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Recommended Citation

J. N. Shriver Jr, *The Maryland Occupational Disease Law*, 4 Md. L. Rev. 133 (1940)

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THE MARYLAND OCCUPATIONAL DISEASE LAW

By J. NICHOLAS SHRIVER, JR.*

An authority on occupational diseases and occupational disease legislation reports that probably King Rothari of ancient Lombardy promulgated the first Workmen's Compensation Act in the year 653 A. D.¹ This "edict", however, was probably not passed with any too altruistic motives, because we are informed that one of the more immediate results of this part of the Rotharian Code was the collection, by the State, of fines ranging as high as 50% of the benefits paid by the party responsible for the injury, for the sole benefit of the Rotharian regal coffers.²

It is not the purpose of this paper to outline the various steps through which governments, haltingly following Rothari's footsteps, finally came to recognize the truth which students of sociology and of the moral law had long recognized as self evident; i. e., that the laborer accepting the burdens of industrial employment was entitled to serious consideration from industry when he received injuries as a result of his employment.³ This gradual recognition of the

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¹ *Workmen's Compensation Legislation—Occupational Diseases* (1935). Address to the Convention of the International Association of Industrial Accident Boards and Commissions, delivered by Thomas N. Bartlett, Esq., of the Baltimore City Bar.

² *Ibid.*

³ That this had long been an accepted principle see the following: Encyclical Letter of Pope Leo XIII on the condition of Labor (1891) "Rerum Novarum"; Encyclical Letter of Pope Pius XI on Reconstructing the Social Order (1931) "Quadragesimo Anno"; *The Idea of Social Legislation*, by Charles W. Pipkin; *The Worker and the State*, by Frank Tillyard; *Principles of Labor Legislation*, by Commons and Andrews; *Labor and the Government*, by the Twentieth Century Fund, Inc.; *Social Politics and Modern Democracies*, by Charles W. Pipkin; *A History of Factory Legislation*, by B. L. Hutchins and A. H. Harrison; *Social Insurance*, compiled by Julie E. Johnsen, particularly page 79 *et seq.*; *Labor's Risks and Social Insurance*, by Harry A. Millis and Robert E. Montgomery; *Workmen's Compensation Insurance*, by G. F. Michelbacher and Thomas M. Nial; *Administration of Workmen's Compensation*, by Walter F. Dodd. A very interesting treatise on the early legislation in the nineteenth century, and the reasons for it, is a report, first published in 1884, entitled "Employers' Liability for Personal Injuries to Their Employees", by Charles G. Fall of the Suffolk Bar (Massachusetts). It was a part of the 14th Annual Report of the Massachusetts Bureau of Statistics and Labor for 1883, and

principle of workmen's compensation has been ably covered elsewhere.⁴ But it is of interest to note here that apparently the first attempt in the United States (legislation bearing both specifically and generally upon workmen's compensation had been enacted toward the end of the third quarter of the nineteenth century in most of the countries of Europe, and particularly on the continent of Europe)⁵ was a Federal law effective in 1908 covering certain employees engaged in government construction work.⁶ The first State to pass a workmen's compensation law was New York, in 1910.⁷ Maryland passed her first act in 1914,⁸ and it has uniformly been sustained by the Courts as a constitutionally proper exercise of legislative power.⁹

Practically all of the early acts were confined to "accidental injuries" or "personal injuries by accident" required to have been sustained during "the course of the employment" and to have "arisen out of the employment". There was no immediate legislative recognition of the occupational disease problem,¹⁰ partly at least because occupational diseases were not considered a problem in this country until the last fifteen years.¹¹ Nor was it (nor is it today) a simple matter to determine the line of demarcation between occupational and non-occupational diseases.¹² A more important reason, however, was that judicial inter-

contains interesting arguments that show some of the real needs for Workmen's Compensation legislation. Accident Prevention and Relief, by Schwedman and Emery is interesting as a survey of European legislative history and as containing recommendations for American legislation.

⁴ See *supra*, notes 1 and 3.

⁵ *Ibid.*

⁶ 35 Stat. 556 (1908).

⁷ 1 SCHNEIDER, WORKMEN'S COMPENSATION (2d Ed.) Sec. 2.

⁸ Md. Laws 1914, Ch. 800; now Md. Code (1924) Art. 101.

⁹ Held constitutional in various cases in Maryland. See particularly *Frazier v. Leas*, 127 Md. 572, 96 A. 764 (1916); *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710 (1917); *Branch v. Indemnity Ins. Co.*, 156 Md. 482, 144 A. 696 (1929).

¹⁰ See *supra* n. 1. Also, by the same author, *What Is an Occupational Disease* (1938) an address delivered before the Insurance Section of the American Bar Association, Baltimore Daily Record, August 22, 1938.

¹¹ There are a number of available works that can be consulted by the interested person. See *Health Maintenance in Industry* (1925) by J. O. Hackett; *Administration of Workmen's Compensation* (1936) by Walter F. Dodd; *Industrial Maladies* (1934) by Thomas Legge; and *Medicolegal Phases of Occupational Diseases* (1939) by C. O. Sappington.

¹² See generally in this connection, Ornstein and Ulmar, *Tuberculosis and Silicosis* (October, 1936) Sea View Hospital Quarterly Bulletin.

pretation of the breadth of the various state acts was lacking, and conservative American legislatures waited for the judicial branch of the government to point the way accurately.

Most of the State Courts, of course, followed English precedents, and in the majority of jurisdictions there was set up a definite line of demarcation between accidental injury and non-accidental injury. In Massachusetts the statute did not use the word "accidental", but simply provided compensation in the event of "personal injury". The Court then quickly decided that this phrase included all "injuries", including occupational diseases.¹³ In Maryland, on the other hand, though the question was kept in the lower courts for a long period of time, the Court of Appeals definitely decided that occupational diseases were not compensable under the clause "accidental injuries . . . and such disease and infection as may naturally result therefrom . . .".¹⁴ Other states, by various modes of judicial interpretation, for the most part held that occupational diseases were not covered by the original acts. A typical example is Michigan, which held directly to the contrary of the *Hurle* case in Massachusetts.¹⁵ The air was thus cleared of doubt to a great extent, at least in the respective jurisdictions. Since the two cases referred to above, legislation or judicial interpretation have brought occupational diseases, either generally or specifically, under the compensation laws of 23 States.¹⁶

¹³ *In re Hurle*, 217 Mass. 223, 104 N. E. 336 (1914).

¹⁴ Md. Laws 1914, Ch. 800, Sec. 62, now Md. Code (1924) Art. 101, Sec. 65. See also, *Ibid.*, Sec. 14. Presumably the reason it was 1925 before the Court of Appeals even was called upon directly to define "accidental personal injury" was because the assumption was made at the very outset of the administration of the Act that occupational diseases were excluded in the Act itself. The first case, strangely enough, in which a definition of "accidental personal injury" was given by the Court of Appeals was the famous case of *Victory Sparkler Co. v. Francks*, 147 Md. 368, 128 A. 635 (1925), which has been cited far and wide as Maryland's attempt to legislate occupational disease coverage by judicial interpretation. This case will be fully discussed later in the text of this paper.

¹⁵ *Adams v. Acme White Lead Co.*, 182 Mich. 157, 148 N. W. 485 (1914); the statute here was identical with that in Massachusetts, and used the phrase "personal injury". The judicial construction is based in part on the preamble of the Act.

¹⁶ Arkansas (approved by Governor, March 14, 1939); California (Sec. 3 (4)); Connecticut (Sec. 5223); Delaware (Sec. 44); Idaho (approved

PART II

LEGISLATIVE HISTORY OF THE MARYLAND
OCCUPATIONAL DISEASE ACT

At the 1935 session of the Maryland Legislature a bill was presented to provide compensation benefits for all occupational diseases. The bill failed in committee. This was not the first attempt to pass such a bill, but always in the past such efforts had resulted in complete failure. However, the 1935 session of the Legislature did not pass into history before one very real accomplishment in the field of Occupational Disease legislation. By its Joint Resolution No. 16¹⁷ it directed the Governor of Maryland to appoint a commission for the purpose of preparing an Occupational Disease legislative program for the State of Maryland, if it should find one necessary.

Following the direction of this Joint Resolution, Governor Nice in October of 1935 appointed the members of the "Maryland Commission for the Study of Occupational Diseases". This Commission was promptly organized, and Theodore C. Waters, a Baltimore attorney, was elected Chairman.¹⁸ The Resolution further provided that the At-

by Governor, March 7, 1939); Illinois (Secs. 5; 6; 8 (1) 3); Indiana (Secs. 5(e); 6; 8 (n); O. D. Law); Kentucky (Sec. 1); Maryland (Sec. 32 A-J; 54; 56; 65 (6) effective June 1, 1939); Massachusetts (Sec. 26); Michigan (Part VII, Secs. 1 (c); 2); Minnesota (Sec. 4327 (1), (2)); Missouri (Sec. 3305 (6)); Nebraska (Sec. 48-152 (b)); New Jersey (Sec. II 22 (b)); New York (Sec. 3 (2)); North Carolina (Sec. 50½ (a); (b)); North Dakota (Sec. 2); Ohio (Sec. 1465-68 a—as amended May 26, 1939); Pennsylvania (Sec. 2 O. D. Act., as amended by 1939 Acts, Chapter 284 on June 21, 1939); Rhode Island (Art. VIII, Secs. 1 (c); 2); Washington (Sec. 7679-1); West Virginia (Art. 6, sec. 5); Wisconsin (Sec. 102, 01 (2)). In addition to the above, the Federal Longshoremen's Act (33 U. S. C. A. § 900, Supp. 1936), and the District of Columbia Code (Tit. 19, Secs. 11-12), particularly by Sec. 2 of the Federal Act, cover, as to all general Federal jurisdictions and as to the District of Columbia, all occupational diseases.

¹⁷ Md. Laws 1935, Joint Resolution No. 16.

¹⁸ The members of the Commission were as follows: Dr. Page Edmunds, representing the Maryland Medical and Chirurgical Faculty; Dr. Allen W. Freeman, of the Johns Hopkins Hospital; Dr. Robert Riley of the State Health Dept.; Mr. A. Stengle Marine of the State Labor Dept.; Mr. Joseph B. McCurdy of the American Federation of Labor; Mr. Albert R. Couchman, representing the self-insured employers of the State of Maryland; Hon. William F. Broening, representing the State Industrial Accident Commission; Mr. Thomas N. Bartlett, an attorney and insurance company executive, as a member at large. The Joint Resolution provided for two members at large and Mr. Waters, the Chairman, was this other member.

torney General of the State of Maryland should be the counsel for the Commission and thus Governor Herbert R. O'Connor, then Attorney General, became its legal advisor.

