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OCCUPATIONAL DISEASES UNDER WORKMEN'S COMPENSATION LAWS†

*Arthur Larson**

The earliest workmen's compensation statutes in this country typically provided compensation only for industrial accidents. Coverage for occupational diseases developed slowly. There have been various reasons for this lag.[1] One was the opinion in some jurisdictions that, while accidental injuries were known to the common law and could be made the subject of an action for damages, the concept of occupational diseases was a stranger to the lexicon of the precompensation-era common law.[2] To the extent that workmen's compensation acts substituted nonfault liability for the kind of injuries that were potential subjects of fault liability, there was thought to be no place for occupational diseases,[3] which, in the sense of a disease due to the "normal" conditions of the industry, as distinguished from the negligence of the employer, had consistently been held incapable of supporting a common law action.[4] Another occasion for hesita-

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1. The lag, which has diminished rapidly in recent years, now consists not only in continuing incompleteness of coverage in some states, but in a variety of limitations and restrictions, including requirements that disability or death occur within a specific time of exposure or employment, absence of benefits for partial disability, and restricted medical payments. *See* text accompanying notes 124-148 for a discussion of these limitations, and text accompanying notes 115-123 for a survey of legislative expansion of coverage.

2. Boshuizen v. Thompson & Taylor Co., 360 Ill. 160, 195 N.E. 625 (1935). In finding Section 1 of the 1911 Occupational Disease Act of Illinois unconstitutional, the court said: "This type of legislation was a complete stranger to the common law and section 1 under consideration here has no common-law origin or history." *Id.* at 162, 195 N.E. at 626-27. The Occupational Disease Act was later held constitutional as a reasonable exercise of the police power in People *ex rel.* Radium Dial Co. v. Ryan, 371 Ill. 597, 21 N.E.2d 749 (1939).

3. Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N.W. 485 (1914). The court said: "We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law." *Id.* at 159, 148 N.W. at 486. When the disease was attributable to the employer's negligence, however, every state that passed on the question except Michigan and Illinois recognized the possibility of an action for damages. Thirty cases supporting this statement are collected in Banks, *Employer's Liability for Occupational Diseases,* 16 ROCKY MT. L. REV. 60, 61, n.5 (1944).

4. Miller v. American Steel & Wire Co., 90 Conn. 349, 97 A. 345 (1916); Industrial Comm'n

tion was uncertainty as to whether a problem as generalized and extensive as occupational disease could be more effectively and appropriately dealt with under workmen's compensation or general health insurance legislation.[5] Finally, the obstacle which has been the most practical and persistent is the argument, discussed later in connection with the prime example of silicosis,[6] that the heavy incidence of certain diseases in particular industries or areas would make their full coverage an impossible burden on the compensation system.

These arguments, however, have not prevented the inclusion of occupational disease coverage in workmen's compensation statutes, for today all fifty states provide some measure of recovery for occupational diseases. Forty-one states,[7] Puerto Rico, Guam, the District of Columbia, the Federal Employees' Act, and the Longshoremen's Act have general coverage; that is, they cover all occupational diseases, sometimes by general definition of the term,[8] sometimes under a broad use of the term "injury,"[9] sometimes under an unrestricted coverage of disease,[10] and sometimes by an entirely separate act.[11] Nine states[12] cover specified diseases ranging from as few as

v. Monroe, 111 Ohio St. 812, 146 N.E. 213 (1924); Gordon v. Travelers' Ins. Co., 287 S.W. 911 (Tex. Civ. App. 1926); Calhoun v. Washington Veneer Co., 170 Wash. 512, 15 P.2d 943 (1932).

5. REPORT OF ILLINOIS COMMISSION ON OCCUPATIONAL DISEASES to Governor Charles Deneen (1911).

6. See text following note 125 *infra.*

7. Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Virginia permits an election between listed or general occupational disease coverage.

8. *E.g.*, CONN. GEN. STAT. ANN. § 31-275 (Cum. Supp. 1974); FLA. STAT. ANN. § 440.151 (Cum. Supp. 1974); MINN. STAT. ANN. § 176.011 (Cum. Supp. 1974); NEB. REV. STAT. § 48-151 (1968); ORE. REV. STAT. § 656.802 (1973).

9. *E.g.*, 5 U.S.C.A. § 8101 (1967); CAL. LABOR CODE § 3208 (Cum. Supp. West 1974); MASS. GEN. LAWS ANN. ch. 152, § 1 (1965). Michigan specifically defines "personal injury" in such a way as to include occupational diseases, without actually using the phrase "occupational disease." See text accompanying note 34 *infra.*

10. *E.g.*, CAL. LABOR CODE § 3208 (Cum. Supp. West 1974); N.D. CENT. CODE § 65-01-02 (Supp. 1973); WIS. STAT. ANN. § 102.18 (1957).

11. *E.g.*, ILL. ANN. STAT. ch. 48, § 172.36 *et seq.* (Smith-Hurd Cum. Supp. 1974); IND. STAT. ANN. § 22-3-7-1 *et seq.* (Cum. Supp. 1974); PA. STAT. ANN. tit. 77, § 1201 *et seq.* (Cum. Supp. 1974).

12. Arizona, Colorado, Iowa, Kansas, Louisiana, New Mexico, Oklahoma, Vermont, and Wyoming.

twelve in Kansas[13] to as many as forty-seven in Colorado.[14]

It is interesting to observe, however, that the earliest kind of occupational disease coverage in the United States took the form of general inclusion within either the term "injury," as in the Massachusetts,[15] Federal Employees'[16] and California acts,[17] or within the term "disease," as in the California[18] and Wisconsin[19] acts. It was not until 1920 that New York adopted the first schedule-type act,[20] following the English practice of listing not only particular diseases but the process in which they are acquired. While the schedule method was once widely copied, the trend has been toward expansion into general coverage, either by abandoning the schedule altogether, or, as was done in New York, Ohio, and, more recently, Nevada, by leaving the list intact while stating that the act also covers all other occupational diseases. The purpose of including a description of the "process" appears to be to establish a strong presumption that the contraction of that disease by one engaged in that process was attributable to the employment, while the contraction of the same disease in another process would require definite affirmative proof of causal connection.[21] The value of such a pre-

13. KAN. STAT. ANN. § 44-5a01 (1973).

14. COLO. REV. STAT. § 81-18 *et seq.* (Cum. Supp. 1972). The restricted character of schedule coverage has elicited much criticism and controversy. For a presentation of the view that coverage should be general, and that schedule lists, even under the most inclusive schedules, are falling short of current industrial diseases, *see* the address of Mr. Ashley St. Clair, Counsel, Liberty Mutual Insurance Co., Boston, Mass., Proceedings of the 35th Annual Convention of the International Association of Industrial Accident Boards and Commissions, U.S. Dep't of Labor, Bureau of Labor Standards Bull. No. 119, p. 70 (1949). For a presentation of the view favoring schedules, *see* Angerstein, *Legal Aspects of Occupational Disease,* 18 ROCKY MT. L. REV. 240 (1946).

For a good example of an obvious miscarriage of justice and defeat of the purposes of compensation legislation because of the technical limitations of a specific occupational disease list, *see* Ridley Packing Co. v. Holliday, 467 P.2d 480 (Okla. 1970).

15. *In re* Hurle, 217 Mass. 223, 104 N.E. 336 (1914) ("injury" interpreted to include blinding by long exposure to coal gas); Johnson v. London Guar. & Accident Co., 217 Mass. 388, 104 N.E. 735 (1914) (lead poisoning).

16. 33 OP. ATT'Y GEN. 476 (1923); 27 OP. ATT'Y GEN. 346 (1909).

17. California deleted the accident requirement in 1915. CAL. STAT. ch. 607, § 2 (1915).

18. CAL. STAT. ch. 586, § 3(4) (1917).

19. WIS. STAT. ANN. § 102.01(2) (1931).

20. N.Y. LAWS 1920, ch. 538.

21. Home Office Memorandum on the English Workmen's Compensation Acts, 1925-1943 (June 1944). *But cf.* Collins v. Nat'l Aniline Div., Allied Chem. and Dye Corp., 8 App. Div. 2d 900, 186 N.Y.S.2d 979 (1959). *See also* note 39 *infra.*

sumption probably explains the retention of both schedule and general coverage in New York, Ohio, and Nevada.

I. Definition of "Occupational Disease"

Definitions of "occupational disease" should always be checked against the purpose for which they were uttered. Among the purposes for which definitions have been formulated are: defeating compensation because an injury is not an accident, but an occupational disease in jurisdictions which had at the time of the decision no occupational disease coverage; getting around the exclusive coverage provisions of the compensation act so as to sue for damages under a statute relating to safe working conditions;[22] limiting benefits or applying unusual procedural rules in those states where special restrictions are placed on occupational diseases, but not on accidents; and, finally, getting awards for occupational disease under general definitions of the term, as against the contention that the disease is an ordinary nonindustrial illness.

