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Workmen's Compensation--Heart Cases--Possible Demise of the "Unusual Strain" Test

Nelson E. Shafer
University of Kentucky

Recent Cases

WORKMEN'S COMPENSATION—HEART CASES—POSSIBLE DEMISE OF THE "UNUSUAL STRAIN" TEST. The decedent, a millwright, apparently suffered from chronic heart and arterial insufficiency at a time when, as part of his usual employment, he helped to install a heavy piece of machinery in his employer's factory. He was stricken with acute myocardial infarction[1] soon after completing the installation, and death ensued within ten days. A petition by decedent's widow for compensation under the New Jersey Workmen's Compensation Act[2] was dismissed on the ground that decedent had not experienced any "unusual strain." She appealed to the state supreme court. *Held*: Reversed. Plaintiff's failure to prove that the decedent suffered an unusual strain, or failure to show that he was engaged in work more strenuous than that for which he had been hired, is immaterial. Absence of such facts is an illusory criterion for denying the existence of a compensable work-connected injury or death by accident. *Ciuba v. Irvington Varnish and Insulator Co.*, 27 N.J. 127, 141 A. 2d 761 (1958).

The *Ciuba* case manifests a departure from a doctrine to which New Jersey not only adhered, but one which it also played a leading part in developing. Heretofore, this highly industrial state had adhered to the "unusual strain (or exertion) test" in heart cases arising under workmen's compensation acts,[3] as had a minority of jurisdictions.[4] This doctrine attained maximum refinement through its

[1] Myocardial infarction is a condition which involves the pathologic death of tissue in the heart muscle due to a complete interference with the blood flow. Blakiston, New Gould Medical Dictionary 597 (2d ed. 1956).

[2] N. J. Rev. Stat., tit. 34, ch. 15 (1937).

[3] Kream v. Pub. Serv. Coordinated Trans., 42 N. J. Supra. 307, 126 A. 2d 385 (1956), *aff'd*, 24 N. J. 432, 132 A. 2d 512, *cert. denied*, 355 U. S. 864 (1957); Seiler v. Robinson, 24 N. J. Super. 559, 95 A. 2d 153, *aff'd*, 13 N. J. 307, 99 A. 2d 422 (1953); Schroeder v. Arthur Sales Co., 5 N. J. Super. 287, 68 A. 2d 878 (1949), *aff'd*, 4 N. J. 116, 71 A. 2 d644 (1950); Grassgreen v. Ridgeley Sportswear Mfg. Co., 2 N. J. Super. 62, 64 A. 2d 616 (1949); Lohndorf v. Peper Bros. Paint Co., 134 N. J. L. 156, 46 A. 2d 439 (1946), *aff'd*, 135 N. J. L. 352, 52 A. 2d 61 (1947). Note that New Jersey restricted application of the unusual strain test to heart cases; see Fox v. City of Plainfield, 10 N. J. Super. 464, 77 A. 2d 281 (1950). But in this connection, compare Neylon v. Ford Motor Co., 8 N. J. 586, 86 A. 2d 577, *rev'd on rehearing*, 10 N. J. 325, 91 A. 2d 569 (1952). See also 6 Rutgers L. Rev. 629 (1952).

[4] Due to changing attitudes and apparent lack of precision in the cases, it is difficult to tabulate or categorize all adherents, present and past, of the so-called minority view. However, the following is submitted as an indication of the jurisdictions which do, did, or seem to follow the unsual strain doctrine.

(a) Colorado, North Carolina, Ohio, South Dakota, and Washington still seem to adhere to the minority view. "In heart cases . . . a showing of an

frequent application by the New Jersey courts. The gist of the doctrine is that, to merit an award of compensation for death or disability due to a heart attack or failure, it must appear that the infirmity was

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accidental strain or over-exertion is necessary to meet the test of an industrial accident. . . ." The Industrial Comm'n of Colo. v. Horner, ——— Colo. ———, 325 P. 2d 698, 699 (1958); "[I]t is clear that in *heart cases* our decisions require a showing that the exertion was in some way unusual or extraordinary." Lewter v. Abercrombie Enterprises, Inc., 240 N. C. 399, 82 S.E. 2d 410, 415 (1954). "[T]here . . . must be some evidence that the death of the workman was caused or contributed to by some act which was different in kind or in exertion from the regular, ordinary work performed by the workman. . . ." Nelson v. Industrial Comm'n, 150 Ohio St. 1, 80 N.E. 2d 430, 436 (1948). In the case of Cooper v. Vinatieri, 73 S.D. 418, 43 N.W. 2d 747 (1950), it was indicated that death caused by a strain upon an already weakened heart is not compensable where the strain resulted from a normal amount of exertion necessary for the performance of one's ordinary duties. Finally, implications from Windust v. Dept. of Labor and Indus., ——— Wash. ———, 323 P. 2d 241 (1958), have led to the conclusion that the state of Washington has become an adherent of the minority view. Comment, 33 Wash. L. Rev. 420 (1958).