The Commission immediately began its work, and public hearings were held. The Surgeon General of the United States was requested to direct a survey of Maryland industry aimed at a determination of the Occupational Disease hazards and exposures in this State.¹⁹ At the public hearings, which were widely advertised, many of the leading medical authorities in the United States appeared and testified.²⁰ Interested employees, employers and insurance companies also were heard. In addition to these public hearings and to the report of the Surgeon General of the United States, the Commission made a complete survey of the laws in states which had already enacted Occupational Disease statutes.

In November, 1936, the Commission forwarded to Governor Nice its recommendations, embodied in the form of specific proposed legislation. The legislation drafted by the Commission and its counsel was approved by every member, and was presented to the Legislature at the 1937

¹⁹ In a paper of this nature it is impossible to give all of the space desired to cover points indirectly affecting the subject matter yet in themselves tremendously important. For example, of paramount and lasting importance to Maryland industry, and particularly to those Maryland industries subject to occupational disease exposures, is the study made by the United States Public Health Service at the request of the Waters Commission, and cooperated in to the fullest degree by the State Department of Health, the Baltimore City Health Department, the Bureau of Environmental Hygiene, the Baltimore Bureau of Occupational Diseases, and the State Bureau of Sanitary Engineering. This survey, and the data and material collected, probe deeply into the occupational disease exposures to which Maryland employees are subjected, in great detail. Recently the United States Public Health Service has published a brochure entitled "Evaluation of the Industrial Hygiene Problems of a State", which in summary form tabulates, analyzes and explains at length (a) the method used in the Maryland survey and (b) the general results of the survey. It makes interesting reading, but its chief value lies in the analysis it makes of the exposures in Maryland industry. Needless to say the Survey formed a fundamental basis for the specific disease recommendations of the Waters Commission. (The brochure referred to is published by the Government Printing Office.) The fact that such a survey was conducted gives some indication of the thoroughness with which that Commission conducted its preliminary work.

²⁰ A complete transcript of all the statements made at these public hearings was transmitted to the Governor on both occasions when the Commission forwarded its recommendations. For a list of those who spoke at these hearings, see the Report of the Commission to Governor O'Connor submitted January 23, 1939.

session, but failed of enactment. It passed the Senate successfully, but was never reported out of committee to the House of Delegates.

Following this unsuccessful attempt, the Commission was requested by Governor Nice to continue its work and to forward any additional recommendations it might have to the 1939 legislature. The Commission again took up its labors, held additional public hearings, and on January 23rd, 1939, forwarded to Governor O'Connor its revised recommendations, again in the form of a draft of a bill. In the meantime, one of Governor O'Connor's campaign pledges in the 1938 election contest had been that he would sponsor the passage of Occupational Disease legislation.

The bill was introduced in the House by Mr. Tolle, Chairman of the Judiciary Committee,²¹ and referred to that Committee. Public hearings were held, and the bill was unanimously reported to the House by this Committee, it having in the meanwhile become sponsored by both Messrs. Tolle and Novak, the latter of whom had previously introduced at the 1939 session an "all inclusive bill", proposing to cover all Occupational Diseases without description of specific diseases.²²

The bill sponsored by the Commission unanimously passed the House and was sent to the Senate Judiciary Committee. After an informal hearing with the Chairman of the Maryland Commission for the study of Occupational Diseases, the Judiciary Committee reported the bill unanimously to the floor of the Senate. A last minute attempt (the first opposition which had arisen to the bill) to amend it by lessening to a large degree the power invested in the Medical Board, was sponsored by a Senator from Western Maryland. However, before the opposition crystalized, this Senator withdrew his proposed amendment. The bill thereupon was enacted unanimously by the Senate, and sent to Governor O'Connor. Public hearings were held by the Governor, and at these hearings several labor leaders

²¹ H. B. No. 484.

²² H. B. No. 83.

expressed dissatisfaction with the bill. However, this opposition apparently did not by any means represent a majority of organized labor or of labor organizations, and on May 24, 1939, Governor O'Connor signed the Occupational Disease amendment to the Maryland Workmen's Compensation Act.²³ The Act went into effect on June 1st, 1939.²⁴

PART III

THE OCCUPATIONAL DISEASE ACT OF 1939—ITS PROVISIONS, AND COMMENTS THEREON

Although the Occupational Disease Amendment²⁵ to the Maryland Workmen's Compensation Act²⁶ will, when codified, simply become an integral part of the Compensation Act,²⁷ yet reference to the amendment will, for the sake of simplicity, be made in this paper as "the Occupational Disease Act", or, simply, as "the Act".

The Act proposes to reclassify the work of employees by providing that employees injuriously subjected to certain listed exposures will be deemed to be engaged in extra hazardous employment, and that employees contracting any of the listed diseases as a result of their employment shall be paid compensation for disability or death.²⁸ There are various limiting provisions in connection with this new schedule of compensable "injuries", and there are

²³ Md. Laws 1939, Ch. 465.

²⁴ The author is indebted to Theodore C. Waters, Esq., Chairman of the Maryland Commission for the Study of Occupational Diseases, for the data from which the above history of the events leading up to the enactment of the Maryland Occupational Disease Act was obtained.

²⁵ Md. Laws 1939, Ch. 465, Sec. 1, adding ten sections, to be known as Sections 32A to 32J, inclusive, to Md. Code (1924) and Md. Code Supp. (1935), Art. 101, and amending Secs. 54, 56 and 65. Subsequent references in this paper will be to "Act," followed by the proposed added or amended Code section numbers.

²⁶ Md. Code (1924) Art. 101.

²⁷ Act, Sec. 1, preamble.

²⁸ Act, Sec. 32-A: "Every employee who, in the regular course of his employment, is injuriously subjected to an exposure to any of the occupational diseases hereinafter named, in an occupation or process hereinafter set down opposite the name of such disease, shall be deemed to be engaged in an extra-hazardous employment within the provisions of Section 32 of this Article. Compensation as provided in this Article shall be payable for disability or death of an employee resulting from the following occupational diseases . . .".

also various procedural and other necessary explanatory sections of this new Act. For the sake of clarity, therefore, the author has divided the Act into ten parts, and will in the following pages outline the Act under these various heads, and comment generally upon their probable legal effect.

1. *Respective Limitations and Duties Placed Upon
Employe and Employer*

As is customary in all types of legislation such as Workmen's Compensation Acts, the persons affected are charged with certain limitations and duties. This is only proper, because the Acts are passed usually in complete derogation of the common law, and therefore there must be limitations upon the enforcement of such laws.²⁹ Thus it is that the Occupational Disease Act requires that when an employe enters into an employment contract with his employer, he shall correctly state his previous medical history with reference to occupational diseases where such information is required by his employer. For failure to be accurate in this regard, in writing, and specifically with regard to "having previously been disabled, laid off, or compensated in damages or otherwise" by reason of any compensable occupational disease,³⁰ the penalty is forfeiture of the right to compensation for the particular disease³¹ about which the misrepresentation is made.³²

The employe or someone acting for him is required to give to the employer written notice of an occupational disease within ten days of "the first distinct manifestation thereof".³³ In case of death this notice, also written, must

²⁹ See generally in this connection *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 101 A. 710 (1917); *Cambridge Mfg. Co. v. Johnson*, 160 Md. 248, 153 A. 283 (1931).

³⁰ Act, Sec. 32-B. The Act is not entirely clear here, but in using the words "No compensation shall be payable for an occupational disease (if there is a false representation of previous disablement, discharge or compensation) because of *such* disease" (italics supplied), the section probably limits the effect of a penalty for such misrepresentation to a false representation of a previous occupational disease actually scheduled in Section 32-A.

³¹ *Ibid.*

³² Act, Section 32-B. second paragraph.

³³ Act, Sec. 32-F.

be given the employer within thirty days of the death.⁸⁴ These provisions, however, are definitely limited, in that the actual knowledge of the employer is deemed to be sufficient notice, and further in that the employer must specifically raise the issue of notice at the hearing or else it is "deemed waived".⁸⁵

There must be a claim filed by the employe or his dependents within one year of the date of disablement or death; however, although the statute states that failure to file such a claim shall "forever" bar it, a typical statutory proviso follows negating what has gone before. Failure to object on the part of the employer at the time of the hearing shall constitute a waiver of the bar; further, if payments of compensation are made there is an absolute waiver; and finally and most importantly (and this makes the "forever" seem slightly overemphasized), if "the employer or his insurance carrier by his or its conduct leads the employe or claimant reasonably to believe that notice or claim has been waived by his or its affirmative conduct", then "notice or claim shall be deemed waived".⁸⁶

The employe shall not be entitled to compensation where his last injurious exposure occurred before June 1, 1939.⁸⁷

There are special provisions in the Act affecting silicosis and asbestosis, and they will be considered later,⁸⁸ but one of these it is proper to include here. That is the provision that, with the approval of the Medical Board created by

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* This language seems to the writer to be much more favorable to the employe, and to the successful breach of the time limitation, than that of the Workmen's Compensation Act regarding a claim covering an accidental injury. There circumstances amounting to fraud or estoppel must be shown, and there the period of limitation begins to run again with the discovery of the fraud or the cessation of the facts amounting to an estoppel. Md. Code (1924) Art. 101, Sec. 39. See Vang Construction Co. v. Marcoccia, 154 Md. 401, 140 A. 712 (1928). Reasonable belief of affirmative conduct seems much more of a question of dispute in fact, and hence more susceptible of proof, than estoppel. Perhaps this language of Section 32-F is an attempt to define "estoppel" or "fraud" as used in Section 39. See also the very recent decision of the Court of Appeals in Parks and Hull, et al., v. Reimsnyder, 9 A. (2d) 648 (Md. 1939).

⁸⁷ Act, Sec. 32-F.

⁸⁸ See topic number 7, *infra* notes 70-91.

the Act,³⁹ employes actually suffering with silicosis or asbestosis are permitted to waive total compensation for any future aggravation of their condition. Should an employe thereafter suffer aggravation, his compensation under the Act shall be limited by his waiver to a maximum of \$2,000.00. Such waiver shall carry over to any new employer in the same trade, and the Commission is authorized to prepare forms for such waiver, and to govern the handling of such forms.⁴⁰

Finally, under this category, the employer is required to report any disability to an employe arising from an occupational disease, "promptly upon obtaining knowledge or notice thereof", to the Commission.⁴¹

2. *Limitations on Dependency.*

There is a limitation applicable to claims of dependents under the Occupational Disease Act to the same effect as that already present in the Workmen's Compensation Act.⁴² In case death results from an occupational disease it is provided that no dependency relationship within the meaning of the Act may be created by marriage or otherwise after the beginning of the first compensable disability from an occupational disease. Dependent after-born children of a marriage pre-existing the compensable disability are, of course, excluded from this limitation.⁴³

In addition to the above limitation, it is provided that death (or disablement) must result within one year after the last injurious exposure to an occupational disease (3 years if silicosis or asbestosis), or in the alternative that death follow continuous disability (beginning within the above periods) for which a claim has been filed and compensation awarded or paid within seven years of the last

³⁹ See topic number 8, *infra* notes 92-93.