Of these, only the last is presently in point. The rest are concerned with the contrast between accident and occupational disease. In a large proportion of the cases involving this contrast, the tag "occupational disease" was synonymous with the verdict "noncompensable." With the expansion of occupational disease legislation, this contrast between accident and occupational disease has lost most of its importance, and awards are frequently made without specifying which category the injury falls in. The two crucial points of distinction between accident and occupational disease were the element of unexpectedness and the matter of time-definiteness. What set occupational diseases apart from accidental injuries was both the fact that they could not honestly be said to be unexpected, since they were recognized as an inherent hazard of continued exposure to conditions of the particular employment,[23] and the fact that they were gradual rather than sudden in onset. Thus, what could ordinarily be an occupational disease might be converted into an accident

22. For a rare example in this category, see Perez v. Blumenthal Bros. Chocolate Co., 428 Pa. 225, 237 A.2d 227 (1968).

23. Industrial Comm'n v. Roth, 98 Ohio St. 34, 120 N.E. 172 (1918):

> A disease contracted in the usual and ordinary course of events, which from the common experience of humanity is known to be incident to a particular employment is an occupational disease. . . . *Id.* at 35, 120 N.E. at 173.

by an unusual and sudden dosage of the same kind of dust or fumes that, absorbed gradually over a long period, would produce a typical industrial disease.[24] Similiarly, occupational disease might be transformed into an accident by the presence of some untoward little incident, breakage or abnormality, like getting anthrax through a scratch,[25] or absorbing harmful fumes because of a defective gas mask.[26] Some courts have found accidental quality when a typical occupational disease was contracted because the employer had not taken all possible steps to eliminate harmful conditions in his plant. Occupational disease, in this view, included only the effects of conditions which were normal in the sense that "science and industry have not yet learned how to eliminate" them.[27] These considerations relate to the question of accident versus occupational disease, when the effect of inclusion within the latter term is the defeat of the claim.

Now that compensation may be had for both accident and occupational disease, the new definitional question has become the location of a boundry line separating occupational disease from diseases that are neither accidental nor occupational, but common to mankind and not distinctively associated with the employment. For this purpose a new set of standards must be used. It is of little value, and, indeed, may be quite misleading, to quote indiscriminately

24. Colorado Fuel & Iron Corp. v. Industrial Comm'n, 162 Colo. 68, 424 P.2d 382 (1967); Colorado Fuel & Iron Corp. v. Industrial Comm'n, 154 Colo. 240, 392 P.2d 174 (1964); Texas Employers' Ins. Ass'n v. Bradford, 381 S.W.2d 234 (Tex. Civ. App. 1964). For an illustration of an opinion drawing this contrast, see Chapman v. Industrial Comm'n, 52 Ohio L. Abs. 9, 81 N.E.2d 626 (1948), *distinguishing* Industrial Comm'n v. Bartholome, 128 Ohio St. 13, 190 N.E. 193 (1934).

25. Hiers v. Hull & Co., 178 App. Div. 350, 164 N.Y. Supp. 767 (1917); Mid-South Packers, Inc. v. Hanson, 253 Miss. 703, 178 So.2d 689 (1965). *See generally* as to the "repeated-impact" theory, A. LARSON, WORKMEN'S COMPENSATION LAW § 39.40 (1973) (hereinafter cited as LARSON).

26. Dailey v. River Raisin Paper Co., 269 Mich. 443, 257 N.W. 857 (1934).

27. Cell v. Yale & Towne Mfg. Co., 281 Mich. 564, 567, 275 N.W. 250, 252 (1937). *See* Gay v. Hocking Coal Co., 184 Iowa 949, 169 N.W. 360 (1918) *and* Pero v. Collier-Latimer, Inc., 49 Wyo. 131, 52 P.2d 690 (1935) (holding that silicosis acquired over a three-month period was an accidental injury, because the harmful conditions could have been eliminated by the use of proper precautions). *But cf.* Oggesen v. General Cable Corp., 273 F.2d 331 (8th Cir. 1960) (negligence action based upon "safe work place" allegations dismissed since injury was occupational and recovery could be had only under the applicable statute).

See generally as to the contrast between accident and occupational disease, LARSON §§ 39-40.

from old definitions, the purpose of which was merely to distinguish accident from occupational disease.

A number of statutes contain detailed definitions of the term "occupational disease," and these definitions provide the clue to the distinction which is controlling for present purposes. The common element running through all these definitions is the distinctive relation of the particular disease to the nature of the employment, as contrasted with diseases which might just as readily be contracted in other occupations or in everyday life. It will be observed at once that this test resembles the original "peculiar risk" test for the "arising out of employment" requirement. Indeed, several statutes, including those of Wisconsin,[28] Massachusetts,[29] and California[30] appear to rely on the limitations imposed by the general test of causal relation rather than on a detailed statutory definition.

The most elaborate statutory definition is that of Virginia,[31] which is essentially the same as those of Illinois[32] and Indiana,[33] which casts the definition almost entirely in terms of the "arising" test:

> As used in this Act, unless the context clearly indicates otherwise, the term 'occupational disease' means a disease arising out of and in the course of the employment. No ordinary disease of life to which the general public is exposed outside of the employment shall be compensable, except:
>
> (1) When it follows as an incident of occupational disease as defined in this title; or
>
> (2) When it is an infectious or contagious disease contracted in the course of employment in a hospital or sanitarium or public health laboratory.
>
> A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances:
>
> (1) A direct causal connection between the conditions under which work is performed and the occupational disease,

28. "'[I]njury' is mental or physical harm to an employee caused by accident or disease . . . ." WIS. STAT. ANN. § 102.01(2) (1973).

29. MASS. GEN. LAWS ANN. § 152.1 (1973).

30. "'Injury' includes an injury or disease arising out of the employment. . . ." CAL. LABOR CODE § 3208 (Cum. Supp. West 1974).

31. VA. CODE ANN. § 65.1-46 (Repl. Vol. 1973).

32. ILL. ANN. STAT. ch. 48, § 172.36 (Smith-Hurd Cum. Supp. 1974).

33. IND. STAT. ANN. § 22-3-7-10 (1974).

(2) It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment,

(3) It can be fairly traced to the employment as the proximate cause,

(4) It does not come from a hazard to which workmen would have been equally exposed outside of the employment,

(5) It is incidental to the character of the business and not independent of the relation of employer and employee, and,

(6) It must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction.

Another representative definition, containing phrases which appear in a number of statutes, is Michigan's:[34]

> "Personal injury" shall include a disease or disability which is due to causes and conditions which are characteristic of and peculiar to the business of the employer and which arises out of and in the course of employment. Ordinary diseases of life to which the public is generally exposed outside of the employment shall not be compensable.

An even shorter definition is Connecticut's:[35]

> "Occupational disease" includes any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such. . . .

Most statutory definitions are similar in substance to these, and, when a statute contains no definition at all, the judicial definition, designed to describe the inclusiveness of the term, will be found to stress the same elements. The New York Court of Appeals, for example, has supplied the following guide to the meaning of the undefined term "occupational disease" in the New York act. This guide stresses, as does the Connecticut definition, the contrast with risks of other employment:

> An ailment does not become an occupational disease simply because it is contracted on the employer's premises. It must be one

34. MICH. COMP. LAWS ANN. § 417.1(c) (1967).
35. CONN. GEN. STATS. REV. § 31-275 (1972).

> 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 some distinctive feature of the claimant's job, common to all jobs of that sort. As this court observed in *Goldberg v. 954 Marcy Corp.*, 276 N.Y. 313, 318, 319, 12 N.E.2d 311, 313, an occupational disease is one "which results from the nature of the employment, and by nature is meant . . . 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."[36]

The distinctive element of an occupational disease is that such diseases are not as readily contracted in everyday life or in other occupations. A little reflection will indicate that there are no significant differences between the two norms commonly used in statutory definitions, that of the exposures of nonemployment everyday life, as in the Virginia or Michigan type definition, and the exposures encountered through employment in other occupations, as in the Connecticut and New York versions. The infinite variety of conditions of other employment—ranging from accounting to lead mining and from baby-sitting to topping Douglas fir trees—is just as great as the variety of conditions of nonemployment life, and has no more of a common element than does "everyday life" to supply a measuring stick by which to judge what is "ordinary" and what is distinctively occupational in a particular employment.

If the employment is attended with unusual germs,[37] poisons, chemicals, fumes, dusts, or similar conditions, the problem of satisfying the distinction from the "ordinary" is not serious.[38] Contro-

36. Harman v. Republic Aviation Corp. 298 N.Y. 285, 288, 82 N.E.2d 785, 786 (1948).

37. Board of Nat'l Missions v. Alaska Indus. Bd., 116 F. Supp. 625 (D. Alas. 1953) (tuberculosis rate in Alaska is about 10 times that of the average state; thus a missionary claimant was exposed more frequently than the public). *See generally* as to this type of case the discussion at text accompanying notes 80-82 *infra*.

38. Woodward Iron Co. v. King, 268 Ala. 680, 110 So. 2d 270 (1959); Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221 (1953); Smith v. Humboldt Dye Works, Inc., 34 App. Div. 2d 1041, 312 N.Y.S.2d 612 (1970); Ciampa v. Tripp Plating Co., 3 App. Div. 2d 621, 158 N.Y.S.2d 18 (1956); Daniels v. Mason, Johnson & MacLean, 9 App. Div. 2d 812, 192 N.Y.S.2d 654 (1959); Allied Materials Corp. v. Thompson, 346 P.2d 945 (Okla. 1959); United Paint Co. v. Tillman, 213 Tenn. 187, 373 S.W.2d 438 (1963).

verted or unsuccessful claims will usually be found to involve, not the definition,[39] but a problem of proof: whether these employment conditions in fact produced this disability.[40] For example, nitric, sulphuric, and chromic acid[41] fumes would abundantly satisfy any requirement of nonordinary risks, but compensation for cancer of the lungs was denied for the death of a man exposed to such fumes on the ground of lack of causal relation, and in view of the fact that the decedent had smoked twenty to forty cigarettes a day for forty years.[42]

39. For a case involving a definition, *see* Morrison v. Allied Chem. Corp., 217 Pa. Super. 784, 269 A.2d 525 (1970), wherein claimant contracted industrial poisoning as the result of his employment, which exposed him to numerous chemicals. He failed, however, to show that the disease was peculiar to his occupation or industry. Compensation was denied, even though claimant's disease was one of those enumerated in the statute. The statute required that the occupational disease be both one enumerated in the act *and* one "peculiar to the occupation or industry in which the employee was engaged, and not common to the general population." PA. STAT. ANN. tit. 77, § 1401(c) (Cum. Supp. 1974). This section is ambiguous because it could be construed as meaning that the disease must be peculiar to the occupation or industry in the sense that it is not common to the general public. But—although this is not clear from the opinion—the court seems to be treating the two parts of the restriction as independent. That is, it may not be enough to show that the disease was not common to the general public. It may be necessary to show also that, while the disease is not common to the public, it is not found in other industries and occupations. If this is indeed the interpretation being followed, it is a preposterous distortion of the concept of occupational disease. Should a worker in a chemical plant be denied benefits for benzol poisoning because benzol poisoning might also affect a worker in a research laboratory or in a manufacturing plant employing benzol? Yet the alternative to assuming this senseless restriction must be to assume that benzol poisoning producing total disability is a disease common to the general public, which is even more ridiculous.

