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Workmen's Compensation - Remote Proximate Cause - Alcoholism Caused by Original Compensable Injury

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between felons and misdemeanants seems sufficient to relieve the charge that the distinction does in fact violate the equal protections clause.

It seems clear that the Wisconsin statute does in fact serve to deny to misdemeanants due process, and that the distinction should be dropped. This is all the more apparent in light of other states' provisions which generally do not make any distinction between defendants for the purpose of change of venue.[22] Furthermore, the trend seems to be toward dropping the felony-misdemeanor classification for purposes of determining which defendants are entitled to such things as jury trial or adequate counsel.[23] Both the statute and the decision in this case are against the weight of authority and the principles of justice, and both should be changed.

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WORKMEN'S COMPENSATION — REMOTE PROXIMATE CAUSE — ALCOHOLISM CAUSED BY ORIGINAL COMPENSABLE INJURY—Plaintiff incurred a back injury arising out of and in the course of his employment at the defendant's plant for which he received the allowable compensation. Shortly after surgery, plaintiff returned to favored employment[1] at a greater wage than he had received previously. More than seven years after his return to work the plaintiff was discharged for being under the influence of intoxicants while at his place of employment. A claim for workmen's compensation was submitted contending that there was a causal relationship between plaintiff's drinking problem and his compensable back injury.[2] The trial court found for the plaintiff and on appeal the Michigan Court of Appeals affirmed. *Scroggins v. Corning Glass Company,* 10 Mich. App. 174, 159 N.W.2d 171 (1968).

The Court of Appeals relied upon the plaintiff's self-diagnosis that his consumption of alcoholic beverages was to relieve the pain caused by his back injury. The plaintiff testified that he hadn't

22. ALA. CODE *tit.* 15, § 267 (1959); CAL. PENAL CODE, § 1033 (West 1956); GA. CODE ANN. § 27-1201 (1953); IDAHO CODE ANN. § 19-1801 (1947); ILL. REV. STAT. ch. 38, § 114-6 (1963); LA. REV. STAT. § 15:290 (1950); MICH. COMP. LAWS § 762.7 (1946) MISS. CODE ANN. § 2508 (1957); N.D. CENT. CODE § 29-15-01 (1960); N.Y. CODE OF CR. PROC. § 344 (Mc-Kinney 1958); WASH. REV. CODE ANN. § 10.25.070 (1961); State *ex. rel.* Ricco v. Biggs, 198 Ore. 413, 255 P.2d 1055 (1955).

23. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (jury); State v. Borst, 278 Minn. 278 Minn. 388, 154 N.W.2d 888 (1967) (counsel); Stevenson v. Halzman, ——Ore.——, 458 P.2d 414 (1969) (counsel).

1. A return to a position commensurate with employee's former work both in salary and status. Scoggins returned as a plant guard.

2. No claim was submitted contending that the type of work contributed to the drinking problem.

any drinking problem previous to his injury. It was stated that in the absence of fraud or contrary evidence this disability is compensable referring to the "statutory dilemma" which requires that if a direct causal connection is established between the injury and employment, then recovery must be allowed, and therefore the court is duty bound to affirm the board's finding of fact.[3]

The Michigan court quoted from Larson on Workmen's Compensation[4] regarding cases that have held:

> Where drugs used in the treatment of a compensable injury led to narcotics addiction or alcoholism, the ensuing consequences were compensable.[5]

The cases enumerated by Larson and relied upon by the Michigan court are distinguishable from the case under consideration. In one case compensation was awarded to an employee who, while at work and not feeling well, took what he thought was wine which in fact was a deadly poison.[6] In the instant case, however, Scroggins was not at work and, further, his drinking problem was repetitive. In another case an injured employee applied "homespun remedies" for approximately one month prior to consulting a physician. Compensation was awarded, however, since the employee had been injured while in the course of his employment and his physician testified that the existing condition could have occurred even if there had been immediate consultation.[7]

Note should be made regarding Larson's quotation alluding to "drugs used in the treatment" which in itself is distinguishable from the instant case. In *Scroggins,* the plaintiff was not prescribed any drugs which led to his alcoholism.