⁴⁰ Act, Sec. 32-E.

⁴¹ Act, Sec. 32-F. This reporting requirement is identical with that in the Workmen's Compensation Act, Md. Code (1924) Art. 101, Sec. 38.

⁴² Md. Code (1924) Art. 101, Sec. 43.

⁴³ Act, Sec. 32-C. Cf. Md. Code (1924) Art. 101, Secs. 36, 43, which allow compensation to a dependent widow, even though marriage is contracted after injury, if there are dependent children of such marriage.

injurious exposure.⁴⁴ This apparently is, in effect, a statute of limitations placed on dependents' rights, as well as on the rights of claimants themselves.

3. *Which Employer Is Liable?*

The Act provides for the difficulty of determining the employer actually responsible for the disability by a seemingly practical solution. That is that "the employer in whose employment the employe was last injuriously exposed to the hazards of such disease . . . shall be liable therefor". So also the average weekly wage shall be computed on the same basis and all notices and claims shall be given to and filed against such employer. In the case of the dust diseases, silicosis and asbestosis, "the only employer . . . liable shall be the last employer in whose employment the employe was last injuriously exposed to the hazards of the disease during a period of sixty (60) days or more" after June 1, 1939. This seems to be a fair provision, and very practical, though undoubtedly some injustice must be done in its application.⁴⁵

4. *Apportionment of Disability.*

In connection with occupational diseases there are frequently aggravations of such diseases by other diseases not scheduled in the Act, or even more frequently there may

⁴⁴ Act, Sec. 32-C.

⁴⁵ *Ibid.* Compare this with the language of New York Code, Ch. 66, Art. 3, Sec. 44: "The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section, may appeal to the board for an apportionment of such compensation among the several employers who since the contraction of such disease shall have employed such employee in the employment to the nature of which the disease was due. Such apportionment shall be proportioned to the time such employee was employed in the service of such employers, and shall be determined only after a hearing, notice of the time and place of which shall have been given to every employer alleged to be liable for any portion of such compensation. If the Board find that any portion of such compensation is payable by an employer prior to the employer who is made liable to the total compensation as provided by this section, it shall make an award accordingly in favor of the last employer, and such award may be enforced in the same manner as an award for compensation."

be pre-existing uncompensable illnesses aggravated or contributed to by occupational diseases. The Act recognizes this fact, and provides that compensation shall be apportioned accordingly.⁴⁶ An interesting departure in this connection is that disability or death may be apportioned between the compensable occupational disease and the non-compensable disease, either aggravated by or aggravating the occupational disease. The causes of death have been held not apportionable by the Maryland Court of Appeals when death results from a combination of accidental injury and pre-existing or contributing non-compensable diseases, under the accidental injury portion of the Compensation Act.⁴⁷

5. Occupational Diseases Scheduled in the Act.

The Act lists thirty-four diseases under the heading "Description of Diseases".⁴⁸ This schedule of diseases includes a large number of all that apparently could arise from the nature of Maryland industry, and follows, with few exceptions, the results of the survey conducted by the agencies mentioned in Part II of this paper, which was directed by the United States Public Health Service.⁴⁹ In connection with that survey, it may be of interest to the reader to know the hypothetical conclusions reached therein, with particular reference to the various exposures in

⁴⁶The exact language of this part of Sec. 32-B, par. 3, follows: "Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, (then compensation will only be allowed on a proportionate basis)."

⁴⁷Md. Code (1924) Art. 101, Sec. 36 (4). See the only decision on this point in Maryland, *Ross v. Smith*, 169 Md. 86, 93, 179 A. 173 (1935): ". . . where death ensues, there is no basis for the determination of the proportionate disability attributable to an old hernia and to the later strangulated hernia as is required by the statute in case of a disability that is due in part to an accidental injury and, in part, to a preexisting disease or infirmity . . . The disability of a servant is conditioned on his being alive". In other words, in line with the wording of many of the compensation acts, the Court of Appeals recognized the distinction made between the words "disability" and "death", and refused to agree with the appellant, who logically enough (grammatically, at least) maintained that death was the ultimate in disability, and hence that when the Compensation Act mentioned disability, death was automatically included.

⁴⁸Act, Sec. 32-A.

⁴⁹See *supra* n. 19.

Maryland industry. It may be stated here that the survey was, of course, necessarily a sampling procedure, and the figures listed in the footnote are projected percentages applied to all of Maryland industry from the sample taken. It should further be stated that the survey included a cross-section of all of Maryland industry. There was a direct and complete study made of 136,422 employees, this being considered a representative sample. There were, as of the 1930 census, 672,906 "gainful workers" in Maryland. Of these, 234,207 individuals were engaged, generally speaking, in non-hazardous employment. So that there were, again speaking generally, 438,699 employees in Maryland hazardous industries as of 1930. With this explanation the table set forth in the footnote below will show some of the important conclusions of the survey. These conclusions are particularly interesting when compared with the list of scheduled diseases in the Occupational Disease Act.⁵⁰ For example the carbon monoxide exposure

⁵⁰ U. S. Health Department Survey—Table 2S:

<i>Materials</i>	<i>Number of Persons Exposed</i>
<i>Gases:</i>	
Carbon monoxide	40,795
Sulphur dioxide	12,711
Other gases	6,799
Hydrogen sulphide	887
<i>Metallic mineral dusts:</i>	
Other metallic mineral dusts.....	29,857
Lead and its compounds.....	15,668
Mercury and its compounds.....	887
Arsenic and its compounds.....	296
<i>Nonmetallic mineral dusts:</i>	
Other nonmetallic mineral dusts.....	19,806
Silica dust	7,686
Coal dust, bituminous.....	6,799
Other silicate dusts	3,547
Coal dust, anthracite	177
Asbestos dust	59
Organic dusts	31,631
Oils	27,788
Other dermatitis producers	23,354
Organic solvents	17,737
Chemicals	8,868
Coal-tar products	7,686
Acids	7,390
Alkalies	6,208

Of the exposures listed above, only six are apparently not in any specific manner covered in the Maryland Act. They are: sulphur dioxide, bituminous coal dust, other silicate dust,

is the largest in Maryland, while the asbestosis exposure is the most minute. Yet both are compensable under the Act.⁵¹

A large number of diseases are covered, to which there is apparently little or no industrial exposure in Maryland. This fact can at least be partially explained by pointing out that the schedule is, almost verbatim, that of the New York Act.⁵²

6. *Qualifications on Compensability of Diseases Scheduled in the Act.*

(a) *The disease must arise out of a specified "process or occupation".*

In a column parallel to and in juxtaposition with the column describing the specific compensable diseases there is a list entitled "Description of Process or Occupation".⁵³

This language differs from that used in the New York Act,⁵⁴ in which the phrase "Description of Process" is used. However, in view of the decisions in New York State, it is thought that the variation will have the effect of neither broadening nor restricting the inclusiveness of the listed

anthracite coal dust, organic dusts, and alkalis. Of these, dangerous exposures to at least two (sulphur dioxide and alkalis) probably would produce such immediate results that the Court would hold that there had been an "accidental injury". The others the Commission apparently had good reasons, medical, economic and/or practical, for not including. Of course in stating that all the other exposures are probably included in the present schedule the writer has grouped some of the "other" classifications in the category of included diseases. This is not completely correct, for example, in the cases of "other metallic mineral dusts" or "other non-metallic mineral dusts". However, these categories are at least partially included in the Act, and hence have been included in the writer's analysis.

⁵¹ Act, Sec. 32-A, (27) (34). It may be of interest to point out here the fact that out of a total of three (so far as the author can determine) carbon monoxide cases to reach the Maryland Court of Appeals, all have been won by the claimant on the theory of accidental injury! *Bethlehem Steel Co. v. Traylor*, 158 Md. 116, 148 A. 246, 73 A. L. R. 479 (1930); *Mt. Savage Mining Co. v. Baker*, 159 Md. 380, 150 A. 864 (1930); *Red Star Coaches v. Chatham*, 163 Md. 412, 163 A. 886 (1933). In the last named of these three cases the accidental nature of the injury was not even questioned on the appeal by the employer, and it reached the Court of Appeals on another ground.

⁵² Cahill's Consolidated Laws of New York (1930), Ch. 66, Sec. 3(2).

⁵³ Act, Sec. 32-A.

⁵⁴ *Supra* n. 52.

processes. In the New York case of *Nielsen v. Firemen's Fund Indemnity Co.*,^{54a} the Court unanimously stated:

"While it is true that the terms of the statute are broad enough to embrace continuous friction and rubbing caused by a shoe in walking,⁵⁵ this is not the intent of the law. 'Process', as employed in the statute, denotes broadly the use and handling of implements and materials in industry, by the laborer in the performance of his task and by the artisan in the exercise of his skill in fabrication and craftsmanship."⁵⁶

It is submitted that that language would be fully applicable to the Maryland Act, with the added thought that, if anything, the use of the words "or occupation", in addition to the word "process", would even more clearly delimit the intention of the legislature.⁵⁷

(b) The disease must not only be scheduled in the Act, but must "be due to the nature of an employment".

Nowhere in the Act is there a definition of the term "occupational disease". Yet it is the belief of the author that the difficulties and serious problems that have arisen in other jurisdictions in which there is no definition of occupational disease will not arise in Maryland, at least to the extent they have in some of the other jurisdictions, even when occupational diseases were not covered by statutes.⁵⁸ There are two reasons for this belief. The first is that the

^{54a} 239 App. Div. 239, 268 N. Y. S. 189 (1933).

⁵⁵ Compare this with the description of the processes opposite Items 30 and 31 of the Maryland Act, Sec. 32-A.

⁵⁶ 239 App. Div. 239, 240, 268 N. Y. S. 189, 191 (1933).

⁵⁷ See also *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 12 N. E. (2d) 311, 313 (1938): ". . . compensation is restricted to disease resulting from the ordinary and generally recognized risks incident to a particular employment, and usually from working therein over a somewhat extended period". This point will be clarified still more, it is believed, by a further consideration of other provisions in the Maryland Act.

⁵⁸ *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 12 N. E. (2d) 311 (1938); *McNeely v. Carolina Asbestos Co.*, 206 N. C. 568, 174 S. E. 509 (1934); *Swink v. Carolina Asbestos Co.*, 210 N. C. 303, 186 S. E. 258 (1936) (injury before occupational disease act passed); *Evans v. Chevrolet Co.*, 232 Mo. App. 937, 105 S. W. (2d) 1081 (1937); *Madeo v. I. Dibner & Bro.*, 121 Conn. 664, 186 A. 616 (1936); in Illinois by specific statutory enactment the term is defined, but there is no schedule of diseases; so also in Connecticut.