(b) Idaho, Missouri, Nebraska and Pennsylvania have not seemed to make any clear-cut pronouncement, but it is possible that they follow the minority view. See Dunn v. Morrison-Knudsen Co., 74 Ida. 210, 260 P. 2d 398 (1953), and Swan v. Williamson, 74 Ida. 32, 257 P. 2d 552 (1953); Crow v. Missouri Implement Tractor Co., 307 S.W. 2d 401 (Mo. 1957), and State ex rel. Hussman-Ligonier Co. v. Hughes, 348 Mo. 319, 153 S.W. 2d 40 (1941); Hamilton v. Huebner, 146 Neb. 320, 19 N.W. 2d 552 (1945), and Rose v. City of Fairmont, 140 Neb. 550, 300 N.W. 574 (1941); Cope v. Philadelphia Toilet Laundry and Supply Co., 167 Pa. Super. 205, 74 A. 2d 775 (1950).

(c) Minnesota and New York occupy a unique position for purposes of our consideration. Minnesota formerly required evidence of unusual exertion in order to prove the existence of an accident. In 1953, the Minnesota statute was amnded and the finding of an accident was no longer required. Minn. Stat. § 176.021(1) (1953). See generally, Fleischer v. State of Minn. Dept. of Highways, 247 Minn. 396, 77 N.W. 2d 288 (1956), and Golob v. Buckingham, 244 Minn. 301, 69 N.W. 2d 636 (1955). New York has at least paid lip-service to the unusual exertion rule for many years. However, there has been a gradual transition from a strict application of the rule, whereby recovery was severely limited, to modern-day notions of liberal construction permitting recovery under a broad interpretation of "unusual." 1 Larson, Workmen's Compensation, §§ 38.64-.64(a) (1952).

(d) Arizona, Arkansas, Florida and Michigan formerly seemed to follow the unusual strain test, but recent decisions tend to indicate that they will no longer take that view. Compare Pierce v. Phelps Dodge Corp., 42 Ariz. 436, 26 P. 2d 1017 (1933), with Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 285 P. 2d 605 (1955); Duke v. Perkin Wood Products, 223 Ark. 182, 264 S.W. 2d 834 (1954), with Bryant Stave and Heading Co. v. White, 227 Ark. 147, 296 S.W. 2d 436 (1956); McNeill v. Thompson, 53 So. 2d 868 (Fla. 1951), with Gray v. Employers Mut. Liab. Ins. Co., 64 So. 2d 650 (Fla. 1952); Nicholas v. Central Crate & Box Co., 340 Mich. 232, 65 N.W. 2d 706 (1954), with Coombe v. Penegor, 348 Mich. 635, 83 N.W. 2d 603 (1957). However, it should be noted that the most recent cases indicated for Arkansas, Florida and Michigan, respectively, did not involve death or disability from heart trouble. With the exception of Florida, it is still possible that these jurisdictions will follow the old New Jersey law which required a showing of unusual strain in heart cases, but not in others; see note 3 supra and accompanying text. In 1953, Florida's statute was amended so that "accident" would encompass unexpected or unusual results. Fla. Stat. § 440.02(19) (1955). Thus, given a proper causal connection, it would seem to follow that there would be a compensable injury by "accident" where unexpected death or disability resulted from heart trouble.

(e) For a consideration of Kentucky's position on this problem, see note 8 infra.

caused or precipitated by an unusual strain or exertion[5] due to an event or happening beyond the normal and routine incidents of the employment itself.[6] The genesis of the doctrine rested on the presumption that any death from heart disease was the result of natural causes.[7]

The significance of the *Ciuba* case to Kentucky attorneys lies in its prospective application in Kentucky decisions. It appears that the "unusual strain" principle raised by the case has never been directly considered by the Kentucky Court of Appeals.[8]

While the unusual strain doctrine is intimately related to concepts of "causal connection" (i.e., whether the accident was one arising out of and in the course of employment) and "traumatic injury," full treatment of these subjects is a matter beyond the scope of this paper.[9]

[5] 1 Larson, Workmen's Compensation § 38.00 (1952).