See Collins v. National Aniline Div., Allied Chem. & Dye Corp., 8 App. Div. 2d 900, 186 N.Y.S.2d 979 (1959) (decedent's condition was not caused by exposure to benzol or its derivatives but instead attributed to another chemical not within the language of the statute; compensation denied).

40. Knott Coal Corp. v. Smith, 354 S.W.2d 513 (Ky. 1962); Pace v. Louisville Crushed Stone Co., 328 S.W.2d 539 (Ky. 1959); Anderson v. Southern Fabricators Corp., 160 So. 2d 438 (La. App. 1964); Brown v. Armour & Co., 168 Neb. 835, 97 N.W.2d 342 (1959); Leiser v. Saks Fifth Ave., 9 App. Div. 2d 832, 192 N.Y.S.2d 848 (1959); Ashley v. Mardon Operating Corp., 9 App. Div. 2d 826, 192 N.Y.S.2d 927 (1959).

41. Mutual Chem. Co. v. Thurston, 222 Md. 86, 158 A.2d 899 (1960).

42. Amoroso v. Tubular & Cast Prods. Mfg. Co., 13 N.Y.2d 992, 194 N.E.2d 694, 244 N.Y.S.2d 787 (1963). *Cf.* Bolger v. Chris Anderson Roofing Co., 112 N.J. Super. 383, 271 A.2d 451 (1970), *aff'd*, 117 N.J. Super. 497, 285 A.2d 228 (1971) (compensation granted, since even if smoking contributed to the development of cancer, the occupational exposure contributed in a major way to the onset or precipitation of the cancer); McAllister v. Workmen's Compensation Appeals Bd., 6 Cal.2d 408, 445 P.2d 313, 71 Cal. Rptr. 697 (1968) (compensation awarded for a fireman's lung cancer, when smoke inhalation from both fire fighting and cigarette smoking were involved).

The conditions of employment, however, which distinguish occupational diseases from ordinary diseases of life need not be unusual chemicals or fumes. They may be distinctive because familiar harmful elements are present in an unusual degree. For example, exposure to change in temperature is common to all life and employment. A moderate amount of it, resulting in splotches on the legs of a theatre ticket seller, has therefore been held not to render that condition an occupational disease.[43] But in the same state the contraction of rheumatoid arthritis has been held occupational when it resulted from continued handling of ice and iced vegetables by a worker in a wholesale market.[44] Likewise, a butcher's pulmonary emphysema has been recognized as an occupational disease, although the disease itself is common to mankind, because of the causal relation to the employment hazard of breathing refrigerated air.[45]

Just as chills and temperature changes are features of everyday life, so are bumps, jars, jolts, and strains—within limits. But repeated strains, if associated with employment, may supply the distinctive element necessary to make a back injury occupational.[46] Tenosynovitis suffered by an employee whose work consisted of lifting and moving boxes and using a hammer and drill, causing her to twist her shoulder and move her arm back and forth, has been held to be an occupational disease, even though a housewife might contract the disease in the course of certain household duties.[47] Bursitis

43. Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 12 N.E.2d 311 (1938). *Accord,* Brooks v. State Dep't of Transp., 225 So.2d 260 (Fla. 1971); Berry v. Owensboro Ice Cream & Dairy Prods., 376 S.W.2d 302 (Ky. 1964). *See* Snir v. J. W. Mays, Inc., 19 N.Y.2d 373, 227 N.E.2d 40, 280 N.Y.S.2d 140 (1967).

44. Peloso v. D'Alessio Bros., 272 App. Div. 984, 72 N.Y.S.2d 699 (1947), *aff'd,* 298 N.Y. 582, 81 N.E.2d 111 (1948). *Accord,* Erb v. Sheffield Farms Co., 272 App. Div. 1082, 74 N.Y.S.2d 555 (1947).

45. Roettinger v. Great Atl. & Pac. Tea Co., 17 App. Div. 2d 76, 230 N.Y.S.2d 903 (1962). *Cf.* Fitch v. Princess Coals, Inc., 463 S.W.2d 941 (Ky. 1971) (chronic bronchitis held not to be an occupational disease, since it is a disorder that the population generally is exposed to); Bess v. Coca-Cola Bottling Co., 469 S.W.2d 40 (Mo. App. 1971).

46. Buchanan v. Bethlehem Steel Co., 278 App. Div. 594, 101 N.Y.S.2d 1011 (1951), *aff'd,* 302 N.Y. 848, 100 N.E.2d 45 (1951). Similar situations and holdings can be found in: Fruehauf Corp. v. Workmen's Compensation Appeals Bd., 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968); Underwood v. National Motor Castings Div., 329 Mich. 273, 45 N.W.2d 286 (1951); DeBella v. Hotel Windsor, 284 App. Div. 919, 134 N.Y.S.2d 389 (1954); Nicoletti v. S.H. Pomeroy Co., 283 App. Div. 1129, 131 N.Y.S.2d 699 (1954).

47. Briggs v. Hope's Windows, 284 App. Div. 1077, 136 N.Y.S.2d 41 (1954). *Accord,* Guardi

of the shoulder from pushing a lever 500 to 700 times a day has been held compensable under a statute defining occupational diseases as including those "due to causes and conditions . . . characteristic of or peculiar to the employment."[48]

Indeed, although walking and sitting might be thought to be about as ordinary as anything in everyday life, an award has been made to a waiter who developed varicose veins after twenty-five years of working on hard-surfaced floors,[49] and to an employee who became afflicted with bursitis of the tail bone from sitting on a steel chair.[50]

On the other hand, New York, which accounts for many of the awards of this type, has refused compensation for thrombophlebitis caused by repeated jarrings as the result of having to jump down from a platform repeatedly for several weeks.[51] New Jersey, which made the award for shoulder bursitis just mentioned, in the same year ruled out tenosynovitis suffered by an employee who for six months pushed cardboard into a sewing machine, as not peculiar to or characteristic of the employee's employment conditions.[52] Utah has refused to include osteoarthritis of the finger joints allegedly caused by seventeen years of legal typing.[53]

It is inevitable that the application of the standards of "everyday life" or "other occupations" should produce some controversial dis-

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v. General Elec. Co., 30 App. Div. 2d 738, 291 N.Y.S.2d 457 (1968) (rheumatoid arthritis); Preusser v. Allegheny Ludlum Steel Corp., 4 App. Div. 2d 727, 163 N.Y.S.2d 524 (1957), *aff'd*, 4 N.Y.2d 773, 149 N.E.2d 339, 172 N.Y.S.2d 823 (1958) (Kienbock's disease).

48. Bondar v. Simmons Co., 23 N.J. Super. 109, 92 A.2d 642 (1952), *aff'd*, 12 N.J. 361, 96 A.2d 795 (1953).

See Frank v. Friedman Die Cutters, 281 App. Div. 934, 119 N.Y.S.2d 681 (1953), *aff'd*, 306 N.Y. 935, 119 N.E.2d 608 (1954) (bursitis contracted as a result of repeatedly lifting and moving boxes was held to be an occupational disease).

49. Wildermuth v. B.P.O. Elks Club, 5 App. Div. 2d 911, 170 N.Y.S.2d 874 (1958). *But cf.* Elkin v. D. & J. Cleaners, Inc., 14 App. Div. 2d 402, 221 N.Y.S.2d 153 (1961) (the court denied the claim, but remanded for determination of whether development of varicose veins was an effect of work as a presser at a cleaners and whether or not his particular work activity was sufficiently distinctive to render the condition occupational in nature).

50. Brown Shoe Co. v. Fooks, 228 Ark. 815, 310 S.W.2d 816 (1958) (three judges dissented on the ground that sitting was not peculiar to the employment).

51. Champion v. W. & L. E. Gurley, 299 N.Y. 406, 87 N.E.2d 430 (1949), *rev'g* 274 App. Div. 863, 82 N.Y.S.2d 8 (1948).

52. Fernandez v. Kiernan-Hughes Co., 23 N.J. Super. 394, 93 A.2d 41 (1952).

53. Edlund v. Industrial Comm'n, 122 Utah 238, 248 P.2d 365 (1952). *See* Popham v. Industrial Comm'n, 5 Ohio St. 2d 85, 214 N.E.2d 80 (1966).

tinctions. For example, a pair of Michigan cases, both involving injury from muscular exertion, illustrates how shadowy the line may become. In *Carter v. International Detrola Corp.*,[54] the claimant had to tip 125-pound boxes on edge to inspect them as they came past her on the assembly line. She developed a progressive swelling and stiffening of the arms and hands from this exertion, which finally disabled her. In denying recovery the court said:

> Plaintiff did manual work which required the continuous use of her arms. In this respect it was no different than many other factory jobs. The resulting excessive movement of the scalenus anticus muscle is not so unique as to be 'characteristic of and peculiar to the business of the employer.' Muscle use is common to most other employments, and the act does not permit compensation for injuries caused by this alone.[55]

A few months later, in *Underwood v. National Motor Castings Division*,[56] the same court was confronted by another female claimant who had been doing lifting that was too heavy for her. In this case, the job was to carry 40-pound castings and put them in an oven. This involved both lifting and stooping, and resulted in a lumbo-sacral strain with a possibility of an intervetebral disc herniation. The Commission found:

> Her work presented a substantial hazard of back injury which was far in excess of that attending employment in general. The heavy and strenuous nature of her employment constituted causes and conditions which were characteristic of and peculiar to the defendant's business.[57]

The employer appealed on the ground that "plaintiff was not subjected to any greater hazard of injury by her work than would be found in employment in general,"[58] but the court affirmed, saying:

> The phrase, "peculiar to the occupation," is not here used in the sense that the disease must be one which originates *exclusively* from

54. 328 Mich. 367, 43 N.W.2d 890 (1950).
55. *Id.* at 369, 43 N.W.2d at 891.
56. 329 Mich. 273, 45 N.W.2d 286 (1951).
57. *Id.* at 274, 45 N.W.2d at 287.
58. *Id.*

> the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations. . . .[59]

The Court went on to say:

> The bending and twisting that plaintiff was required to do in order to place the cores in the oven was a part of her job and peculiar to defendant's business.[60]

The character of the risk, then, need not be "unique," although that word had been used in the excerpt from the *Carter* opinion quoted above.