Court of Appeals has consistently since 1925⁵⁹ defined occupational disease uniformly,⁶⁰ and thus one great source of argument is rather definitely and completely decided. In the *Victory Sparkler* case the Court defined an occupational disease as follows:

“. . . one which arises from causes incident to the profession or labor of the party's occupation or calling. It has its origin in the inherent nature or mode of work of the profession or industry, and it is the usual result or concomitant. If, therefore, [and here the Court goes on to make its meaning clear beyond dispute] a disease is not a customary or natural result of the profession or industry, *per se*, but is the consequence of some extrinsic condition or independent agency, the disease or injury cannot be imputed to the occupation or industry, and is in no accurate sense an occupation or industry disease.”⁶¹

The second reason the Maryland Courts should have little difficulty in disposing of this question is because of the very explicit language in the Act itself. This or similar language is not found in the New York Act, nor is it found so definitely in any of the original State Acts.⁶² Some of the Courts have arrived at similar conclusions, after extended litigation brought out the points involved.⁶³ In no less than 3 separate places the Maryland Act states and repeats the fundamental requirements for compensability of an occupational disease.⁶⁴ In the first instance (Section 32-A) it uses the words “injuriously subjected to an ex-

⁵⁹ *Victory Sparkler Co. v. Francks*, 147 Md. 368, 128 A. 635, 44 A. L. R. 363 (1925).

⁶⁰ *Gunter v. Sharpe & Dohme*, 159 Md. 438, 151 A. 134 (1930); *Sinsko v. A. Weiskettel & Sons*, 163 Md. 614, 163 A. 851 (1933); *Foble v. Knefely*, 6 A. (2d) 48 (Md. 1939).

⁶¹ *Victory Sparkler Co. v. Francks*, 147 Md. 368, 379, 128 A. 635, 638, 44 A. L. R. 363, 368 (1925). In the latest case in Maryland, *Foble v. Knefely*, 6 A. (2d) 48, 53 (Md. 1939), the Court reiterates its stand: “(An occupational disease is) some ailment, disorder or illness which is the expectable result of working under conditions naturally inherent in the employment and inseparable therefrom, and is ordinarily slow and insidious in its approach”.

⁶² See various state acts referred to *supra* n. 16; also various charts of U. S. Labor Department, Division of Labor Standards, referred to *infra*.

⁶³ See *Bartlett*, *supra* notes 1 and 10.

⁶⁴ Act, Section 32-A, first paragraph; Section 32-B, first paragraph; Section 32-C, third paragraph.

posure", thus at the outset qualifying the fact of exposure. The exposure must be "injurious". Next (Section 32-B) it is found that the employee must be "disabled from performing his work in the last occupation in which he was *injuriously exposed* to the hazards of such disease, or dies as a result of such disease, *and the disease was due to the nature of an occupation or process described in Section 32-A hereof . . .*" (Italics supplied). Finally, the Act (Section 32-C) links all that has been said before in an apparently indisputable *sine qua non*, as follows:

"An employer shall not be liable for any compensation for an occupational disease 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, and is actually incurred in his employment . . .".⁶⁵

It seems to be a logical deduction from the above language that the Occupational Disease Commission, and the legislature, had clearly in mind the experience in other jurisdictions. Possibly they had before them the New York decisions, and the difficulties experienced in finally limiting the broad coverage extended by the 1935 amendment to the New York Law.⁶⁶ Undoubtedly, too, they re-

⁶⁵ Note the striking resemblance between the statutory language quoted and the definition in *Victory Sparkler Co. v. Francks*, 147 Md. 368, 128 A. 635, 44 A. L. R. 363 (1925).

⁶⁶ Prior to 1935 New York had an Act scheduling twenty-seven specific occupational diseases and processes. In 1935 there was added, under the "Disease" column, the words: "Any and all occupational diseases". Under the "Process" column were added: "Any and all employments enumerated (in the list of extra-hazardous employments)". The New York Court of Appeals stated, in interpreting this addition, that in spite of the broad coverage "(an occupational disease) is not the equivalent of a disease resulting from the general risks and hazards common to every individual regardless of the employment in which he is engaged". Also: "An occupational disease is one which results from the nature of the employment . . . ; (in other words, from) conditions to which all employees of a class are subject, and which produces 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". *Goldberg v. 954 Marcy Corp.*, 276 N. Y. 313, 12 N. E. (2d) 311 (1938). Or, as a lower New York Court stated the proposition: "With respect to occupational diseases, the statute covers only those caused by special enumerated hazards to which the

called the Idaho case of *Ramsay v. Sullivan Mining Co.*,⁶⁷ which cited Judge Parke's language in the *Victory Sparkler* case. That case cited with complete approval the definition quoted previously in the text, *infra*, from the *Victory* case.⁶⁸

All of the decisions, all of the facts and all of the experience of experts in the field indicated that there should be as little doubt as possible left as to the intent of the Act. Apparently this was understood by those responsible for the Maryland Act, and acted upon accordingly.⁶⁹

7. *Special Provisions as to Silicosis and Asbestosis.*

Silicosis is defined in the Act to be ". . . the characteristic fibrotic condition of the lungs caused by the inhalation of silicon dioxide (SiO₂) dust . . .".⁷⁰ Asbestosis is similarly defined: "the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust".⁷¹

Lung diseases present some of the most difficult of medical diagnostic problems.⁷² Since Occupational Diseases

employe is peculiarly subjected; it does not provide compensation for disease resulting from the general hazards and risks common to every individual, regardless of the nature of his employment". *Nielsen v. Firemen's Fund Indemnity Co.*, 239 App. Div. 239, 240, 268 N. Y. Supp. 189, 191 (1933).

⁶⁷ 61 Idaho 366, 6 Pac. (2d) 856 (1931).

⁶⁸ 1 SCHNEIDER, WORKMEN'S COMPENSATION (2 Ed.) 643, Sec. 223.

⁶⁹ In this connection the reader is again referred to the address entitled *What Is an Occupational Disease*, *supra* n. 10, by Thomas N. Bartlett, Esq. Since Mr. Bartlett was a member of the Maryland Commission, his address is particularly pertinent. In addition, it is of interest to note that Theodore C. Waters, Esq., the Chairman of the Maryland Commission, has been since its inception a member of the Committee on the Economic, Legal and Insurance Phases of the Silicosis Problem of the National Silicosis Conference.

⁷⁰ Act, Sec. 65(14).

⁷¹ *Ibid.*

⁷² The literature on this subject and kindred ones is tremendous. The major aspect of the pneumoconioses is of course the medical one, and in that regard the reader interested in a more thorough research is referred to the exhaustive bibliography compiled by Miss Marian Clare of the United States Public Health Service and included as Appendix C of the pamphlet "Evaluation of the Industrial Hygiene Problems of a State", Public Health Bulletin No. 236 of the U. S. Public Health Service. The attorney-practitioner is also referred to this bibliography, as well as specifically to *Tuberculosis and Silicosis*, by Ornstein and Umar (Quarterly Bulletin of Sea View Hospital, October 1936); *Silicosis and Silicotuberculosis*, by Ornstein (Medical Clinic of North America, September 1938); *Attorney's Text Book of Medicine*, by Dr. Roscoe N. Gray (1934); *Medico-legal Phases of Occupational Disease*, by Dr. C. O. Sappington, (1939). The current monthly periodical, *Industrial Medicine*, contains frequent and worthwhile articles on this subject of general interest to the practicing attorney.

have been publicized in recent years with the natural emphasis on silicosis—many incorrect diagnoses of silicosis or pneumoconiosis have been made. This has been due in part at least to the tendency of the medical profession to lay much stress upon occupational history in these cases. It is a well known medical fact that most people in adult life show some pathology of the lungs. Given some pulmonary pathology and a history of occupational exposure to silica many doctors have been prone to give the diagnosis of "silicosis" or "pneumoconiosis" without too much study as to the nature of the pathology present and its cause. In Maryland the industrial survey referred to frequently above⁷³ indicated that the problem involved was not of as great consequence numerically as it is in some other states. It was estimated that only about 8,000 persons in Maryland are exposed to silica dust (SiO_2), while less than 100 apparently are exposed to asbestos dust. Yet both of these diseases, which comprise a distinct division of the generic term pneumoconiosis,⁷⁴ are covered by the Act.⁷⁵ Other dust diseases arising out of other non-metallic mineral dusts, are covered to the extent that they are sometimes sequelae of some of the diseases and processes scheduled. But silicosis and asbestosis, being so controversial, are accorded separate treatment.⁷⁶

The provisions covering both silicosis and asbestosis recognize the fact that the exposure to silicosis is not great in Maryland.⁷⁷ They also recognize the fact that silicosis is caused *solely* by the inhalation of silicon dioxide dust into the alveoli at the extreme ends of the bronchioles of the lungs.⁷⁸ Finally, it recognizes the accepted medical premise that, ordinarily, large quantities of particles of silicon dioxide (SiO_2) of respirable size are necessary over a long period of time for the development of silicosis, and

⁷³ See particularly *supra* n. 19.

⁷⁴ Gould's Medical Dictionary (4th Ed.)

⁷⁵ Act, Sec. 32-A, (33), (34).

⁷⁶ This is in line with the New York Act as it was finally amended in 1936.

⁷⁷ See *supra* notes 19 and 73.

⁷⁸ Gray, *op. cit. supra* n. 72; Sappington, *Ibid.*

that frequently a mistaken diagnosis is made in tubercular cases, and even in cases of "heart disease, bronchitis or asthma."⁷⁹

The Act provides that for partial disability due to silicosis or asbestosis no compensation shall be paid.⁸⁰ While this fact may still be considered arguable by some, yet it can fairly be stated that the weight of authority is that partial disability from silicosis or asbestosis is non-existent. Either a person with these diseases is totally disabled or not disabled from doing ordinarily laborious work. Total disability or death is necessary before compensation is payable, in which event the maximum compensation payable shall be governed by the existing compensation law.⁸¹ There is a sliding scale of maximum benefits (beginning at \$500.00 and increasing at the rate of \$50.00 per month) payable in the event the disability or death occurs immediately following the effective date of the Act.⁸² There is an additional limitation on the total amount payable, however,

⁷⁹ Gray, *op. cit. supra* n. 72. See also U. S. Public Health Service Bulletin No. 176 (1928).

⁸⁰ Act, Sec. 32-D.