Compensation has been denied an employee who mistakenly took the wrong medicine. A mild sedative had been prescribed by the employee's physician but the claimant mistakenly swallowed a bichloride of mercury tablet which had been prescribed five years previously by the same physician for a similar injury. The court pointed out that the employee's mind was not deranged nor was his eyesight affected and that by his independent intervening act he severed the causal chain.[8]

Somewhat analogous to the case under consideration is where the employee incurs a compensable injury and subsequently commits suicide. In the instant case the claimant had performed voluntary

3. Scroggins v. Corning Glass Co., 10 Mich. App. 174, 159 N.W.2d 171, 173 (1968).
4. 1. A. LARSON, WORKMEN'S COMPENSATION, § 13.21 at 192.86 (1968).
5. *Id.*
6. Elliot v. Industrial Accident Comm'n, 21 Cal.2d 281, 131 P.2d 521 (1942).
7. Tierney v. Independent Warehouse Co., 16 App. Div.2d 844, 227 N.Y.S.2d 548 (1962).
8. Brown v. N.Y. State Training School for Girls, 285 N.Y. 37, 32 N.E.2d 783 (1941).

acts during the interim between his compensable injury and his alcoholism which led to his subsequent disability. The suicide situation is similar in that following a compensable disability the employee commits the act of self-destruction by his own volition. In a Minnesota case,[9] compensation was denied where the deceased committed suicide three and one-half years after suffering a back injury which arose out of and in the course of employment. This result, notwithstanding testimony by one psychiatrist that the suicide was induced by emotional problems caused by the back injury and that the suicide resulted from an uncontrollable impulse. A psychiatrist testifying for the defense opinioned that there were other emotional problems caused by domestic difficulties which may have led to the suicide. The court stated that the possibility of a causal connection was too remote and speculative, and that the plaintiff must show that the suicide resulted from an uncontrollable impulse without conscious volition in order to establish a direct and unbroken causal chain.[10]

In two cases awarding compensation for suicide, allegedly caused by an original compensable injury, the time interval between the events was much shorter—one week in one case[11] and seven days in the other.[12] In addition, one jurisdiction did not have a statute expressly precluding compensation if the injury or death was intentionally self-inflicted.[13]

North Dakota cases have held that the burden of showing that an injury was incurred in the course of or arose out of the employment is upon the claimant, and that awards should not be made upon mere surmise and conjecture.[14] In 1934 the North Dakota court denied compensation to an employee who claimed that an ulcer formed in his eye as the result of his employment as a hog scraper. Evidence was introduced that bristles were airborne and in the past many of them had lodged in various parts of the body. The court held that this evidence was too speculative to establish a causal connection. The court then recited what is ostensibly the present rule:

> Where . . . the injury may equally well have been occasioned by factors entirely different from the one advanced

9. Lehman v. A.V. Winterer Co., 272 Minn. 79, 136 N.W.2d 649 (1965). This case is also reported in 15 A.L.R.3d 611.

10. *Id.* at ——, 136 N.W.2d at 651.

11. Anderson v. Armour & Co., 257 Minn. 281, 101 N.W.2d 435 (1960).

12. Harper v. Industrial Comm'n, 24 Ill.2d 103, 180 N.E.2d 480 (1962). Harper was released from the hospital and pronounced fit to return to work, by his physician, on March 11, 1957. He committed suicide on March 18, 1957.

13. *Id.* at ——, 180 N.E.2d at 482.

14. Pace v. N.D. Workmen's Comp. Bureau, 51 N.D. 815, 201 N.W. 348, 350 (1924).

> as a theory and entirely removed in time from the course of the employment, . . . no recovery can be had.[15]

The issue of a compensable injury subsequently followed by self-induced alcoholic consumption has not been litigated in North Dakota but in 1963 the question of willful intoxication by the claimant which allegedly caused the subsequent injury was discussed.[16] The deceased was involved in a head-on collision while in the course of his employment. A blood test was improperly administered which precluded the introduction of evidence relating to the deceased's intoxicated state, hence the compensation claim was allowed.[17] However, in its dicta the court alluded to what is presently North Dakota Century Code 65-01-02(8), stating that if the results of the blood test had been admissible the claimant would not have recovered, because willful intoxication acts as a bar to recovery.[18] The pertinent portion of the statute reads:

> 'Injury' . . . shall not include an injury caused by the employee's willful intention to injure himself . . . nor any injury received because of the use of narcotics or intoxicants. . . .[19]

The North Dakota Legislature in exercising its police and sovereign powers declared:

> that the prosperity of this state depends in a large measure upon the well-being of its wage workers; and to secure this prosperity . . . sure and certain relief for workmen injured in hazardous employment and for their families and dependents.[20]

In addition, the courts have subscribed to the theory that:

> The Workmen's Compensation Act must be liberally construed to promote the ends intended to be secured by its enactment.[21]