The *Underwood* approach seems to have carried the day in Michigan, having been expressly followed in two later cases, one involving an intervertebral disc injury caused by lifting and carrying molds weighing 20 to 100 pounds,[61] and the other awarding compensation for lumbar strain from lifting heavy wheels weighing 40 pounds from a conveyor and placing them on a skid on the floor behind the worker.[62]

II. Judicial Expansion of the Occupational Disease Concept

Under schedule-type occupational disease statutes, there is relatively little occasion for judicial interpretation of the extent of coverage, although occasionally a question may arise as to what is included within some such generic term as "poisoning,"[63] or on how wide a range of similar or related conditions a named disease embraces. Tennessee, for example, has held that silicosis includes pulmonary fibrosis,[64] and that contact dermatitis includes

59. *Id.* at 275, 45 N.W.2d at 287, *quoting* Samels v. Goodyear Tire & Rubber Co., 317 Mich. 149, 154, 26 N.W.2d 742, 745 (1947).

60. Underwood v. National Motor Casting Div., 329 Mich. 273, 276, 45 N.W.2d 286, 288 (1951).

61. Fields v. G. M. Brass & Aluminum Foundry Co., 332 Mich. 113, 50 N.W.2d 738 (1952).

62. Gibbs v. Motor Wheel Corp., 333 Mich. 617, 53 N.W.2d 573 (1952).

63. Watkins v. National Elec. Prods. Corp., 165 F.2d 980 (3d Cir. 1948).

64. Whitehead v. Holston Defense Corp., 205 Tenn. 326, 326 S.W.2d 482 (1959), wherein the court stated:

> Some diseases are so closely related to certain classified diseases that they must be

panniculitis and dermatomyositis.[65]

The schedule list is exclusive, and it is not within the power of the courts to add new items, however obvious an occupational disease the omitted item may be.[66] But when the statute contains a general coverage of occupational diseases, with or without a schedule or definition, the courts are confronted with the continuing task of inclusion and exclusion of borderline diseases.

Some of the inclusions show a disposition to go somewhat beyond the earlier conventional notion of the typical lead poisoning or silicosis type of occupational disease. The term "disease" is construed in its broadest sense of an "impairment of the normal state" or "disorder or derangement of an organism."[67] Thus, back strain and herniated disc,[68] flat feet,[69] deterioration of a toe joint,[70] bursitis,[71] rheumatoid arthritis,[72] sciatic neuritis,[73] tenosynovitis,[74] varicosity,[75]

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denominated as "occupational", provided the elements of causation can be connected, either directly or indirectly, with the conditions under which an employee is required to work. *Id.* at 331, 326 S.W.2d at 485.

See Buck Simmons Auto & Elec. Supply Co. v. Kesterson, 194 Tenn. 115, 250 S.W.2d 39 (1952) *and* Smith v. Tennessee Furniture Indus., Inc., 208 Tenn. 608, 348 S.W.2d 290 (1961), whose broad interpretation of the Tennessee statute is apparently calculated to offset in some measure the unusually short schedule list. *But cf.* Knoxville Poultry & Egg Co. v. Robinson, 477 S.W.2d 515 (Tenn. 1972). *See also* Amato v. Heywood Co., 12 App. Div. 2d 536, 206 N.Y.S.2d 626 (1960).

65. Maryland Cas. Co. v. Miller, 210 Tenn. 301, 358 S.W.2d 316 (1962).

66. Miceli v. State Compensation Ins. Fund, 157 Colo. 204, 401 P.2d 835 (1965); Comish v. J. R. Simplot Fertilizer Co., 86 Idaho 79, 383 P.2d 333 (1963); Hicks v. Liberty Mut. Ins. Co., 165 So. 2d 51 (La. App. 1964); Collins v. National Aniline Div., Allied Chem. & Dye Corp., 8 App. Div. 2d 900, 186 N.Y.S.2d 979 (1959); Henry v. A. C. Lawrence Leather Co., 231 N.C. 477, 57 S.E.2d 760 (1950); Asten Hill Mfg. Co. v. Bambrick, 5 Pa. 664, 291 A.2d 354 (1972).

67. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961 ed.)

68. Freuhauf Corp. v. Workmen's Compensation Appeals Bd., 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968); Underwood v. National Motor Castings Div., 329 Mich. 273, 45 N.W.2d 286 (1951); Goyer v. Fred. K. Blanchard, Inc., 25 App. Div. 2d 892, 269 N.Y.S.2d 338 (1966); Fellows v. Syracuse Supply Co., 24 App. Div. 2d 791, 263 N.Y.S.2d 785 (1965); Ross v. Kollsman Instrument Corp., 24 App. Div. 2d 670, 261 N.Y.S.2d 186 (1965); Buchanan v. Bethlehem Steel Co., 278 App. Div. 594, 101 N.Y.S.2d 1011 (1951), *aff'd*, 302 N.Y. 848, 100 N.E.2d 45 (1951). *See also* notes 43 to 62 *supra*, for a number of related examples.

69. Townsend v. Union Bag & Paper Co., 282 App. Div. 968, 125 N.Y.S.2d 360 (1953).

70. Gillette v. Harold, Inc., 257 Minn. 313, 101 N.W.2d 200 (1960).

71. Bondar v. Simmons Co., 23 N.J. Super. 109, 92 A.2d 642 (1952), *aff'd*, 12 N.J. 361, 96 A.2d 795 (1953).

72. Guardi v. General Elec. Co., 30 App. Div. 2d 738, 291 N.Y.S.2d 457 (1968).

73. Krauss v. Marcel Wagner Glove Co., 32 App. Div. 2d 600, 299 N.Y.S.2d 635 (1969).

74. National Stores, Inc. v. Hester, 393 S.W.2d 603 (Ky. 1965).

75. Elkin v. D. & J. Cleaners, Inc., 25 App. Div. 2d 790, 269 N.Y.S.2d 224 (1966); Vines v. Lazar Motors, 277 App. Div. 1083, 100 N.Y.S.2d 735 (1950).

effeminacy and impotency,[76] enlarged heart,[77] and loss of hearing,[78] have been held compensable as occupational diseases, when produced or aggravated by the distinctive conditions or exertions of the employment.

Moreover, the element of gradualness, so heavily stressed in definitions contrived to distinguish accident, loses its importance when the sole question is the inclusiveness of an occupational disease statute. Where conditions of employment produce outright infection, for example, it may be treated as an occupational disease although the process is much more sudden than that described in the older definitions. The contraction of tuberculosis by a telephone operator through contact with an infected mouthpiece,[79] the contraction of tuberculosis by nurses,[80] dishwashers,[81] or others[82] in hospitals or sanitoria, and the onset of pneumonia from the comparatively brief exposure suffered by a taxi driver while trying to extricate his taxi from the mud[83] have all been compensated.[84]

A disease which might otherwise be thought clearly nonoccupational may become occupational because the employment facilitates its transmission. *Mason v. Young Women's Christian Association*[85] is the best example of this development. Ordinarily one would not think of tuberculosis as an occupational disease of telephone operators; but if the enforced use of a close-fitting mouth-

76. Stepnowski v. Specific Pharmaceuticals, Inc., 18 N.J. Super. 495, 87 A.2d 546 (1952).

77. Eckert v. Commander Larabee Mfg. Co., 278 App. Div. 623, 101 N.Y.S.2d 860 (1951).

78. Green Bay Drop Forge Co. v. Industrial Comm'n, 265 Wis. 38, 60 N.W.2d 409 (1953), *rehearing denied*, 265 Wis. 38, 61 N.W.2d 847 (1953). The subject of loss of hearing presents a number of questions too specialized for a general article on occupational diseases. For a detailed discussion, see LARSON § 41.50.

79. Mason v. Y.W.C.A., 271 App. Div. 1042, 68 N.Y.S.2d 510, *motion for leave to appeal denied*, 297 N.Y. 1037, 74 N.E.2d 486 (1947).

80. Otten v. State, 229 Minn. 488, 40 N.W.2d 81 (1949); Hayes v. St. Mary's Hosp., 285 App. Div. 914, 137 N.Y.S.2d 409 (1955); Pogue v. Crouse Irving Hosp., 281 App. Div. 931, 119 N.Y.S.2d 842 (1953); Quallenberg v. Union Health Center, 280 App. Div. 1029, 117 N.Y.S.2d 24 (1952).