⁸¹ *Ibid.* The statute governing this provision is Md. Code (1924), Art. 101, Sec. 36. There is an important difference here, however, between the Compensation Act and the Occupational Disease Act. Under the former a claimant can receive benefits for total or partial disability while alive, and his dependents may be paid a maximum of \$5,000.00 compensation in addition to the payments made the claimant (subject to a limitation that the dependents may only be paid weekly payments at the regular rate (depending upon the average wage of the employe) for the remainder of the period between the date of the death and the 416 weeks following the injury). The employe has one right; the dependents an entirely separate one. See *Gull Specialty Co. v. Snyder*, 151 Md. 78, 134 A. 133 (1926). This is apparently not true in the Occupational Disease Act, because it is stated that the "total compensation *and* death benefits payable (if disability or death occurs during the month of June, 1939) shall not exceed the sum of five hundred dollars (\$500)". A \$50.00 per month maximum increase is then legislated, but again "for total disability *and* death". Finally, "such progressive increase . . . shall continue *only* until such total amount equals but does not exceed the sums which would be payable to the particular employe *or* his dependents; had such total permanent disability *and* death been due to an accidental injury". (Italics supplied.) Act, Sec. 32-D. In other words, under Md. Code (1924) Art. 101, Sec. 36, the employe totally disabled from uncomplicated silicosis or asbestosis may be paid \$6,000.00. His dependents, if he dies, without receiving compensation himself, are apparently entitled to receive a maximum of \$5,000.00 in compensation payments (subject of course to the average life expectancy of the deceased). In no event, however, shall the total paid to both the employe and his dependents exceed \$6,000. This is not so in the case of an employe injured by an accident. He and his dependents together may receive a maximum far in excess of \$6,000, under the circumstances explained above.

⁸² Act, Sec. 32-D.

which is important. That is that the average life expectancy of a person of the age and sex of the deceased shall govern the maximum of weekly payments to be made to dependents in case death results from uncomplicated silicosis or asbestosis.⁸³

It is provided that, in the absence of *conclusive* evidence in favor of the claim, there shall be a presumption "in fact," so that unless an employee (or his dependent) can show that, during a period of ten years before his disablement, he was "exposed to the inhalation of silica dust or asbestos dust" over a five-year span, two or which years must have been in Maryland under a Maryland contract of employment, then his death or disablement is *not* due to the nature of his occupation. There is a proviso that if the employee is in the employ of the same employer for the five-year period, then it matters not that he has worked outside of Maryland.⁸⁴

Obviously, even if these facts are met, the burden is still on the employee (or his dependents) to prove as a matter of fact that his exposure has been such as to be in fact injurious, and further, that it caused his disability.

The limitation on dependents and/or claimants with reference to the necessity that disablement or death from silicosis or asbestosis occur within three years of the last injurious exposure, unless the employee dies after a con-

⁸³ *Ibid.*

⁸⁴ *Ibid.* Section 32-D seems to ignore the limitation in Section 32-A relative to the contraction of occupational diseases. This apparently is an oversight, and probably can be judicially resolved as one. The section states: "In the absence of conclusive evidence in favor of the claim, disability or death from silicosis or asbestosis shall be presumed in fact not to be due to the nature of *any occupation within the provisions of Section 32-A of this Article . . .*". (Italics supplied.) Section 32-A purports expressly only to cover, respectively and severally, diseases contracted in the processes or occupation listed opposite each disease. Therefore the only occupations or processes covering silicosis and asbestosis are, respectively, numbers 33 and 34 of Section 32-A. The other occupations listed in Section 32-A have no bearing, either by way of extension of limitation, upon the compensability of silicosis. If they did, then the last paragraph of Section 32-C, and indeed the schedule itself, would be meaningless. It is certainly highly probable that Section 32-D will be construed to apply to silicosis (or asbestosis) arising out of *any process or occupation* "involving an exposure to or direct contact with silicon dioxide (SiO₂) dust" or (asbestos dust), and silicosis (asbestosis) from any other cause will be held non-compensable.

tinuous period of disability (which began within the three-year period) for which a claim was filed within seven years of the last injurious exposure, has been previously discussed.⁸⁵ This limitation is of course subject to the provision discussed in the last paragraph requiring conclusive evidence of long exposure to either silica or asbestos dust.⁸⁶ The provision in Section 32-D deals with the evidence required to prove an "injurious exposure" under the Act, while Section 32-C limits the period during which disablement or death must occur *after* the last "injurious exposure".

The waiver provision allowing the employee, even though a victim of silicosis or asbestosis, to waive full compensation in return for employment, is discussed under Item 1, *supra*.⁸⁷

There is one other provision affecting and limiting the right to compensation for silicosis and asbestosis. That is that the only employer liable in these cases is the last employer in whose employ the employe was last injuriously exposed to the hazards of the disease during the sixty days (or longer period) *after* June 1, 1939.⁸⁸

A question may arise as to whether or not the apportionment provision of the Act⁸⁹ applies to silicosis and asbestosis. The Act is specific in stating (1) that compensation shall not be payable for partial disability from either disease and (2) that if total disability or both shall result from "uncomplicated silicosis or asbestosis" certain benefits shall be payable.⁹⁰ However, there is no provision stating that compensation shall *not* be paid for total disability or death from silicosis *complicated* by some other

⁸⁵ Act, Sec. 32-C. See *supra* n. 44, and text thereto. Item 2, *supra*.

⁸⁶ See *supra* n. 84, and text thereto.

⁸⁷ Act, Sec. 32-E. See *supra* notes 39 and 40 and text thereto.

⁸⁸ Act, Sec. 32-C. This is only important in contra-distinction to the provision governing other occupational diseases, in which event the employer during the "last injurious exposure" will be held liable. Here for silicosis and asbestosis the question of "last injurious exposure" is limited by the provision that such exposure be "during a period of sixty (60) days or more" after June 1. In other words, an employer is apparently not subject to being held unless the employe works sixty days or more in an injurious exposure.

⁸⁹ Act, Sec. 32-B.

⁹⁰ Act, Sec. 32-D.

non-compensable disability or disease. It is difficult to determine what will guide the Courts in their interpretation of this provision. Since the Act states that "In the event of total disability or death from *uncomplicated* silicosis or asbestosis, compensation shall be payable . . .", and since it further states in the paragraph following the one from which the quotation was just taken, that "In case of death from *uncomplicated* silicosis compensation shall be payable . . .", it would seem that the legislative intent is clear. The intent apparently is to compensate *only* for total disability or death from uncomplicated silicosis or asbestosis, and that intent should govern.⁹¹

8. *The Medical Board.*

The Act provides for the creation, by gubernatorial appointment, of a Medical Board of three members. Two shall be experienced in the "diagnosis, treatment and care of industrial diseases", and one shall be an expert roentgenologist. All are required to have practiced their respective specialties for five years, and must be in "good professional standing". Their names shall be chosen from separate lists of not less than three persons (divided as above into two nominees "experienced in occupational diseases" and one in roentgenology) to be submitted to the Governor independently by the Deans of Johns Hopkins and the University of Maryland Medical Schools and the council of the Medical and Chirurgical Faculty of Maryland. The term of the members is to be six years, and the original appointments are to be made so that a term will expire

⁹¹ "The cardinal rule in the construction of a statute is to ascertain the intention of the legislature as it is expressed in the words of the statute, and for this purpose the whole act must be considered together." *Mitchell v. State*, 115 Md. 360, 364, 80 A. 1020, 1024 (1911), citing *State v. Archer*, 73 Md. 44, 20 A. 172 (1890). See also *Brenner v. Brenner*, 127 Md. 189, 96 A. 287 (1915); and *Frazier v. Leas*, 127 Md. 572, 96 A. 764 (1916). On the other hand, as a practical matter it should be pointed out that death or even total disability from uncomplicated silicosis or asbestosis is almost impossible of medical proof, because the end result of both of these diseases is apparently almost always a complication of the disease with tuberculosis. Hence if the intent of the legislature is probed deeply enough, possibly the apparent inconsistency of providing an ineffectual remedy might force the Commission and even the courts to allow an apportioned award of compensation in these cases.

every two years. The Chairman is to be designated by the Governor.⁹²

Generally, the powers of the Medical Board involve the right to formulate rules to govern their procedure, to investigate working conditions, to order and conduct autopsies, to have laboratory work carried out, and to conduct hearings and render decisions on "medical questions".⁹³

9. *The Health Department.*

Under the Act both the State and the Baltimore City Departments of Health are given concurrent duties. The Commission which studied occupational diseases in Maryland, and the legislature, recognized the truism that a compensation act for occupational diseases is no real remedy, and that control and prevention is the only long range hope for the workmen who are exposed to these diseases.⁹⁴ Thus they provided that the Health Department shall carry on a continuing study relative to the control and prevention of occupational diseases, and shall formulate regulations looking to that end, after public hearings, which shall have the force of law. The regulations shall be enforced by the Health Department. The results of the studies and investigations made shall be put into the form of proposed legislative changes in, additions to or subtractions from the current occupational disease law. And finally, the Health Department shall be the recipient of all occupational disease reports from physicians who learn of their existence.⁹⁵

⁹² Act, Sec. 32-G. The Chairman is to receive a salary of \$2,500.00 per year, the other members \$2,000.00. They "shall devote as much of their time as may be required to perform the duties and carry out the functions of the board . . .". *Ibid.*

⁹³ *Ibid.* This application of powers will be discussed more fully under Item 11-a, *infra*.

⁹⁴ See, among hundreds of such publications, the published 1937 records of the Occupational Disease Symposium of the Northwestern University Medical School, and particularly the address in these records of Mr. B. C. Heacock, President of the Caterpillar Tractor Company of Peoria, Illinois. Compensation legislation for occupational diseases is not a remedy; control through disease prevention is.

⁹⁵ Act, Sec. 32-J.

10. Definitions in the Act.

(a) Specific changes and new definitions.

The Act changes several of the existing definitions in the Workmen's Compensation Act to include the new occupational disease provisions. The definition of "accidental injury" is thus amended to include "the occupational diseases specified and enumerated in Section 32-A of this Article".⁹⁶ "Occupational Disease" is defined to mean "only the diseases enumerated and specified in Section 32-A".⁹⁷ "Silicosis and asbestosis" are defined to mean "the characteristic fibrotic condition of the lungs" caused respectively by each dust.⁹⁸ Finally, "disablement" is defined as being "the event of an employee's becoming actually incapacitated, either partially or totally, because of an occupational disease, from performing his work in the last occupation in which exposed to the hazards of such disease; and (the definition adds) 'disability' means the state of being so incapacitated".⁹⁹

⁹⁶ Act, Sec. 65(6).

⁹⁷ *Ibid.*, (13).

⁹⁸ *Ibid.*, (14).

