazard was similarly caused by a co-worker, "not any peculiar feature of the claimant's employment as a truck driver."⁸⁸ The Court concluded, with respect to both cases, that

[i]n sum, we view an occupational disease as an ailment which is the result of a distinctive feature of the kind of work performed by claimant and others similarly employed, not an ailment caused by the peculiar place in which particular claimant happens to work, as in *Snir*, or caused by ordinary contact with a fellow employee as in *Paidier*. . . . The Legislature can extend the meaning of occupational disease to include all illness causally related to the worker's employment. We cannot.⁸⁹

The dissenting opinion by Judge Bergan, joined by Judge Keating, opened by characterizing the Court's earlier opinion in *Goldberg* as a "gloss" on the definition of occupational disease which was more restrictive than the words of the statute itself. After discussing the placement of the "any and all" provision at the end of the list of specific diseases, he commented upon the juxtaposition of the disease and process columns of paragraph 29. With reference to this paragraph he stated that "Read literally this would seem to mean a disease produced by the work or by the

⁸⁷ *Snir v. J. W. Mays, Inc.*, 19 N.Y.2d 373, 378, 227 N.E.2d 40, 43, 280 N.Y.S.2d 140, 143 (1967).

⁸⁸ *Paidier v. Park East Movers*, 19 N.Y.2d 373, 379, 227 N.E.2d 40, 43, 280 N.Y.S.2d 140, 144 (1967).

⁸⁹ *Id.* at 380, 227 N.E.2d at 44, 280 N.Y.S.2d at 144.

environment of the work.”⁹⁰ The *Goldberg* opinion, he argued, unnecessarily restricted its scope to only those diseases generally recognized as naturally incident to a particular employment.

It must be apparent that there are many diseases which ought to be treated as ‘occupational’ within the scope of the statute, which are truly brought on by the work itself or by the environment of the work, but which could be contracted in other ways and which may not ‘generally’ be regarded as so special a ‘hazard’ of the particular occupation as to distinguish it from the usual run of occupations.⁹¹

The dissent found support for its position in *Roettinger v. A & P Tea Co.*,⁹² *Benware v. Benware Creamery*,⁹³ and *Mason v. Y.M.C.A.*⁹⁴ which, it was contended, cut through the “natural incident” requirement of *Goldberg*. Judge Bergan concluded:

In both the cases before us, therefore, the awards made by the board ought to be sustained, since they are based on a showing of a recognizable link, confirmed by medical opinion, between the occupationally created environment and the disease in an occupation listed in the statute as appropriate for relief for ‘any occupational disease.’⁹⁵

The dissent here for the first time departed from the line of cases proceeding from *Goldberg*; indeed, the dissent even explicitly challenged the validity of the *Goldberg* definition of occupational disease and indicated that it preferred a basic “relationship to the employment” test. Nevertheless, it was a minority view.

Thus, there has been a uniform interpretation of the term “occupational disease” in the *Goldberg*, *Harman*, *Champion*, *Detenbeck* and *Paider* cases. These cases, of course, were not the only cases on occupational disease

⁹⁰ *Id.* at 381, 227 N.E.2d at 44, 280 N.Y.S.2d at 145 (dissenting opinion).

⁹¹ *Id.*

⁹² 17 App. Div. 2d 76, 230 N.Y.S.2d 903 (3d Dep’t 1962), *aff’d*, 13 N.Y.2d 1102, 196 N.E.2d 268, 246 N.Y.S.2d 633 (1963).

⁹³ 22 App. Div. 2d 968, 254 N.Y.S.2d 466 (3d Dep’t 1964), *aff’d*, 16 N.Y.2d 966, 212 N.E.2d 771, 265 N.Y.S.2d 284 (1965).

⁹⁴ 271 App. Div. 1042, 68 N.Y.S.2d 510 (3d Dep’t), *motion for leave to appeal denied*, 297 N.Y. 1037 (1947).

⁹⁵ *Paider v. Park East Movers*, 19 N.Y.2d 373, 383, 227 N.E.2d 40, 45, 280 N.Y.S.2d 140, 147 (1967).

decided by the Court of Appeals, but they do represent those cases in which full opinions were written on the subject by the Court. Using terms such as "natural incident," "recognizable link," and "unavoidable result," the Court has consistently required that diseases, to be considered occupational, must be the result of the *type* of work the claimant is doing. It is not sufficient to merely show that the disease arose out of the employment in order to establish compensability. It is clear, therefore, that coverage for occupational diseases is not as extensive as coverage for accidental injuries under New York law. Finally, it should be noted that not only must the disease be due to the nature of the employment, but, as has been seen from the decision in *Detenbeck*, the disability must be caused *solely* by the nature of the employment.