81. Mills v. Detroit Tuberculosis Sanitarium, 323 Mich. 200, 35 N.W.2d 239 (1948).

82. Board of Nat'l Missions v. Alaska Indus. Bd., 116 F. Supp. 625 (D. Alaska 1953). *See* note 37 *supra*.

83. Feist v. North Dakota Workmen's Compensation Bureau, 42 N.W.2d 665 (N.D. 1950). *Accord*, Shore v. Pacific Employers' Ins. Co., 102 Ga. App. 431, 116 S.E.2d 526 (1960).

84. *See also* LARSON § 8.50 for a number of similar cases presenting the "arising-out-of-employment" issue.

85. 271 App. Div. 1042, 68 N.Y.S.2d 510 (1947).

piece is an inherent part of the job, and if such use enhances the probability of transmission of the disease from one operator to another, then apparently the distinctiveness of the mechanism of transmission supplies all that is needed of occupational character. It would seem to follow that any disease, however exotic, could become an occupational disease if one could show some method of transmission peculiar to the employment. Thus, smallpox might become an occupational disease of a deep-sea diver whose diving helmet had been used by others, and gonorrhea might become an occupational disease of lathe operators if they shared the use of protective goggles. Whether courts will explore the full implications of this means-of-transmission idea remains to be seen.[86]

The ultimate question to which this line of development leads, is whether sheer proximity to a diseased co-worker, enforced by the nature of the employment, is sufficient to make a disease occupational? Michigan and New York are so far the only states to have confronted this question. Michigan has said yes. New York has said no. While the Michigan facts were somewhat stronger than those in either of the New York denials, there may also be a basic disagreement in principle.

All three of the cases involved contraction of tuberculosis. In the Michigan case, *Vanderbee v. Knape & Vogt Manufacturing Co.*,[87] the peculiar contribution of the employment lay in the fact that a diseased co-worker had the responsibility of training the claimant, and, because of the high level of noise in the room, the two were forced to shout at each other with their heads six inches to a foot apart. This happened several times a day, for two to five minutes, over a four or five week period. Within a month after the co-worker entered a hospital suffering from tuberculosis, claimant's tuberculin test was for the first time positive.

In the first New York case, *Harman v. Republic Aviation Corp.*,[88] the facts showed only that the claimant worked a few feet away from

86. A similar principle was applied in Hovancik v. General Aniline & Film Corp., 8 App. Div. 2d 171, 187 N.Y.S.2d 28 (1959). The claimant, over a four-month period, worked with another technician who had active tuberculosis. He and his diseased co-worker used the same mouth pipette, probably no more than four or five times. Contraction of tuberculosis was held compensable as an occupational disease.

87. 48 Mich. App. 488, 210 N.W.2d 801 (1973).

88. *See* note 36 *supra* and accompanying text.

a fellow employee who had active pulmonary tuberculosis. In the later New York case, *Paider v. Park E. Movers,*[89] the enforced proximity was somewhat more pronounced, though by no means as close as in the Michigan case. Claimant contracted tuberculosis from a co-employee with whom he was required to share a truck cab. The court said that this was not a hazard peculiar to a truck driver, but merely one of this particular job, and therefore was not compensable as an occupational disease.

The real issue in these three cases comes to this: must the occupational character of the disease lie in the disease itself, as lead poisoning to a lead worker, or can it lie in the fact of proximity that facilitates its transmission? It seems well established, particularly in New York, that a common disease like tuberculosis can become occupational when particular employment devices like mouthpieces and pipettes play a part in its transmission. In principle, however, there seems to be no insuperable reason why some mechanical gadget associated with the job must be involved. The essence of the occupational character is the marked and enforced increase in the kind of contact that spreads the disease, beyond normal non-employment contacts. By this standard, it would not be too difficult to distinguish *Harman* and *Vanderbee.*

The proximity in *Harman*, although protracted, was no more intimate than that of ordinary human contacts off the job. It is quite another matter, because of the distinctive employment condition of loud noise, to have a tubercular co-worker shouting in your face at the top of his lungs from a distance of six inches.

Somewhere between is *Paider*, the other New York case. It could well be argued that *Paider* is closer to *Vanderbee* than to *Harman.* Being forced to breathe the same air as a tubercular truck driver within the close confines of a truck cab seems to amount to a sufficiently distinctive employment condition facilitating transmission to make the disease occupational. In other words, sharing a cramped truck cab could be analogized to sharing a telephone mouthpiece or a mouth pipette.

III. Effect of Allergy or Preexisting Weakness

A question that continues to elicit some divergence of opinion is

89. 19 N.Y.2d 373, 227 N.E.2d 40, 280 N.Y.S.2d 140 (1967).

whether a disability produced by the action of employment conditions on claimant's own individual allergy, hypersensitivity or preexisting weakness is an occupational disease under the general definition of that term. More than any other single issue, this question highlights the difference between definitions aimed at distinguishing accident, and definitions aimed at delineating the positive coverage of the term "occupational disease." In accident-distinction definitions, one often emphasized feature of an occupational disease was its prevalence as an ordinary incident of the particular employment. The disease was sometimes pictured as one to which practically everybody might succumb sooner or later if he remained at work under normal conditions for a long enough time.

The fatal impact of this feature of the definition in individual allergy cases is obvious if it is carried over into the present problem of interpreting occupational disease coverage. The Missouri court, for example, relying on accident-distinction definitions, has held that asthma admittedly caused by prolonged exposure to wheat dust was not an occupational disease because claimant's own individual allergy contributed to the result.[90] The court said:

> [T]he asthma or emphysema from which he suffered, even though brought on by the prolonged inhalation of wheat dust, and even though not uncommon among people engaged in the milling industry, was nevertheless not a natural result or incident of the employment itself, but . . . was attributable to the employee's own individual innate sensitivity or allergy to the properties of wheat dust . . . . Whether any other person would be affected in the same manner as the employee would depend upon whether he was allergic in the same manner as the employee.[91]

Maryland has taken the same position, although with a stronger statutory background than Missouri, which had no statutory definition. At the time of this decision, Maryland provided schedule-type coverage with the proviso that no listed occupational disease should

90. Sanford v. Valier-Spies Milling Co., 235 S.W.2d 92, 95 (Mo. App. 1950). *Accord,* Watson v. International Milling Co., 190 Kan. 98, 372 P.2d 287 (1962); Olivier v. Liberty Mut. Ins., 241 La. 745, 131 So. 2d 50 (1961); Picquet v. Toye Bros. Yellow Cab Co., 77 So. 2d 569 (La. App. 1955); Smith v. Cascade Laundry Co., 335 S.W.2d 501 (Mo. App. 1960); E.I. DuPont DeNemours & Co. v. Johnson, 212 Tenn. 123, 368 S.W.2d 295 (1963).

91. 235 S.W.2d at 95.

be compensable unless "such disease shall be due to the nature of an employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment."[92] On the strength of this language, the court held that asthma caused by rubber fumes was not an occupational disease, since "asthma had never been known to occur as a result of the operation in which the claimant was engaged, either by the Kelly-Springfield Tire Company, or by the Goodyear Tire and Rubber Company in its plant at Akron, Ohio."[93]

The majority of jurisdictions, however, have held individual allergies or weaknesses immaterial, where the particular conditions of employment in fact caused the disability.[94] The leading case promulgating this position is *Le Lenko v. Wilson H. Lee Co.*,[95] wherein, a linotype operator became incapacitated by dermatitis attributed to antimony fumes. There had been no other case of dermatitis in defendant's plant, which had been operating for many years. None of the testifying physicians had had any experience with such a case, and medical literature disclosed few examples of it. The court proceeded on the premise that "the dermatitis of the plaintiff was due to his individual susceptibility, to an unusual degree, to the fumes of the antimony."[96] The applicable statute defined occupational disease as "a disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such."[97] The court said:

92. Kelly-Springfield Tire Co. v. Rowland, 197 Md. 354, 359, 79 A.2d 153, 156 (1951).

93. *Id.*

94. Aleutian Homes v. Fischer, 418 P.2d 769 (Alas. 1966); Le Lenko v. Wilson H. Lee Co., 128 Conn. 499, 24 A.2d 253 (1942); Princess Mfg. Co. v. Jarrell, 465 S.W.2d 45 (Ky. App. 1971); Bird v. Pennfield Agricultural School Dist. No. 1, 348 Mich. 663, 83 N.W.2d 595 (1957); Riggs v. Gooch Milling & Elevator Co., 173 Neb. 70, 112 N.W.2d 531 (1961); Stepnowski v. Specific Pharmaceuticals, Inc., 18 N.J. Super. 495, 87 A.2d 546 (1952); Maniscalco v. Pizza Chef, Inc., 17 App. Div. 2d 884, 233 N.Y.S.2d 291 (1962); Morrocco v. Mohican Stores, Inc., 16 App. Div. 2d 684, 230 N.Y.S.2d 526 (1962), *aff'd*, 13 N.Y.2d 1015, 195 N.E.2d 306, 245 N.Y.S.2d 595 (1963); Berman v. A. Werman & Sons, 14 App. Div. 2d 631, 218 N.Y.S.2d 315 (1961); Mayr v. Price, 9 App. Div. 2d 801, 192 N.Y.S.2d 752 (1959); Horvath v. Wickwire Spencer Steel Co., 275 App. Div. 1014, 91 N.Y.S.2d 709 (1949); Simpson Logging Co. v. Department of Labor & Indus., 32 Wash.2d 472, 202 P.2d 448 (1949); Kroger Grocery & Baking Co. v. Industrial Comm'n, 239 Wis. 445, 1 N.W.2d 802 (1942). *Cf.* Silke v. Walter, 69 N.J. Super. 208, 174 A.2d 89 (1961); Rutterschmidt v. Wolff, 14 App. Div. 2d 960, 220 N.Y.S.2d 1022 (1961).

95. 128 Conn. 499, 24 A.2d 253 (1942).