⁹⁹ *Ibid.*, (15). The Compensation Act does not define disability from accidental injuries. See, on specific types of disability, *Baltimore Publishing Co. v. Hendricks*, 156 Md. 74, 143 A. 654 (1928); *Congoleum Nairn v. Brown*, 158 Md. 285, 148 A. 220, 67 A. L. R. 780 (1930); *Baltimore Tube Co. v. Dove*, 164 Md. 87, 164 A. 161 (1933). The *Congoleum Nairn* case, *supra*, has this to say with reference to disability: ". . . the claimant's eighth (issue) was whether the injury to the right hand rendered him totally incapacitated from performing 'such work as he was accustomed and qualified to perform, at the time of the accident'. And on his first prayer the jury were instructed that they might find the permanent total disability referred to in the eighth issue if they found that previous to the last accident the claimant was able to do the regular work assigned to him, but after that accident 'was totally and permanently incapacitated to do said work or any other work that he was accustomed and qualified at the time of the accident to perform'. The objection is that total disability in the Compensation Act means incapacity to do further work of any kind, not only of the kind he was accustomed and qualified to perform at the time of the accident, as the issue and prayer assumed. And we think the objection is well taken . . . in this particular case, the claimant, although he may have been considered by the jury as able to perform the duties of some occupation as testified, was, under the instruction, to be compensated as totally disabled if the work for which he was previously qualified was of a higher grade or materially different in other respects. In the opinion of this court that was not the purpose of the compensation statute". It may be stated parenthetically that in view of the above language, of the

(b) *Some apparent anachronisms.*

Under this part of this paper it perhaps will not be amiss to point out a few apparent statutory errors, of perhaps minor importance, but nevertheless of general interest. Attention has already been called to the possible lack of clarification of the intent of the legislature with reference to the compensation of silicosis or asbestosis complicated by other disease or injury.¹⁰⁰

Strangely enough, no provision is made for changing the language of Section 14, which is the section in the Compensation Act specifically requiring the payment of com-

language of the cases cited in that case, of the statements of the Court of Appeals, and of various utterances of the United States Supreme Court, an interesting question of constitutionality may arise in connection with this definition of disability. Of course, "all presumption being in favor of the validity of an act of the legislature" (*E. Clemens Horst Co. v. Ind. Acc. Comm.*, 184 Cal. 180, 193 Pac. 105, 110 (1920)), the Court might hold that the legislative intent was simply to increase the amount of payments by the device of defining disability differently for occupational diseases and for accidental injuries. But the possible fallacy seems to the writer to be that the legislature is not basing its rule upon facts, and, as quoted above, possibly "that was not the purpose of the compensation statute". See the detailed decision in *New York Central R. v. White*, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247 (1917), and particularly the following excerpts, containing various reasons why the Supreme Court held the New York Act constitutional. "(The Act) . . . graduates the compensation for disability according to a prescribed scale *based upon the loss of earning power*, having regard to the previous wage and the character of the disability . . ." (Italics supplied). In the new Maryland definition of disability from occupational diseases the loss of earning power is ignored. Regardless of earning power, disability is based upon an ability to perform the work in the last employment in which injuriously exposed to a disabling occupational disease. ". . . there is the loss of earning power; a loss of that which stands to the employe as his capital in trade. . . . it is not unreasonable for the state, while relieving the employer from responsibility for damages . . . to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the *loss of earning power incurred* . . ." Again, in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260 (1917), the Supreme Court pointed out that the state constitutionally "may regulate (by compensation statutes) the carrying on of industrial occupations that frequently and inevitably produce personal *loss of earning power* among the men and women employed . . .". The phrase "loss of earning power" runs through all of the cases, and definitely seems to limit the authority of the legislature. There is at least a possibility that other measures of disability may be held arbitrary and unreasonable, and hence contrary to the fourteenth amendment. (This same provision is Section 37 of the New York law, and apparently has not been contested on the grounds discussed above). Then too, the fact that a different measure of disability applies in the Maryland Act to accidental injuries may amount to discrimination between employers and hence possibly the definition might be held bad for that reason.

¹⁰⁰ See *supra* n. 91 and text thereto.

pensation to injured employees. That section provides that:

“Every employer subject to the provisions of this article (i. e., engaged in extra hazardous employment or having jointly with his employer elected the Act), shall pay or provide as required herein compensation according to the schedules of this Article for the disability or death of his employes resulting from an *accidental personal injury sustained by the employe . . .*” (Italics supplied).

This omission, probably one of oversight, will undoubtedly not affect the validity of the attempted coverage of occupational diseases, because the legislative intent is so definitely clear.¹⁰¹ As a matter of fact, Section 32-A expressly provides that “compensation . . . shall be payable for disability or death” arising from certain occupational diseases, so the legislative intent will not be hard to find.

Another rather unimportant error to be found in the Act as amended is that the definition of “extra-hazardous employment” was not in any way revised, in Section 65 (1),¹⁰² to include Section 32-A. Again the Court will undoubtedly go to the intent of the legislature, as expressed in Section 32-A, and include in the old definition the newly enacted Section 32-A, which by its express terms makes certain occupational disease exposures extra-hazardous.

11. *Administrative Procedure Under the Act.*

Because of the fact that the Occupational Disease Act changes in a number of respects the administration of procedure relating to claims, it was thought that the whole subject of procedure should be discussed separately under the three headings which follow.

(a) *Procedure before the Medical Board.*

“The State Industrial Accident Commission shall refer every claim for compensation for an occupa-

¹⁰¹ *Ibid.*

¹⁰² “65 (1) ‘Extra-hazardous employment’ means a work or occupation described in *Section 32* of this Article”. This is the unamended language of this definition. (Italics supplied.)

tional disease to the Medical Board for investigation, hearing and report, excepting . . . such cases wherein there are no controversial medical issues. No award shall be made in any such case until the Medical Board shall have duly investigated and heard the case and made its report and its decisions with respect to all medical questions at issue. The date of disablement, if in dispute, shall be deemed a medical question.¹⁰³ . . . Disablement and disability shall be determined by the Medical Board as herein provided¹⁰⁴ . . . The percentage of . . . contribution (of a compensable occupational disease and a non-compensable disease or infirmity to disability or death) . . . to be determined by the Medical Board¹⁰⁵ . . . The Medical Board shall file with the State Industrial Accident Commission the records of all proceedings . . . before (it) . . . together with its own report and findings upon all medical questions involved in the claim. Included in such record shall be the findings of the Medical Board, determining the nature of the disease, the extent of injury and the degree of disability sustained by the claimant.¹⁰⁶

In the few undramatic sentences above the Maryland Legislature has provided the groundwork for a separation, on an administrative basis, of medical and legal questions. The framers of the Act took as their example the acts of other states which have provided for medical boards in connection with their occupational disease legislation.¹⁰⁷

¹⁰³ Act, Sec. 32-H.

¹⁰⁴ Act, Sec. 65 (15).

¹⁰⁵ Act, Sec. 32-B.

¹⁰⁶ Act, Sec. 32-I.

¹⁰⁷ In six states there is provided a Medical Board, and as a practical matter the findings of these Boards on disputed medical questions are almost final. Certain conditions are set out under which findings on medical facts may be reviewed by the Accident Commission, but these occasions are few. The States are: Arkansas, Idaho, Massachusetts, Michigan, Ohio and Pennsylvania. In fourteen other states with occupational disease coverage there is no provision for a medical board, but examinations may (and in Kentucky and Rhode Island *must*) be ordered by the Commission, before special medical examiners, in ten of these states (California, Illinois, Indiana, Kentucky, Minnesota, Missouri, North Dakota, Rhode Island, Washington, Wisconsin). In the three other states with occupational disease laws there is a Medical Board created, but the findings in these are only advisory: New York (the Board here being limited to dust diseases alone), North Carolina, West Virginia. The four states with no provisions at all relative to medical boards are Connecticut, Delaware, Nebraska and New Jersey.

They went a step further in their assignment of duties to the Medical Board than have many of the other states, and yet they stopped short of the rule that the findings of fact on medical questions shall not be subject to the review of the Commission. This rule has been in effect for sometime in Massachusetts and Michigan, and was very recently enacted into the laws of Ohio and Pennsylvania. It also falls short of the very recent statutes of Arkansas (a newcomer into the Workmen's Compensation field), Idaho, and Pennsylvania, in which states only a very limited review of the findings of the Board is allowed.¹⁰⁸ In Maryland the findings of the Medical Board are subject to be reviewed by the Commission, and this procedure will be discussed later in this paper.¹⁰⁹

The routine of the Medical Board, as set forth in the Act, consists chiefly in the making of examinations of claimants, the conducting of autopsies, the taking of testimony of witnesses offered by either party at regularly called hearings, and the rendering of findings and conclusions concerning all of the medical issues involved in disputed claims.¹¹⁰ If the employe or employer request it, the Board shall allow duly qualified physicians of their own choice to participate in the physical examinations conducted by the Board.¹¹¹ Failure of the employe (or the dependents) to cooperate in allowing the Medical Board to conduct its examination (or its autopsy) will result in the suspension of all proceedings and the abrogation of any compensation payments which otherwise would be due the employe.¹¹²

When the Board reports its findings to the Commission it shall furnish the Commission with a complete transcript of its proceedings, including all testimony heard, both from medical and lay witnesses. It shall further indicate in its

¹⁰⁸ See *supra* n. 107.

¹⁰⁹ Item 11 (b), *infra*.

¹¹⁰ Act, Secs. 32-H, 32-I.

¹¹¹ Act, Sec. 32-H.

¹¹² *Ibid.*

findings what medical reports and x-rays were considered by it.¹¹³

The Board has the power to order autopsies whenever it considers such necessary; this power is given concurrently to the Commission.¹¹⁴ The Board (or the Commission) may designate the doctor to perform or attend such autopsy, and all autopsies are required to be conducted under the supervision of the public official authorized to supervise such proceedings.¹¹⁵

Finally, the Act is very definite in its insistence that certain facts shall be deemed to be medical questions. As quoted at the outset of this portion of the paper, the date of disablement,¹¹⁶ the percentage of contribution between compensable and non-compensable disability,¹¹⁷ the nature of the disease, the extent of injury and the degree of disability sustained are stated to be medical questions.¹¹⁸

It is interesting to note that the Act makes no definite provision for compelling the appearance of witnesses at hearings before the Board. The Board is given no powers to punish for contempt, and no instructions as to the method to be used in conducting hearings, the admissibility of evidence, and kindred questions. Broad powers are simply given "to make rules regulating its procedure, . . . to conduct hearings on medical questions, . . . and to per-

¹¹³ Act, Secs. 32-H, 32-I. Apparently the intent here is to have included in the record sent to the Commission all medical data reviewed by the board, whether or not the doctors making the report were examined or cross-examined formally by the Board. Cf. *Dembeck v. Shipbuilding Corp.*, 166 Md. 21, 170 A. 158 (1934).

¹¹⁴ Act, Sec. 32-H. It is difficult to understand the reason for the concurrent powers given the Board and the Commission in connection with autopsies. The Act is so definite in all other respects as to the separation of powers of the two agencies that there must be some reason for the possible conflict here created.