This liberal construction is illustrated by the case of a waitress being shot while in the course of her employment.[22] It was clear that the incident did not arise out of the employment but compensation was allowed because the claimant needed only to show that the injury arose out of (because of) *or* in the course of (during period of) not both. The court stated:

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15. Kamrowski v. N.D. Workmen's Comp. Bureau, 64 N.D. 610, 255 N.W. 101 (1934).
16. Erickson v. N.D. Workmen's Comp. Bureau, 123 N.W.2d 292 (N.D. 1963).
17. *Id.*
18. *Id.* at 295.
19. N.D. CENT. CODE § 65-01-02(8) (Supp. 1969).
20. Brown v. N.D. Workmen's Comp. Bureau, 152 N.W.2d 799, 801 (N.D. 1967).
21. Erickson v. N.D. Workmen's Comp. Bureau, 123 N.W.2d 292, 294 (N.D. 1963).
22. Lippmann v. N.D. Workmen's Comp. Bureau, 55 N.W.2d 453 (N.D. 1952).

> [W]e think it was the intention and purpose of the legislature to enlarge and extend the coverage of the statute and to afford compensation to an employee for an injury which such employee might sustain because of his employment even though he was not on the premises where his actual work was to be or was being performed and was not actively engaged in such work, but the injury was inflicted upon him because of his employment; and that the legislature thought it was as desirable and as proper that the industry should carry such off-hour risk as it was that it should carry the working-hour risk.[23]

Even with the liberal construction it is difficult to visualize the North Dakota court extending such "liberalism" to include a case such as *Scroggins*. It seems reasonable to assume that Scroggins was not in the course of his employment during the seven and one-half years whenever the consumption of alcoholic beverages occurred. Therefore, the relevant quaere would be, whether or not the ingesting of alcoholic beverages arose out of his employment. North Dakota's answer seems to be found in cases which deny compensation.[24]

To establish a causal connection expert medical testimony, although not expressly stated, appears to be a requirement.[25] Generally alcoholism is considered to be a disease and the statute requires that the disease must be "fairly traceable to the employment" in order to be compensable.[26] Before a causal chain can be established the evidentiary rule of the statute requires that the disease arise under conditions where it is apparent to the rational mind that there is in fact a causal connection.[27] Compensation cannot be awarded on surmise, conjecture or a mere guess.[28]

A 1966 North Dakota decision denied compensation which involved the expiration of the deceased from a ruptured aneurism[29] some two and one-half months after injuring his ankle during the course of his employment. The court stated:

> [S]uch causal relationship cannot be based on mere surmise or speculation. Where the alleged cause of death is purely

23. *Id.* at 460.
24. Kuntz v. N.D. Workmen's Comp. Bureau, 139 N.W.2d 525 (N.D. 1966); Feist v. N.D. Workmen's Comp. Bureau, 80 N.W.2d 100 (N.D. 1956); McKinnon v. N.D. Workmen's Comp. Bureau, 71 N.D. 28, 299 N.W. 856 (1941); Kamrowski v. N.D. Workmen's Comp. Bureau, 64 N.D. 610, 255 N.W. 101 (1934).
25. Kuntz v. N.D. Workmen's Comp. Bureau, 139 N.W.2d 525 (N.D. 1966); Feist v. N.D. Workmen's Comp. Bureau, 80 N.W.2d 100 (N.D. 1956); McKinnon v. N.D. Workmen's Comp. Bureau, 71 N.D. 228, 299 N.W. 856 (1941); Kamrowski v. N.D. Workmen's Comp. Bureau, 64 N.D. 610, 255 N.W. 101 (1934).
26 N.D. CENT. CODE § 65-01-02(9) (Supp. 1969).
27. Feist v. N.D. Workmen's Comp. Bureau, 80 N.W.2d 100, 102 (N.D. 1956).
28. *Id.*
29. "A localized abnormal dilation of a blood vessel (as an artery) filled with fluid or clotted blood, usu. forming a pulsating tumor, and resulting from disease of the vessel wall." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (G. & C. Merriam Co. 1961).