96. *Id.* at 502, 24 A.2d at 255.

97. *Id.*

> We cannot import into the conception of occupational disease under our law the element that the disease must be a usual or generally recognized incident of the employment. Compensation under our law is not to be denied because the injury would not have occurred except for the peculiar susceptibility of the individual worker. . . . If . . . a disease is the natural result of conditions which are inherent in the employment and which attach to that employment a risk of incurring it in excess of that attending employment in general, an award of compensation is not precluded because the risk is one which has not become generally recognized or because only employees unusually susceptible will suffer from it.[98]

In other words, the test is (1) whether the employment conditions actually caused the disability, and (2) whether these conditions were peculiar to the employment in the sense that they were encountered there in a degree beyond that prevailing in employment generally.

The Washington court reached the same result in *Simpson Logging Co. v. Department of Labor and Industries*[99] under a broader statute defining occupational disease as "such disease or infection as arises naturally and proximately out of extra hazardous employment."[100] The obstacle here was not statutory but judicial, for the court had before it a definition promulgated in *Seattle Can Co. v. Department of Labor and Industries*[101] which included the sentence: "Every worker in every plant of the same industry is alike constantly exposed to the danger of contracting a particular occupational disease."[102] The court met this obstacle by admitting that the earlier definition was inspired by a desire to enlarge the meaning of "accident" by constricting the mutually exclusive concept of "occupational disease." The advent of occupational disease coverage rendered the old definition obsolete, said the court, and a new definition giving effect to the intention of the legislature in creating occupational disease coverage must be adopted. The new rule, under the literal wording of the act, is that:

> no disease can be held not to be an occupational disease as a matter

98. *Id.* at 504, 24 A.2d at 256.
99. 32 Wash.2d 472, 202 P.2d 448 (1949).
100. *Id.* at 477, 202 P.2d at 451.
101. 147 Wash. 303, 265 P. 739 (1928).
102. *Id.* at 307, 265 P. at 741.

> of law where it has been proved that the conditions of the extrahazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted.[103]

Accordingly, asthma from personal sensitivity to the dust, smoke and fumes of a plywood plant was held compensable.

The rarity of the condition or the allergy does not detract from its compensability. Few people may have been aware that, to a person of unusual susceptibility, the inhalation of dust containing female sex hormones could cause effemination and impotency, but New Jersey has nonetheless squarely classed this result as an occupational disease.[104]

Moreover, the quantitative extent of the exposure is immaterial, if, in combination with the worker's unusual sensitivity, it was sufficient to produce the disease. In *Berman v. A. Werman & Sons*,[105] minimal exposure to benzol caused an employee's death. Benefits were awarded for a fatal occupational disease on the ground that "there is no known minimal amount of benzol exposure which could not prove harmful . . . to the supersensitive individual. . . ."[106]

Closely related to the question of preexisting allergy is that of preexisting weakness, disease, or susceptibility. Most courts treat this problem the same as that of allergies, and hold that when distinctive employment hazards act upon these preexisting conditions to produce a disabling disease, the result is an occupational disease.[107] Thus when admittedly nonindustrial pulmonary emphysema was aggravated by employment dust and fumes, Oklahoma concluded that the end product was an occupational disease.[108] New Jersey has held that aggravation of a nonoccupational fungoid condition by repeated exposure to benzine constitutes a compensable

103. 32 Wash. 2d at 479, 202 P.2d at 452.

104. Stepnowski v. Specific Pharmaceuticals, Inc., 18 N.J. Super. 495, 87 A.2d 546 (1952).

105. 14 App. Div. 2d 631, 218 N.Y.S.2d 315 (1961).

106. 218 N.Y.S.2d at 316.

107. Beaudry v. Winchester Plywood Co., 255 Ore. 503, 469 P.2d 25 (1970) is a typical case. *Contra*, Bess v. Coca-Cola Bottling Co., 469 S.W.2d 40 (Mo. App. 1971). For a case resolving administrative difficulties regarding aggravation of an occupational disease, see Schoch v. State Accident Ins. Fund, 496 P.2d 53 (Ore. App. 1972).

108. National Zinc Co. v. Hainline, 360 P.2d 236 (Okla. 1961).

disease.[109] New York has accepted as compensable a low-back strain caused by continued lifting aggravating a congenitally weak back,[110] Dupuytren's contracture in the palms of hands possibly due in part to a physiological defect,[111] and aggravation of preexisting arteriosclerotic vascular disease.[112] Delaware has compensated for aggravation of a sandblaster's Boeck's sarcoid disease,[113] and Michigan has added tennis elbow to this category involving preexisting susceptibility.[114]

It can readily be seen that the line between occupational disease and aggravation of preexisting disease or weakness had become blurred. The ultimate working rule that seems to emerge is simply that a disability which would be held to arise out of the employment under the tests of increased risk and aggravation of preexisting condition will be treated as an occupational disease.

IV. Continuing Legislative Expansion of Coverage

The expansion of occupational disease coverage by legislative action continues, although not always rapidly enough to keep up with changing conditions and identification of new diseases. Since 1950, the number of states having occupational disease coverage has grown from forty-four to fifty, and the number having general coverage has risen from twenty-seven to forty-three.

Much of the expansion since 1950 has involved the addition of various diseases to existing schedules.[115] This has occurred both in states where the schedule is exclusive and in those where it is not.[116]

109. Giambattista v. Thomas A. Edison, Inc., 32 N.J. Super. 103, 107 A.2d 801 (1954). *Accord,* Bond v. Rose Ribbon & Carbon Mfg. Co., 78 N.J. Super. 505, 189 A.2d 459, *aff'd,* 42 N.J. 308, 200 A.2d 322 (1963).

110. Buchanan v. Bethlehem Steel Co., 278 App. Div. 594, 101 N.Y.S.2d 1011, *aff'd,* 302 N.Y. 848, 100 N.E.2d 45 (1951). *Contra,* Detenbeck v. General Motors Corp., 309 N.Y. 558, 132 N.E.2d 840 (1956).

111. Rogan v. Charles F. Noyes, Inc., 10 App. Div. 2d 765, 197 N.Y.S.2d 758 (1960).

112. Griffin v. Griffin & Webster, Inc., 283 App. Div. 145, 126 N.Y.S.2d 672 (1953).

113. Zallea Bros. v. Cooper, 53 Del. 168, 166 A.2d 723 (1960).

114. Samels v. Goodyear Tire & Rubber Co., 317 Mich. 149, 26 N.W.2d 742 (1947).

115. For a complete listing of diseases specifically covered by particular states, see Larson § 41.70, n.1.

116. Jurisdictions having a schedule in addition to general coverage include: Alabama, Georgia, Idaho, Iowa, Nevada, New Hampshire, New York, Ohio, Pennsylvania, Puerto Rico, Rhode Island, and Utah. In Virginia the employer may elect schedule coverage.

The commonest addition has been radiation disease.[117] Sometimes the results of ionizing radiation have been added to the earlier radiation statutes based on exposures to X-rays and radioactive substances, and other times radiation diseases are covered for the first time.

An interesting recent phenomenon has been the burgeoning, in all parts of the country, of statutes granting special compensation coverage to firemen or policemen, or both, for respiratory and heart diseases connected with the exertions of the employment.[118] No two statutes are quite identical. Most establish a presumption of work connection when these diseases result from performance of active service, a presumption that cannot be rebutted merely by evidence of preexisting heart disease[119] nor by medical opinion that the occupation had no effect on the weakened heart.[120] All sorts of special qualifications, conditions, exceptions, and provisos have been festooned upon the basic model, including minimum periods of service, full-time status, pre-employment examinations, and the like. Inevitably questions of extent of coverage have arisen, which have been dealt with both by judicial interpretation[121] and sometimes by legislative enlargement of the range of persons protected. Thus, Minnesota started with members of organized fire departments in 1955; in 1957 added members of organized police departments; then in 1959 the highway patrol; and in 1963, members of the game warden serv-

117. All states now have some coverage of diseases due to exposure to radioactivity, either through full-coverage statutes, or through specific addition to the schedule, or both. *See, e.g.*, Besner v. Walter Kidde Nuclear Lab., 24 App. Div. 2d 1045, 265 N.Y.S.2d 312 (1965) (decedent had been exposed to radiation on several occasions. Medical testimony was given that there was no safe dosage, since medical science did not know the exact effects or radiation, and each individual reacts differently. Award for death caused by radiation-induced acute myeloblastic leukemia affirmed).

118. Baker v. Workmen's Compensation Appeals Bd., 18 Cal. App. 3d 852, 96 Cal. Rptr. 279 (1971).

119. Turner v. Workmen's Compensation Appeals Bd., 258 Cal. App. 2d 442, 65 Cal. Rptr. 825 (1968); Bussa v. Workmen's Compensation Appeals Bd., 259 Cal. App. 2d 261, 66 Cal. Rptr. 204 (1968).

120. Sperbeck v. Department of Indus., Labor & Human Relations, 46 Wis. 2d 282, 174 N.W.2d 546 (1970).

121. State Compensation Ins. Fund v. Workmen's Compensation Appeals Bd., 251 Cal. App. 2d 772, 59 Cal. Rptr. 760 (1967) (claimant, a deputy coroner who served as a part-time deputy sheriff, was not one of those the legislature intended to include in this coverage); Buescher v. Workmen's Compensation Appeals Bd., 265 Cal. App. 2d 520, 71 Cal. Rptr. 405 (1968).

ice and State Crime Bureau.[122] One state, North Carolina, has held such provisions invalid as class legislation.[123]

V. Special Occupational Disease Restrictions

In most states the benefits for occupational diseases, and the conditions controlling compensability, are the same as for other kinds of disability. In spite of a marked trend toward abolition of special restrictions in recent years,[124] there remains a significant number of states which retain special provisions affecting occupational diseases, and especially dust diseases. Eight states, for example, place unusual limits on medical benefits for silicosis, asbestosis, and other occupational diseases.[125] There are also to be found special rules on benefits for partial disability, periods of exposure, and time of death or disability following exposure. In view of the persistence of this substantial array of restrictive provisions, a brief review of their background may be useful.