¹¹⁵ Act, Sec. 32-H.

¹¹⁶ And in connection with the finding of the date of disablement, the Act specifies clearly in Sec. 32-H that if it cannot be fixed scientifically, the Board "shall fix the most probable date, having regard to all the circumstances of the case". This is a legislative instruction to be arbitrary if necessary, and yet it is probably sound enough to withstand attacks on its constitutionality on the theory that the public good requires a decision to be made. Such language in the statute only emphasizes the fact that fixing the date of disablement is a difficult task, and that the Medical Board is performing the functions of a jury and must carefully weigh all disputed evidence.

¹¹⁷ Act, Sec. 32-B.

¹¹⁸ Act, Secs. 32-H, 32-I.

form such other reasonable duties as the work of the Board may require".¹¹⁹ It is possible that the rule-making power thus granted will be sufficient to authorize them to prescribe hearing procedure, including minor evidence rules, the appearance of parties, and the formal rules for conduct of hearings, but it is difficult to see how the power can be so found in the Act. Certainly it cannot be held that the power to subpoena witnesses is given. But because of the fact that the Occupational Disease Act is simply an amendment to the Workmen's Compensation Act, then a certain latitude in interpreting the extent of the powers given the Board may be found in the language of the Compensation Act that "this Article shall be so interpreted and construed as to effectuate its general purpose", the ordinary rule of strict construction of statutes in derogation of the common law to the contrary notwithstanding.¹²⁰

(b) Procedure before the Commission.

As already indicated, the Commission is given concurrent authority with the Medical Board to order autopsies.¹²¹ But in addition to this, the Commission is given the power of sitting as an appellate body and reviewing, on the motion of an aggrieved party filed within thirty days of the decision of the Medical Board, the findings of that Board.¹²² In the first instance the Commission simply acts as the transmittal agency, and sends to all parties certified copies of the findings of the Board. In the event no protest arises within thirty days from either party, the Commission then hands down its award, based upon and conforming to the findings of the Medical Board on medical questions. But if there is a properly timed request for a review by either party, then, in the second instance, the Commission reviews the entire record and the proceedings before the Medical Board, and upon that record and its review thereof it may

¹¹⁹ Act, Sec. 32-G.

¹²⁰ Md. Code (1924) Art. 101, Sec. 63.

¹²¹ See *supra* n. 114 and text thereto.

¹²² Act, Sec. 32-I.

render its decision. This may be, apparently (although it is not specifically so stated), an award reversing any or all of the findings of the Medical Board, and awarding or denying compensation accordingly.¹²³

The importance of this review allowed by the Commission may minimize to some extent the probable dispute as to what are and are not medical issues. In the last analysis the Commission decides all issues, medical and otherwise. However, there is a procedural dispute still possible, because in the case of medical issues the Commission is limited to the record made before the Medical Board, while on all other issues it may initiate, hear and re-hear testimony of all parties. But as a practical matter, since its decision on all facts is final,¹²⁴ there will be less necessity than might otherwise have arisen to determine the difficult dividing line between questions medical and non-medical.¹²⁵

There is granted the Commission the customary power of continuing jurisdiction over all cases, but in all occupational disease cases the period of limitations on reopening a claim for a modification of or change in a final award must be made within one year (rather than three as in the case of accidental injuries) of a final award.¹²⁶

(c) Procedure on Appeal.

As in the case of accidental injuries, an appeal to the common law courts of Maryland is allowed in the Act.¹²⁷ However, in occupational disease cases, unlike accident cases, no appeal is allowed on the facts, and the findings of fact by the Commission are final. Such a provision is constitutional.¹²⁸ Thus an appeal in workmen's compensation cases involving occupational diseases will cover only ques-

¹²³ *Ibid.* Apparently the Commission upon review may not open up the record for further testimony: ". . . and upon the record thus made . . . (i. e. "the proceedings, findings and report of the Medical Board") shall render its decision or award upon all issues referred to the Medical Board".

¹²⁴ See item 11(c), *post*.

¹²⁵ To be practical again, the Act has settled rather clearly the main controversial questions that might arise over this particular issue, by designating the important medical questions as such.

¹²⁶ Act, Sec. 54.

¹²⁷ Act, Secs. 32-I, 56.

¹²⁸ *Baltimore v. Bloecher & Schaaf*, 149 Md. 648, 132 A. 160 (1926); *Branch v. Indemnity Ins. Co.*, 156 Md. 482, 144 A. 696 (1929).

tions of law. The proceedings and practice will probably be very similar to those now prevailing in appeals from the Federal Employees' Compensation Commission,¹²⁹ although of course the method of bringing the appeal will conform to the present Maryland practice.¹³⁰

PART IV

THE MARYLAND CASES

In this concluding part of this paper the attempt will be briefly to analyze the important Maryland cases—and there are only a few—which directly bear or throw light upon the probable future rulings of the Court of Appeals. It is clear that the best that can be ascertained from cases already decided is a trend of thought which may be helpful in plotting the future course of the Maryland law relating to accidents and to occupational diseases. But there are a few beacon lights that may be helpful in this regard.

Probably the most praised, the most criticized, and consequently the most widely discussed case in the United States on the subject of accidental injury is the case of *Victory Sparkler Co. v. Francks*.¹³¹ As has already been pointed out, that case was the first in Maryland to discuss thoroughly the scope of the phrase "accidental personal injury", and to define that phrase and the term "occupational disease". Prior to the *Victory* case, for almost eleven years the bar of Maryland, and the lower courts, were in apparent agreement as to the elements constituting an accidental personal injury.

It is conceivable that such harmony might have continued indefinitely, except that a jury, in a common law action, happened to award one Catherine R. Francks a verdict of \$22,500 for injuries she sustained allegedly because of the negligence of her employer in not furnishing her a safe place to work. At that point the Court of Appeals

¹²⁹ 33 U. S. C. A. (Supp. 1937) Sec. 921.

¹³⁰ See generally *Frazier v. Leas*, 127 Md. 572, 96 A. 764 (1916); *Monumental Printing Co. v. Edell*, 163 Md. 551, 164 A. 171 (1933).

¹³¹ 147 Md. 368, 128 A. 635, 44 A. L. R. 363 (1925).

stepped in (at the request of the employer) and decided in the first place that when an employer is properly insured under the Compensation Act, no injury sustained in extra-hazardous employment, and arising out of and in the course of such employment, may be the subject of common law litigation, and in the second place that the phosphorus poisoning sustained by Catherine Francks was, under the circumstances of the case, compensable as an accidental personal injury under the terms of the Workmen's Compensation Act.

The immediate effect of this decision was to reduce the amount recoverable by the said Miss Francks from \$22,500 to a maximum of approximately \$5,500. The long range effect was to include in the category of accidental personal injuries a group of injuries which, before this decision, apparently had not been considered to be covered by the Compensation Act. This group could be said to embrace a class of injuries to be called neither "occupational diseases", as the term is defined in the *Victory* case, nor clearly definable "accidental injuries", in the dictionary sense of the term. The cause of the phosphorous poisoning was held in the *Victory* case to be the employer's negligence; the "accidental injury" was held to be the combination of circumstances beginning in the unexpected (so far as the employe was concerned) negligence of the employer in allowing phosphorus vapor to escape to the place where the employe worked and culminating in the necrosis of the employe's jaw as the direct result of the entry of phosphorus into the employe's system. The time and place of entry of the phosphorus into the system were not required to be shown; nor was there required the showing of any definite lesion through which the phosphorus entered to cause the poisoning. "The infection is the accidental injury . . .". The necrosis was not the result of an occupational disease because its cause arose not necessarily out of the employment, nor as a natural result of the employment, but originated in the negligence of the employer. The accidental nature of the necrosis lay in the fact that

the infection was not to be foreseen or expected by the employe, and the injury was accidental regardless of the time of its inception or the specific (in point of time) period or periods of the injection of the poison. This classification covered an "unexpected" happening (the "unexpected" or "by chance" going to the unconsciousness of danger on the part of the injured employe) arising out of and in the course of the employment, whether the happening or injury be the result of entry of poison into the body "through the medium of a pimple point, an unsound tooth, a scratch, or a lesion, or of ingestion or in breathing".¹³² But the limitation is that the introduction of such poison must be unexpected and unforeseen—thus held the Court in the *Victory* case—to be called accidental under the Compensation Act.

Negligence as a Basis for Recovery.

Thus it will be seen that of all the constituent elements going into the *Victory* case, the point of greatest importance was that the employer's negligence made the poisoning unexpected and unforeseen so far as the employee was concerned, "that the phosphorus poisoning happened without her design or expectation, and so her injury was accidental".¹³³ The negligence of the employer really seems

¹³² *Ibid.*

¹³³ This case has been followed to an extreme in North Carolina (*McNeely v. Carolina Asbestos Co.*, 206 N. C. 568, 174 S. E. 509 (1934)). This was a case of asbestosis contracted in an asbestos plant, yet on the authority of the *Victory* case it was held that negligence of the employer made the disease an accidental injury rather than an occupational disease; *Cf. Ramsay v. Sullivan Mining Co.*, 51 Idaho 366, 6 Pac. (2d) 856 (1931) quoting the definitions of occupational disease given in the *Victory* case, and quoted herein in the text to footnote 61. It is interesting to note that in 1925, shortly prior to the *Victory* case, the Court of Appeals of Maryland specifically excluded an argument that negligence played any part in the Workmen's Compensation scheme. "But in cases arising under the Workmen's Compensation law the question of negligence is excluded . . .". (*Bramble v. Shields*, 146 Md. 494, 506, 127 A. 44, 48 (1925)). But in that case the question was not that of the definition of accidental injury, but rather a question of the meaning of "naturally resulting therefrom" as used in Section 65 (6) of the Compensation Act. Aside from the above, the *Victory* case has been cited, favorably and unfavorably (but mostly favorably), by the Courts of last resort of the following States: Alabama, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Louisiana, Missouri, North Carolina, New Hampshire, New York, Oklahoma, South Dakota, Washington, West Virginia, Wyoming, C. C. A. 8th, Minnesota (and other Federal jurisdictions in some of the States listed).

to be the turning point of the decision, because that was held to create the unexpected and unforeseen condition of exposure to phosphorus poisoning (the "accident") which ultimately caused the necrosis (the "injury").

This theory of negligence forming a basis for recovery has been developed and limited in Maryland in several later cases. The next important case in which there was a strenuous argument made by the employee that an employer's negligence made a case compensable was *Gunter v. Sharp & Dohme*.¹³⁴ In that case, in which it was proved that the employe had nephritis or Bright's Disease, the Court held that he suffered from an occupational disease. It specifically went over the facts in so holding, and pointed out that there was absolutely no proof of negligence, and that all the evidence pointed to the fact that the employe was suffering from an occupational disease as defined in the *Victory* case. The inference, however, was that had negligence been proved the decision might have been different, because if negligence had been shown then the disease could not have been said to have arisen *necessarily* out of this employment.