> speculative and may equally well have been occasioned by factors entirely different from those on which the claim against the Fund is based, no recovery can be had.[30]

This case had two expert medical witnesses for the claimant, one who felt there was a "reasonable suspicion" that the ankle injury was a factor in the subsequent ruptured aneurism. The other expert testified that the probabilities of such causal relationship were equal.[31]

In other jurisdictions various reasons have been offered for denying recovery for subsequent ailments to original compensable injuries. Tort concepts were discussed in Missouri:

> [W]ell reasoned authority recognizes, there must be no intervening independent cause to break the chain of causation between the new injury or aggravation and the original injury in order that liability be imposed upon the employer for the consequential results.[32]

In another case, the same court stated that the causal connection between the compensable injury and the subsequent harm is a question of fact.[33] Michigan has found that behavior which affects the morale of fellow workers, such as gambling, harms the employer's business.[34] In addition, voluntary drunkenness, moral turpitude, and the fact that the claimant has suffered no wage loss,[35] have been cited as reasons for denying compensation. In Iowa expert medical testimony to the fact that an original injury "could have caused" a subsequent disability is insufficient to establish a causal relation. The expert medical testimony would have to be corroborated by non-expert testimony which would then constitute a fact question as to causal connection. The court stated that testimony of the expert and non-expert combined would be a minimal case for the claimant.[36]

The strongest authority for concurring with the subject case is found in a 1961 Tennessee case.[37] The deceased received a back injury in the course of his employment and subsequently underwent surgery. Approximately ten months after his surgery, the decedent was discharged from care with a twenty percent permanent partial disability. Deceased consumed whiskey to relieve his pain and later

30. Kuntz v. N.D. Workmen's Comp. Bureau, 139 N.W.2d 525, 528 (N.D. 1966).
31. *Id.*
32. Wilson v. Emery Bird Thayer Co., 403 S.W.2d 953, 958 (Mo. 1966).
33. Oertel v. John D. Streett & Co., 285 S.W.2d 87, 96 (Mo. 1955).
34. Todd v. Hudson Motor Car Co., 328 Mich. 283, 43 N.W.2d 854.
35. Garrett v. Chrysler Corp., 337 Mich. 192, 59 N.W.2d 259, 260 (1953).
36. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).
37. Fennell v. Maryland Cas. Co., 208 Tenn. 116, 344 S.W.2d 352 (1961).

died. The court awarded compensation stating that there was a causal connection relating the original back injury with the ensuing demise. Prior to surgery the deceased had suffered from hallucinations and was treated in the hospital for delirium tremens. Thorzine was prescribed for a nervous condition and the doctor testified that, even though not prescribed, whiskey would have the same effect. The cause of death was hepatitis.[38] Testimony was admitted at the hearing that the deceased suffered from malnutrition and when this status is combined with alcohol one's life can be in very great danger. The physician testified that it was reasonable to conclude that the deceased and his wife thought the thorzine was prescribed as a pain killer and that the whiskey accomplished the same result. The court conceded that this was a close case but justified the result because of the requirement that the statute be construed liberally in favor of claimants.[39] Four points distinguishing the above fact situation from the Scroggins' case should be emphasized. First of all, there was testimony that the deceased was not an alcoholic. Secondly, the deceased had not returned to work. Thirdly, the interval between the deceased's discharge from the hospital and his demise was only fifty-eight days. Finally, a permanent disability had been established.

As espoused by Cheit[40] a definite liberal trend for compensating claimants continues:

> The originally narrow interpretation of that famous phrase 'accidental injury arising out of and in the course of employment' has broadened to include the victim of occupational disease and the worker whose pre-existing disability is aggravated by his job. It has even brought benefits to a Denver University football player injured in scrimmage; to a New York office boy hurt when the paper clip he was shooting with a rubber band backfired; and to the widow of the California executive whose suicide was traced to a work-caused manic-depressive state.[41]

Fault is not considered in determining whether an employee's disability arose out of and in the course of his employment with regard to the original injury.[42] However, it seems to be stretching legal principles to allow recovery to an employee who persists in self-diagnosis and treatment for a period of seven and one-half years without consulting a physician.

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38. *Id.* at ——, 344 S.W.2d at 354.
39. *Id.* at ——, 344 S.W.2d at 355.
40. E. CHEIT, INJURY AND RECOVERY IN THE COURSE OF EMPLOYMENT (1961).
41. *Id.* at IX.
42. Erickson v. North Dakota Workmen's Comp. Bureau, 123 N.W.2d 292, 295 (N.D. 1963).

The general rule is quoted by Larson:

> The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is a direct and natural result of a compensable primary injury.[43]

Quaere whether seven and one-half years of alcoholic consumption is a direct and natural result of the original back injury?

TOM ALLISON

43. 1 A. LARSON, WORKMEN'S COMPENSATION, § 13.11 at 192.60 (1968).