The original reason for these restrictions was the fear that the compensation system could not bear the financial impact of full liability for dust diseases, simply because they were so widespread in particular industries. As investigators began to examine the granite works, mines, quarries, foundries, monument works, and other establishments where silica dust was prevalent, they discovered that almost every employee had silicosis in one stage of development or another. When a state introduced full silicosis coverage, it might discover, as Wisconsin did, that the insurance premium for monument workers, for example, promptly soared higher than the payroll itself, with the result that the entire industry was closed down. To some extent this problem may be thought of as a tempo-

122. *See* Minn. Stat. Ann. § 176.011 (Cum. Supp. 1974). *See, e.g.*, Schwartz v. City of Duluth, 264 Minn. 514, 119 N.W.2d 822 (1963); Gray v. City of St. Paul, 250 Minn. 220, 84 N.W.2d 606 (1957).

123. Duncan v. City of Charlotte, 234 N.C. 86, 66 S.E.2d 22 (1951).

124. At one time, twenty states placed special restrictions on payments for silicosis, asbestosis, and other dust diseases: Arkansas, Colorado, Florida, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Vermont, and West Virginia.

125. Ark. Stat. Ann. § 81-1314(b) (1960); 48 Ill. Ann. Stat. § 172.43 (1966); Kan. Stat. Ann. § 44-5a10-5a14 (1973); Rev. Codes Mont. Ann. § 92-1311, 13, 16, 27 (Cum. Supp. 1973); Nev. Rev. Stat. § 443.145 *et seq.* (1973); Gen. Stats. N.C. § 97-52 *et seq.* (Supp. 1973); Ohio Rev. Code § 4123.68 (1973); Vt. Stat. Ann. tit. 21, §§ 1005, 1007 (Cum Supp. 1974).

rary one because of the backlog of advanced cases left over from an era of poorer preventive methods and less complete understanding of the disease. Some states nevertheless met this problem by introducing a sliding scale of silicosis benefits which would reach full size in a number of years, by barring benefits for partial disability, and by throwing up a variety of barriers based on relation of time or degree of exposure to time of disability, death, or claim.

What happened, however, was that these makeshift measures, contrived to tide employers and carriers over a transitional difficulty, remained ingrained in compensation acts long after their reason for existence had diminished or disappeared. As early as 1950, one commentator stated:

> We no longer are seeing new cases of silico-tuberculosis except in the older workers who were exposed to the heavier dust concentrations in the past.[126]

The persistence of this unsatisfactory situation led to a dramatic attempt in Michigan to have the special statutory limits on silicosis benefits struck down as unconstitutional.[127] The essence of the claimant's argument—a theory with fascinating implications for constitutional law in general—was that a statute which might have been constitutional when passed could become unconstitutional by the disappearance of the conditions whose existence had made its original enactment necessary. The constitutional provision chiefly relied on was the equal protection clause of the fourteenth amendment. The claimant argued that the maximum limit of $6,000 for silicotic disability created an arbitrary, unreasonable and discriminatory classification. The court, although sympathetic toward the claim, held that it was beyond its power to apply this reasoning to the instant case because at the time the decedent's rights accrued the classification was not obsolete. It is interesting that the court apparently did not rule out the possibility of reconsidering this line of attack in some future case in which the evidence on obsolescence would be stronger. The court said:

126. Address by Dr. O.A. Sander at the 36th Annual Convention of the I.A.I.A.B.C., DEP'T OF LABOR BULL. No. 142, p.51, "Workmen's Compensation Problems, 1950."

127. Gauthier v. Campbell, Wyant & Cannon Foundry Co., 360 Mich. 510, 104 N.W.2d 182 (1960).

> Any argument that the scheme is now "obsolete" as to future disabilities must wait consideration on a record which presents facts from which it might be deducted that the legislative reasoning had lost all value with the passage of time and change of circumstances [citing cases].[128]

One of the most common types of restrictive provisions bars claims unless the disability or death occurred within a specified number of years after a specified event such as the last day of work for the particular employee[129] or the last injurious exposure.[130] The arbitrariness of these statutes and their exceptions has produced senseless discrimination. For example, under the Utah statute, the three-year limitation in death cases is replaced by a five-year period if death results from a continuous total disability "for which compensation has been paid or awarded."[131] In *Pacific Coast Cast Iron Pipe Co. v. Industrial Commission*,[132] death benefits were denied the widow because, although the employee had actually applied for compensation during his lifetime, the Commission had never gotten around to passing on his claim before his death. It was conceded that the claim would have been granted, but because of nonaction beyond the control of either the employee or his widow, the literal terms of the statute were not fulfilled.[133]

The key operative concepts affecting the various silicosis limitations vary so much from state to state that no overall generalizations about their definition are possible. Some involve the interpretation of such terms as "injurious exposure"[134] and "last employer."[135] Other terms that may require definition are "date of disability," which is often related to the cessation of actual work,[136] "contraction

128. *Id.* at 522, 104 N.W.2d at 188.

129. *See, e.g.*, UTAH CODE ANN. § 35-2-13 (Supp. 1973).

130. *E.g.*, COLO REV. STAT. § 81-18-10(g) (1963) (within five years of last injurious exposure). *See* Graber v. Peter Lametti Constr. Co., 293 Minn. 24, 197 N.W.2d 443 (1972); Bethlehem Steel Co. v. Gray, 4 Pa. 590, 288 A.2d 828 (1972).

131. UTAH CODE ANN. § 35-2-13 (Cum. Supp. 1973).

132. 118 Utah 46, 218 P.2d 970 (1950).

133. For a detailed discussion of this and other restrictive limitations, such as rigid requirements of exposure during a specific period prior to disablement or death, see LARSON § 41.80.

134. Turner v. State Compensation Comm'r, 147 W.Va. 145, 123 S.E.2d 880 (1962).

135. Czepukaitis v. Philadelphia & Reading Coal & Iron Co., 203 Pa. Super. 493, 201 A.2d 271 (1964).

136. Piragowski v. National Sugar Refining Co., 11 App. Div. 2d 824, 202 N.Y.S.2d 611 (1960); Fetner v. Rocky Mount Marble & Granite Works, 251 N.C. 296, 111 S.E.2d 324 (1959).

of silicosis," which has been held to refer, not merely to the physical fact of inhalation of silica dust, but to the development of observable symptoms,[137] and "compensation," which has been held to include medical benefits.[138] Similarly, the range of diseases or conditions embraced within the "silicosis" provision will depend both on the words chosen by the legislature and on its intent. The term "silicosis or other dust diseases" has been held to include pulmonary emphysema from various substances including silicates,[139] but not blindness attending sinusitis and rhinitis caused by dust,[140] since this was obviously not a part of the problem at which the restrictive legislation was aimed. And when the statute provides that the disability be caused by uncomplicated silicosis or that silicosis be an "essential factor," it has been held insufficient to show that the claimant's total disability was caused largely by tuberculosis and, to a minor extent, by silicosis.[141]

The general trend toward liberalization of occupational disease provisions has been most marked in connection with statutes requiring disability or death to occur within a specified period after last exposure or employment. Some of these relaxations apply to occupational diseases generally;[142] many apply to silicosis and related diseases;[143] and most, at least as to the limitations periods, have dealt with the special problem of slowly developing radiation injury, sometimes accompanied by other latent injuries.[144] The commonest

137. Yaeger v. Delano Granite Works, 236 Minn. 128, 52 N.W.2d 116 (1952).

138. Bayless v. List & Clark Constr. Co., 201 Kan. 572, 441 P.2d 841 (1968).

139. Whitt v. Brunswick-Balke-Collender Co., 1 Mich.App. 494, 136 N.W.2d 734 (1965) (claimant contracted pulmonary emphysema from exposure to calcium carbonate, aluminum oxide, and various forms of silicates. The court held that this type of dust was included within the term "silicosis or other dust diseases" and claimant's recovery was limited by this section of the statute). *See also* Mills v. Princeton Mining Co., 133 Ind. App. 486, 183 N.E.2d 359 (1962); Habovick v. Curtiss-Wright Corp., 207 Pa. Super. 80, 215 A.2d 389 (1965).

140. Felcoskie v. Lakey Foundry Corp., 382 Mich. 438, 170 N.W.2d 129 (1969).

141. Stockdale v. Sunshine Mining Co., 84 Idaho 506, 373 P.2d 935 (1962).

142. See, for example, statutes in the states of Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maryland, Missouri, Nebraska, Ohio, Oregon, Rhode Island, Vermont, Virginia, Washington, and West Virginia.

143. Statutes exist in the following states: Colorado, Maryland, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, and Utah.

144. See statutes in the following states: Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, South Carolina, Texas, and Wisconsin. *See generally* the excellent discussion by Estep & Allan, *Radiation Injuries and Time Limitations in Workmen's Compensation Cases,* 62 MICH. L. REV. 259 (1963).

change is to make time periods run only from knowledge, real or constructive, of the condition and its relation to the employment, at the same time often removing or extending considerably the absolute outside time limits on the filing of a claim.