CONCLUSION

In reviewing the foregoing materials it is noted that the concept of occupational disease historically came into being upon the recognition by the medical profession, prompted by observation of the frequent incidence of particular diseases in men practicing particular trades, of the association between disease and occupation. The term occupational disease originally meant a disease peculiar to a certain occupation and associated with that occupation in a well-recognized, frequent and generally exclusive manner. The disease was always linked to an occupational activity and was generally a foreseeable result of such activity.

This definition came to be adopted and utilized when legislation was first passed providing benefits for disablement due to occupational disease. This was true in New York when it first adopted occupational disease legislation in 1920 and is evidenced by the structure of the coverage afforded, consisting of a listing of specific diseases and specific industrial processes related thereto.

When the Legislature adopted the general coverage provision in 1935, it did not intend to change the earlier understanding of the concept of occupational disease. This

was particularly evidenced by the amendment of the bill which later became what is now paragraph 29 while that bill was pending in the Assembly. The change from "any and all disabling diseases and disabling illnesses" to "any and all occupational diseases" furnishes rather strong proof that the legislative intent was not to cover all diseases which arose out of the employment but rather to limit coverage to "occupational diseases," *i.e.*, those diseases which were directly traceable to the *nature* of the occupational activity engaged in by the employee. The courts have implemented legislative intent by consistently and uniformly interpreting the term "occupational diseases" to mean only those diseases which are the natural result of the type of work activity performed by the claimant.

It is clear from these cases that the law of occupational disease in New York is substantially different from the law of accidental injury. Any injury that can be related to the employment is compensable whereas a disease must not only be related to the employment but to the particular type of employment engaged in by the employee. Using the *Paider* case as an illustration, the test for occupational disease could be summarized in the form of a question: Is the disease related to the claimant's work *as a truck driver* for Park East Movers? Mere relationship of the disease to the employment with Park East Movers is insufficient to establish compensability.

Other holdings of the Court of Appeals in cases involving occupational disease where decisions were rendered without opinion or only a brief *per curiam* opinion do not depart from the rule. Those most frequently discussed in dissenting opinions⁹⁶ and articles⁹⁷ are *Roettinger v. A & P Tea Co.*,⁹⁸ *Benware v. Benware Creamery*,⁹⁹ and

⁹⁶ *Id.* at 380, 227 N.E.2d at 43, 280 N.Y.S.2d at 145 (dissenting opinion).

⁹⁷ Barker, *New York Workmen's Compensation: Occupational Disease*, 31 ALBANY L. REV. 15 (1967).

⁹⁸ 17 App. Div. 2d 76, 230 N.Y.S.2d 903 (3d Dep't 1962), *aff'd*, 13 N.Y.2d 1102, 196 N.E.2d 268, 246 N.Y.S.2d 633 (1963).

⁹⁹ 22 App. Div. 2d 968, 254 N.Y.S.2d 466 (3d Dep't 1964), *aff'd*, 16 N.Y.2d 966, 212 N.E.2d 771, 265 N.Y.S.2d 284 (1965).

*Mason v. Y.M.C.A.*¹⁰⁰ In the *Roettinger* case, the claimant, a butcher, contracted pulmonary emphysema due to constantly going back and forth between a refrigerated meat cooler and other areas of the store which were at higher temperatures. The evidence indicated that the condition was due to the exposure to cold air. In the *Benware* case, the claimant, a general worker in a dairy plant, was required to wash milk bottles and other equipment in cold water and also handle cold milk containers. His hands were constantly immersed in cold liquids and he was exposed to cold air. He was diagnosed as having Raynaud's disease. In each case the Board made an award on an occupational disease basis which was affirmed by the Court of Appeals without opinion.

Neither of these cases represent a departure from the previous definition of occupational disease. In both cases the employees were required as part of their work activity to be exposed to cold air or cold liquids. It could be anticipated that a butcher, in order to handle meat, would have to enter a refrigerated area. It could also be anticipated that such repeated exposure to temperature extremes might result in a pulmonary ailment. Likewise, a bottle washer and dairy worker would, of necessity, have contact with cold water and cold objects. Any butcher or any dairy bottle washer would be exposed to the same conditions which were peculiar to that type of employment.