[6] The probable purpose of this requirement was to remove from the area of compensability those cases in which a heart sufferer continued his work although work was contra-indicated. Todd v. Northeastern Poultry Producers Council, Inc., 9 N.J. Supra. 348, 73 A. 2d 863 (1950).

[7] Ames v. Sheffield Farms Co., 1 N. J. 11, 61 A. 2d 502 (1948); Lohndorf v. Peper Bros. Paint Co., 134 N. J. L. 156, 46 A. 2d 439 (1946), *aff'd*, 135 N. J. L. 352, 52 A. 2d 61 (1947); Schlegel v. H. Baron & Co. 130 N.J.L. 611, 34 A. 2d 132 (1943).

[8] Kentucky has managed to avoid direct consideration of the unusual strain doctrine. As deduced from a fair distillation of Kentucky decisions, it would seem that the situation in Kentucky is somewhat as follows. The burden of proof is placed on a claimant to show that death or disability was a natural and direct result of an accident, or of a disease directly caused by an accident. Ratliff v. Cubbage, 314 Ky. 716, 236 S.W. 2d 944 (1951). Where death or disability has resulted from a malfunction of the heart, the Workmen's Compensation Board has been reluctant to find any injury by "accident" arising out of and in the course of employment. Salmon v. Armco Steel Corp., 275 S.W. 2d 590 (Ky. 1955); Rue v. Kentucky Stone Co., 313 Ky. 568, 232 S.W. 2d 843 (1950). Likewise, the Board has been hesitant to find that an activity performed as part of the employment, as opposed to a prior disorder, actually caused the ultimate injury complained of. Ratliff v. Cubbage, supra; Fannin v. Amer. Rolling Mill Co., 284 Ky. 188, 144 S.W. 2d 228 (1940); Aden Mining Co. v. Hall, 252 Ky. 168, 66 S.W. 2d 41 (1933); Wallins Creek Collieries Co. v. Williams, 211 Ky. 200, 277 S.W. 234 (1925); Rusch v. Louisville Water Co., 193 Ky. 698, 237 S.W. 389 (1922). In reaching its conclusions, the Board has placed no apparent emphasis on the question of whether there was any usual or unusual strain or exertion. Upon review of the Board's findings, the Court of Appeals gives great weight to the determinations made below. H. Smith Coal Co. v. Marshall, 243 S.W. 2d 40 (Ky. 1951). In fact, the Board has consistently refused to award compensation for death or disability in heart cases, and the Court of Appeals has not reversed one decision. Although many of the foregoing cases considered the element of trauma, it is submitted that any such discussion was mere dictum. A critical analysis of the cases would tend to indicate that the fundamental issues were not resolved by a determination of whether or not a trauma was present. Compensable injuries, in the absence of a disease, were not limited to those of a traumatic nature. Adams v. Bryant, 274 S.W. 2d 791, 793 (Ky. 1955). The requirement of "traumatic" personal injury was not added to Ky. Rev. Stat. § 392.005 until 1956. Ky. Acts 1956, ch. 77, § 1.

[9] The statutes or judicial decisions of all but three states require that a compensable injury be "accidental" in nature. 1 Larson, Workmen's Compensation § 37.10 (1952, Supp. 1958). In addition to the question of whether there was an accident, there is also the question of whether the resulting injury or death arose out of the employment, i.e., whether it was caused by the employment.

Briefly, an accident is found to exist in most jurisdictions if an unexpected *event* caused the injury, or if the injury itself was an unexpected *result* of the claimant's routine duties.[10] Another ingredient of the accident concept in most jurisdictions is that the injury must be traceable to a definite time, place, and occasion or cause.[11]

Based primarily but not exclusively on the argument that an injury, as an unlooked-for result, should be compensable, many text writers have condemned the minority jurisdictions' insistence on showing an unusual exertion or strain to satisfy the requirement of "accidental."[12] Although this censure may be warranted in many situations, the unusual strain doctrine may have some merit, at least in the heart cases. There is a substantial group of contemporary medical specialists who agree that ordinary strain should not be considered the cause of heart attacks. Thus, requiring unusual effort on which to base a claim for heart failure would be in line with this current medical opinion.[13]

Policy considerations may induce courts to consider another benefit which might be ascribed to this doctrine, viz., the promotion of hiring the "heart-handicapped." By holding that heart disease caused or aggravated by usual effort would not be a basis for recovering workmen's compensation, employers' fears of financial loss due to the death or disability of their workers would be dispelled, and men who have had heart disease might be better able to secure employment.[14]

The Kentucky statute has provided for a similar socially desirable result by specifically excluding from compensation *any results* of a pre-existing disease.[15] Where disability is traceable partly to pre-

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This frequently involves the question of which doctrine as to risk is applied. See Id. § 6 (1952). For a discussion of problems connected with "traumatic injury," see note, 47 Ky. L.J. 437 (1959 supra.