A common restrictive clause is that omitting or limiting benefits for partial disability caused by occupational or dust diseases.[145] Where partial disability is noncompensable, and at the same time claimant is barred unless he makes claim within a specified time, the stage is set for what could be another seemingly unavoidable pitfall for the silicosis victim: the possibility that this condition may not develop beyond partial disability within the period of limitations, and that therefore there might appear to be no moment in time when he could ever make a valid claim. This trap was successfully avoided, however, by an Oklahoma claimant who simply filed his claim within the statutory period in spite of the fact that at the moment of filing the condition, only partially disabling, was noncompensable. He then used the added time available for a reopening petition for change in condition to get his case heard when total disability in fact ensued.[146]

In line with the general trend toward liberalizing the treatment of occupational diseases is the removal of abosolute benefit limitations in New Jersey, Maryland, Massachusetts, Michigan, and Florida. It may be noted that there also is some movement in the direction of removal of the ban on partial disability benefits for occupational diseases generally, as in Colorado and Vermont, or for silicosis and related diseases, as in Michigan and Florida.

In about half of the states, the provisions on second injury funds

145. For a listing of the 19 states having some such limitation, together with interpretive cases see LARSON § 41.80 n.47. *See also* Bethlehem Steel Co. v. Carter, 224 Md. 19, 165 A.2d 902 (1960) (held that a permanent partial disability award, but not a total disability award, is in order when claimant was reassigned duties away from exposure to silica dust in order to prevent further injury).

146. Southwest Stone Co. v. Washington, 381 P.2d 872 (Okla. 1963). After filing, claimant became totally disabled and applied for a re-opening of the claim. The court held that in such a case the claimant was correct in filing a claim within the one-year time period following exposure after the condition became known. Although not compensable, his petition to reopen for change of condition, upon attainment of a compensable state of disability, was controlled by the statute of limitations applicable to reopening, 500 weeks, and not the shorter period for filing original claims. Denial of compensation, based upon the original decision of noncompensability, was vacated and remanded.

are sufficiently broad to appear to cover preexisting occupational disease;[147] in other states such as Colorado, Kansas, Kentucky, and Ohio, occupational diseases have specifically been brought within the second-injury fund procedure. In New York there is a special fund for dust disease cases, under which, in the event of total disability or death from a dust disease, the employer is liable for a limited number of weeks, and the fund is liable thereafter, regardless of any previous condition or disability. Special provision for the state or for the subsequent injuries fund to bear part of the cost in certain cases has also been made in Michigan, Pennsylvania, and California.

In a few instances, silicosis and similar diseases are singled out for the purpose of adding rather than subtracting a benefit. New York, for example, provides special hospital care and medical treatment for silicosis. Since it is highly desirable for employees in early but nondisabling stages of illness to get out of the dusty environment, several states provide benefits to such workers who leave or change jobs for this reason. In Idaho, South Dakota, and Wisconsin, the provision applies only to silicosis. In Arkansas and North Carolina, the allowance extends to both silicosis and asbestosis, and in Ohio to silicosis and coal miner's pneumoconiosis.

VI. The "Black Lung Act"

Dissatisfaction with restrictions and inadequacies of state compensation acts in the area of pneumoconiosis, of the kind just discussed, resulted in an extraordinary resort to federal power to rectify the situation or induce the states to do so.

On December 30, 1969, President Nixon signed the Federal Coal Mine Health and Safety Act of 1969 ("Black Lung Act").[148] This law is primarily designed to establish nationwide health and safety standards for the coal-mining industry. It also includes an income-maintenance provision that is quite unusual since for the first time it gives the federal government at least temporary responsibility in a traditionally state administered area of workmen's compensation. Under Title IV of the Act, monthly cash benefits are provided for

147. *See* Larson § 59.32.

148. Coal Mines Health and Safety Act, 30 U.S.C.A. § 901-36 (Cum. Supp. 1974).

coal miners who are "totally disabled" because of pneumoconiosis ("black lung" disease), and for their dependents and survivors, when death either was due to pneumoconiosis or occurred while the miner was totally disabled by pneumoconiosis. Full medical benefits as well as rehabilitation benefits were added by the 1972 amendments.[149]

"Pneumoconiosis," for the purpose of these benefits, is defined as a chronic dust disease of the lung arising out of employment in a coal mine.[150] If a miner who is suffering or has suffered from the disease was employed in one or more underground coal mines for ten or more years, there is a rebuttable presumption that his disease arose out of such employment.[151] If a deceased miner was so employed and died from a respiratory disease, there is also a rebuttable presumption that death was the result of the disease. If a miner is suffering from or dies having an advanced irreversible state of pneumoconiosis, it will be irrebuttably presumed that he is totally disabled or his death was caused by the disease.[152]

Two federal agencies—the Department of Health, Education, and Welfare and the Department of Labor—are involved in administering the cash benefit provisions. The Department of Health, Education, and Welfare (through the Social Security Administration) is responsible for the payment and administration of benefit claims filed by living miners on or before December 31, 1973. The Department of Labor has responsibility for claims filed by miners after December 31, 1973.

In addition, the program provides that if a claim is filed after

149. The addition of medical and rehabilitation benefits is the result of an almost invisible change in the statute. In Sec. 422(a), there is a long list of 26 numbers representing the sections of the Longshoremen's Act that are *not* incorporated by reference, both in the standards to be applied by the Labor Department when directly handling claims, and in the criteria that states must meet to take over administration of these cases. In 1972, the number "7" quietly disappeared from this list of numbers. This was a lucky seven for the miners, since its deletion gave them full medical benefits for life, as well as rehabilitation benefits—this being what Section 7 of the Longshoremen's Act provided.

150. Coal Mines Health and Safety Act, 30 U.S.C.A. § 902(b) (Cum. Supp. 1974).

151. If the employment period was 15 years or more, the presumption applies, under the 1972 amendments, even if there is a negative chest X-ray. Coal Mines Health and Safety Act, 30 U.S.C.A. § 921(c)(4) (Cum. Supp. 1974).

152. These presumptions are collected in the Coal Mines Health and Safety Act, 30 U.S.C.A. § 921(c) (Cum. Supp. 1974).

June 30, 1973, but on or before December 31, 1973, the claimant would receive benefits from the Social Security Administration only through December 31, 1973. Thereafter the employer is responsible for payment of these benfits. The benefits will continue indefinitely for miners who filed for benefits before July 1, 1973, and widows who filed before January 1, 1974, as well as for widows on the death of a miner who was a beneficiary under the program.

Benefit payments to a miner or his widow are reduced if the beneficiary is also receiving payments on account of his disability under a state's workmen's compensation, unemployment insurance, or disability insurance program.

The Act also includes a "maintenance of effort" provision under which any reduction by a state in its workmen's compensation, unemployment insurance, or disability benefits for persons eligible to receive the "black lung" benefits will result in a stoppage of the federal payments to residents of that state. The benefits are not retroactive—that is, no benefits are paid for any period before the date on which a claim for them is filed.

For benefit claims filed after 1973, overall responsibility for the program shifts to the Department of Labor. Such claims will be processed under state workmen's compensation acts in those states with laws that are approved by the Secretary of Labor as providing adequate coverage for pneumoconiosis.[153] Generally speaking, a state law will be determined to have adequate coverage for pneumoconiosis if the cash benefits under such law and the criteria for determining eligibility are not less favorable to the claimant than those applicable to claims under the "Black Lung Act."

Where a state workmen's compensation law does not have the approval of the Secretary of Labor, coal mine operators will be liable for payment of benefits that are to be secured through self-insurance

153. The Act requires that the Secretary of Labor publish, not later than October 1, 1972, a list of states providing the requisite coverage. The Secretary duly published a notice that no states were up to standard. As of March 1973, there were still no laws that had been officially approved as being in compliance, in spite of a considerable flurry of legislative activity inspired by this Act in Alabama, Illinois, Kentucky, Montana, Tennessee, Utah, Virginia, West Virginia, and Wyoming. The inability of the Secretary to certify compliance with minimum criteria was perhaps understandable, in view of the fact that no regulation fixing criteria had been published at that time.

or purchase of an insurance policy. In such cases, the benefit levels are to be the same as those provided under the federally financed part of the program, and subject to a number of specified exceptions, are to be made under the same conditions that would apply if the claim were subject to the provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act. Where payment from a coal mine operator or his insurer cannot be obtained, the Secretary of Labor will make the payments to which a totally disabled miner or his dependents are entitled under the Federal Coal Mine Health and Safety Act.

The Department of Labor is authorized to issue regulations pursuant to the Act. These regulations fall into two main parts. The first set of regulations covers the procedures and rules applicable to the direct handling of claims by the Labor Department.[154] The second set contains the criteria that state statutes must meet to qualify for taking over this class of cases.[155]

VII. Conclusion

There is no mystery about what needs to be done to eliminate the worst deficiencies in occupational disease protection. The solution is simply to cover them all by a blanket inclusion of occupational disease, and to abandon the practice of covering only listed diseases, unless such lists are themselves followed by a catch-all clause embracing all other occupational diseases. It is gratifying that the movement in this direction has been one of the most conspicuous areas of compensation reform in recent years, but a number of tragic omissions and limitations inherited from the past still remain to be remedied.

A strong new force, federal government pressure, is now operating on this problem in two ways. The first is the recommendation of the National Commission on State Workmen's Compensation Laws calling for (among other reforms) complete occupational disease coverage, and for federal action to "guarantee compliance" with this standard by any state that has not done so by 1975. The second development is the advent of the "Black Lung Act," with its im-

154. 20 C.F.R. § 725 (1973); 38 Fed. Reg. 16962 (1973); 38 Fed. Reg. 26042 (1973); 38 Fed. Reg. 12494 (1973).

155. 38 Fed. Reg. 8328 (1973).

plicit hint that it can easily be extended by the addition of a few words to any other occupational diseases that state laws have unduly neglected.

Between the legislative improvements resulting both from the existing momentum toward change and the two-pronged push by Washington, and the judicial expansion of the occupational disease concept occurring in most states, it may well be that we shall witness, within a few years, the kind of complete occupational disease protection that compensation acts in theory should have provided from the very beginning.