*Mason*¹⁰¹ represents a somewhat more difficult problem. The claimant in that case was a telephone switchboard operator who became infected with tuberculosis by means of a telephone mouthpiece which had been contaminated by a fellow worker who had tuberculosis. An award by the Board was affirmed by the appellate division in a short memorandum opinion and leave to appeal was denied by the Court of Appeals. It is true that in this case, as in

¹⁰⁰ 271 App. Div. 1042, 68 N.Y.S.2d 510 (3d Dep't), motion for leave to appeal denied, 297 N.Y. 1037 (1947).

¹⁰¹ *Id.* *Hovancik v. General Aniline & Film Corp.*, 8 App. Div. 2d 171, 187 N.Y.S.2d 28 (3rd Dep't 1959) presents a similar issue in a slightly different fact situation. A laboratory technician contracted tuberculosis through the use of a glass pipette contaminated by a co-worker. The award was affirmed by the appellate division.

Harman and *Paider*, the ultimate source of infection was a fellow employee. However, in *Mason* the telephone mouthpiece, which was an essential instrument in the performance of the duties of the job, served as the means of transmission of the disease. The use of this instrument necessitated close oral contact which heightened a potential danger of infection and therefore might be said to constitute a special hazard peculiar to that occupation. In the *Harman* and *Paider* cases, however, the means of transmission was merely the atmosphere, the environment in which the work was performed, which bore no special relation to the type of work activity performed. It should also be noted that the *Mason* case was specifically distinguished in the *Harman* opinion. Therefore, in this writer's opinion, the *Mason* case represents the outermost limit to which the Court will go in occupational disease cases.

These holdings, and indeed the full opinion cases as well, do not mean that there has been no judicial expansion of the concept of occupational disease. Originally that concept included only those diseases which were clearly recognized and associated in a generally exclusive manner with the trade or occupation. This required proof that the nature of the occupation bore a hazard common to all workers performing that type of work and also that the work frequently produced the disease in the average worker in that trade.

A review of the Court's major decisions in occupational disease cases will indicate that these requirements have been softened somewhat, at least in cases involving claims for initial contraction or precipitation of an occupational disease as distinct from claims involving questions of an occupational aggravation of a pre-existing condition. In precipitation claims one now need only show that the work activity was peculiarly hazardous to all workers in that line of work and could *potentially* result in the disease which was the subject of the claim. In aggravation claims, however, in addition to proof of a common hazard together with potential contraction there should be proof of an *actual* high incidence of the disease among that type of worker. The reason for this would appear to be the

fundamental requirement that the occupation essentially be the *sole cause* of the disease. In precipitation claims this is not so difficult to establish in view of the absence of previous susceptibility of the claimant, whereas in aggravation claims the issue is much more difficult to resolve and hence the degree of proof required is higher. This level of proof in aggravation claims might be partially satisfied by inquiring of attending physicians in the course of their testimony whether the work activity, in and of itself, could have produced the claimed condition in the normal individual.

This study permits the suggestion of a formulation to aid in ascertaining the standard required by the courts. It would appear that for a disease to be considered occupational, it must be a *reasonably foreseeable consequence of some necessary, distinct and typical aspect of the employee's actual occupational activity*. It is not sufficient that the disease is merely associated by way of causation with the employment with a particular employer.

Applying this test to the *Snir* case it can be seen that chronic myositis is not a reasonably foreseeable consequence of work as a cashier. Similarly, tuberculosis is not an expected incident of the occupation of truck driving as in the *Paidier* case, though it is of the practice of nursing. An example of an occupational disease with reference to truck driving is *Nayor v. Harwick Trucking Corp.*,¹⁰² where an award was affirmed for occupational "Bell's palsy" caused by constant draft due to driving in an open truck cab. There, as in the *Roettinger* and *Benware* cases, the element of foreseeability was present.

In sum, therefore, the realm of occupational disease is the realm of the expected as distinguished from the world of accident which deals with the unexpected. Whatever inequities may result from such a view are not a consequence of judicial failure to properly interpret the law. Any remedy for such inequities must come, as the courts have often pointed out, from the Legislature, which is the repository of the policy-making power and the source of social change.

¹⁰² 283 N.Y. 62, 27 N.E.2d 434 (1940).