In the heart "strain or exertion" cases, it would appear that the problem is reduced to a question of whether, in fact, the particular exertion or strain did cause the result. Usually the precipitating effort occurs while the employee is doing what he was expressly hired to do. If he were not so engaged, the two-fold problem of causation in fact and either risk or deviation from the course of employment would be additional matters for consideration. For an extended discussion of deviation problems, see 1 Larson, Workmen's Compensation § 19 (1952).

[10] 1 Larson, Workmen's Compensation § 38.00 (1952); 4 Schneider, Workmen's Compensation § 1240(a) (1945).

[11] 1 Larson, op. cit. supra note 10, § 37.20.

[12] 1 Larson, op. cit. supra note 10, § 38.61; Clark, Workmen's Compensation Law: Reviews of Leading Current Cases, 20 NACCA L.J. 32 (1957); Horovitz, Workmen's Compensation Law: Reviews of Leading Current Cases, 19 NACCA L.J. 34 (1957); 8 Ark. L. Rev. 198 (1954); 31 Neb. L. Rev. 632 (1952); 6 Rutgers L. Rev. 629 (1952); 7 Vand. L. Rev. 428 (1954).

[13] Comment, 33 Wash. L. Rev. 420, 430-33 (1958).

[14] Id. at 433-34.

[15] Ky. Rev. Stat. § 342.005 (1959).

existing disease, and partly to accidental injury, the Workmen's Compensation Board must apportion an award accordingly.[16] In other words, if a pre-existing condition is "lighted up," excited or aggravated, compensation may be awarded only to the extent that disability is due to the injury.[17]

It would appear that the Kentucky Court now defines "accidental" death or disability in terms of "unexpected result."[18] This being so, it should not be difficult for the court to sustain a claim for compensation for death or disability from a heart disorder resulting from an "accident," even though there is no showing of an unusual strain. However, the finding of such an extraordinary effort may be deemed necessary to satisfy the "arising out of" requirement, i.e., to show that the heart trouble was work-connected in causation, and thereby overcome the presumption that death or disability resulted from natural causes.[19] One justification for the doctrine is that the showing of unusual exertion would tend to sustain the finding of a causal connection between the alleged precipitating event and resulting disability.[20]

But it is submitted that, rather than resolve question of causation in terms of unusual exertion, the Board should undertake an investigation to determine whether there is evidence to support a conclusion that the employment, *in fact,* caused the unexpected result for which compensation is sought. By borrowing the "sine qua non" rule[21] from the domain of torts, it could be determined "whether death or disability would have occurred, 'but for' the activities rendered as part of the employment." And to prevent employers from becoming absolute insurers of their employees, the idea of "apportionment"[22] could be supplemented by the notion that compensation may be denied where an employee has chronic heart trouble which has reached such a stage that death is likely to ensue at any time, and from any exertion, even if death actually does come while he is doing the ordinary work of his employment.[23]

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[16] Hendricks v. Kentucky & Va. Leaf Tobacco Co., 312 Ky. 849, 229 S.W. 2d 953 (1950); Highland Co. v. Goben, 295 Ky. 803, 175 S.W. 2d 124 (1943).

[17] Parrott v. S. A. Healy Co., 290 S.W. 2d 798 (Ky. 1956).

[18] Where an injury is suffered unexpectedly and without design it is an "accident," Hillerich & Bradsby Co. v. Parker, 267 S.W. 2d 746 (Ky. 1954). An "accident" for workmen's compensation purposes is something unusual, unexpected, and undesigned. Totz Coal Co. v. Creech, 245 S.W. 2d 924 (Ky. 1951).

[19] See note 7 supra and accompanying text.

[20] For a criticism of this rationalization, i.e., that unusual strain "insures" causation, see 1 Larson, Workmen's Compensation § 38.81 (1952).

[21] Prosser, Torts 220 (2d ed. 1955).

[22] See note 16 supra and accompanying text.

[23] McNamara v. Industrial Acc. Comm'n, 130 Cal. App. 284, 20 P. 2d 53 (1933).