The next case in point is *Cambridge Mfg. Co. v. Johnson*.¹³⁵ In that case the negligence argument was ruled invalid by the Court, but again because the employe tried, and failed, in the attempt to show negligence. The Court did not specifically hold that the employe suffered from an occupational disease. As a matter of fact he died from pulmonary tuberculosis, but the inference from the opinion is that fumes in a feed mill aggravated this disease. The

¹³⁴ 159 Md. 438, 151 A. 134 (1930).

¹³⁵ 160 Md. 248, 153 A. 233 (1931). An interesting point in connection with the decision in the Johnson case is the following statement of the Court of Appeals: ". . . but in every case (referring to other cases holding that diseases aggravated by injuries were compensable) the injury was such as could be pointed to as having occurred at a definite time and place". This language of course should not be studied out of its context, yet it definitely ignores the Victory case wherein it was stated that "the fundamentally accidental nature of the injury . . . (cannot) be altered by the consideration that the infection was gradual throughout an indefinite period . . .". As a matter of fact, except for the answer given by the Court to the employe's claim of negligence (which obviously was based upon the Victory decision) the Victory case is not once referred to even by inference.

Court pointed to what might easily be designated as the contributory negligence of the employe in failing to use gas masks provided by the employer, and in not opening the windows provided, and its holding was based upon the fact that no accidental injury was shown by the claimant. It ruled against the claimant by paralleling the case with the facts proved in the *Gunter* case. It may well be said that in practical effect the Court ruled that the disease was occupational and also that it was not the result of an accident.

In chronological order, the case in which the question of negligence was next argued was *Sinsko v. Weiskittel*.¹³⁶ The employe worked for years in a "sand blast room" and finally died, apparently from the effect of the sand on his lungs. This too resulted in a ruling against the employe, also on the ground that the pneumoconiosis (possibly silicosis) from which the worker was suffering was not accidental in origin. The Court definitely stated that in the *Victory* case the phosphorus poisoning involved therein "was held not to have resulted from the occupation as a necessary or usual consequence, but from the negligence of the employer".

A departure in the application of the rule of negligence occurred in the case of *Geipe v. Collett*.¹³⁷ In that case the negligence was not on the part of the employer, but was charged to a third person, whose actions created an unforeseen and unexpected condition, resulting in a paralytic stroke (held compensable). This case is perhaps not exactly in line with the group here presented, but it certainly should be included in this discussion. A truck driver was following, in his truck, another vehicle, on the rear of which a man was riding. This person so riding suddenly jumped from the tail gate of the other vehicle. The truck driver, Collett, was so surprised and shocked that he suffered a paralytic stroke in attempting to avoid the man who jumped. The important point brought out in this case

¹³⁶ 163 Md. 614, 163 A. 851 (1933).

¹³⁷ 172 Md. 165, 190 A. 836, 109 A. L. R. 887 (1937).

is that the unforeseen and unexpected event constituting the "accident" was the negligence, not of the employer, but of the man who jumped.

Finally, negligence was spoken of and used as part of the basis for a decision in favor of the employe in the case of *Foble v. Knefely*.¹³⁸ That case was one in which an employe, by constant pressing of her knee against a "knee-press" or lever, sustained a bruise of the knee tissues. Here it was argued by the employer that the worker knew of the defective knee press, and knew that it was stiff and difficult to operate, and hence the negligence was not unforeseen and unexpected, but the Court pointed out that even though the defect was known to the employe, the result, i. e., the knee injury, was not in fact foreseen by her. Thus the unforeseen *result*, rather than cause, apparently created the "accident". There was also an alternative theory for recovery, namely, that there was a "series" of accidental injuries through the constant rubbing of the employe's knee.

*Diseases Aggravated, Precipitated or Caused by
an Accidental Injury.*

The scope of this paper is not broad enough to cover all the cases under this heading. It is necessary, however, that several of the more important cases be briefly discussed.

It is a fundamental of Maryland case law that a disease aggravated, precipitated or caused by an accidental injury is compensable.¹³⁹ Further, in almost all the cases reach-

¹³⁸ 6 A. (2d) 48 (Md. 1939).

¹³⁹ *Jewel Tea Co. v. Weber*, 132 Md. 178, 105 A. 476 (1918); *Coastwise Shipbldg. Co. v. Tolson*, 132 Md. 203, 103 A. 478 (1918); *Stewart & Co. v. Howell*, 136 Md. 423, 110 A. 899 (1920); *Kelso v. Rice*, 146 Md. 287, 126 A. 93 (1924); *Bramble v. Shields*, 146 Md. 494, 127 A. 44 (1923); *Dickson Construction Co. v. Beasley*, 146 Md. 568, 126 A. 907 (1924); *Standard Oil Co. v. Mealey*, 147 Md. 249, 127 A. 850 (1925); *Standard Gas Equipment Corp. v. Baldwin*, 152 Md. 321, 136 A. 644 (1927); *Armour Fertilizer Co. v. Thomas*, 153 Md. 631, 139 A. 356 (1927); *Kaufman Construction Co. v. Griffith*, 154 Md. 55, 139 A. 548 (1927); *Coca Cola Bottling Works v. Lilly*, 154 Md. 239, 140 A. 215 (1928); *Neeld Construction Co. v. Mason*, 157 Md. 571, 146 A. 748 (1929); *Townsend Grace Co. v. Ackerman*, 158 Md. 34, 148 A. 122 (1930); *Baltimore & O. R. R. v. Brooks*, 158 Md. 149, 148 A. 276 (1930) (compensation disallowed); *Celanese Corporation v. Lease*, 162 Md.

ing this conclusion it has been held to be a jury question as to whether or not an accidental injury has in fact caused, aggravated or precipitated a disease.

In *Slacum v. Jolley* a sunstroke was held under the evidence not to constitute an accidental injury, or to be the result of one.¹⁴⁰ To the same effect was *Miskowiak v. Bethlehem Steel Co.*¹⁴¹ On the other hand, in *State Roads Commission v. Reynolds*,¹⁴² and in *Schemmel v. Gatch*,¹⁴³ the facts were held sufficient to show an accidental injury under the requirements laid down by the Court of Appeals.¹⁴⁴ These are best stated in the words of the Court in *Slacum v. Jolley*, to the effect that sunstroke is compensable, just as any other injury resulting from an accident, when it is "caused by unusual and extraordinary conditions in the employment which cannot be regarded as naturally and ordinarily incident thereto".¹⁴⁵

587, 160 A. 881 (1932); *Waddell's Coal Co. v. Chisholm*, 163 Md. 49, 161 A. 276 (1932); *Horn Ice Cream Co. v. Yost*, 164 Md. 24, 163 A. 823 (1933); *Baber v. Knipp*, 164 Md. 55, 163 A. 812 (1933); *Baltimore Tube Co. v. Dove*, 164 Md. 87, 164 A. 161 (1933); *Federal Tin Co. v. Hoffman*, 164 Md. 431, 165 A. 323 (1933); *Catherman v. Ennis*, 164 Md. 519, 165 A. 482 (1933); *Moller v. Unger*, 166 Md. 198, 170 A. 777 (1934); *Jackson v. Ferree*, 173 Md. 400, 196 A. 107 (1938) (compensation disallowed); *Spence v. Bethlehem Steel Co.*, 173 Md. 539, 197 A. 302 (1938); all cases cited in footnotes 134-138 *supra*; and all cases cited in footnotes 140-151, *infra*.

¹⁴⁰ 153 Md. 343, 138 A. 244 (1927).

¹⁴¹ 156 Md. 690, 145 A. 199 (1929).

¹⁴² 164 Md. 539, 165 A. 475 (1933).

¹⁴³ 164 Md. 671, 166 A. 39 (1933).

¹⁴⁴ *Cf. Robertson v. North American Refractories*, 169 Md. 187, 181 A. 223 (1935).

¹⁴⁵ In *Schemmel v. Gatch*, *supra* n. 143, the Court seems to go beyond the boundaries limited in the *Slacum*, *Miskowiak*, and *Reynolds* cases, *supra*. It held that the conditions under which the employe worked "were peculiar to the employment and not such as affected the public generally in that neighborhood", and from those facts (coupled with medical testimony concerning the onset of the strokes), the jury might properly draw an inference that the injury was caused by "unusual and extraordinary conditions in the employment". The fact that the conditions were peculiar to the employment would seem to indicate that under the language quoted above from the *Slacum* case the injury was definitely not compensable. See also for an apparently extreme application of the rule later announced in *Slacum v. Jolley*, *Standard Gas Equipment Co. v. Baldwin*, 152 Md. 321, 136 A. 644 (1927). This case, never specifically overruled, held, among other things, that a jury question was presented when an employe, in practically the last stages of arteriosclerosis and chronic nephritis, slipped to the floor and later died, having some burns on his body from the molten iron he was carrying, which apparently spilled on him after he slumped down. There was apparently little or no evidence of "unusual and extraordinary conditions in the employment". Note the strong dissent by Judge Parke, who wrote the opinion in the *Victory* case.

There is a group of Maryland cases which, at least after the first one, held that carbon monoxide poisoning is definitely an accidental injury. *Bethlehem Steel Co. v. Traylor*,¹⁴⁶ was the first case to hold this. The Court did so on the direct authority of the *Victory* case, arguing that "a succession or series of accidental injuries culminating in the same consequential results" was compensable, and that the evidence was sufficient for an inference of "successive asphyxiations" from the gas, rendering the employe's system "more sensitive to the one (asphyxiation) from which he is said to have lost his life". In succession, and without serious question on this point, followed the cases of *Mount Savage Mining Co. v. Baker*,¹⁴⁷ and *Red Star Motor Coach Co. v. Chatham*.¹⁴⁸ Since carbon monoxide poisoning is now compensable under the Act, these cases are hardly important in reference to that particular disease. However, they bear very importantly on the question of what the Court will consider an accidental injury, particularly when diseases are contracted which are not scheduled in the Act, or when they are contracted without meeting the requirements of Sections 32-A-D of the Act.¹⁴⁹

Finally, following the *Victory* case there are three cases holding that diseases or injuries of slow contraction are compensable as accidental injuries. The first is the *Traylor* case, *supra*. That is a definite example of a series of intangible injuries not involving physical force. The ingestion of carbon monoxide gas into the system on repeated occasions was held under the evidence to have so weakened the constitution of the employe that he finally succumbed to his exposure. Thus a field embracing all types of internal injuries from working conditions was laid open to compensation, the sole requirement being that, as in this case, there was a definite time at which the employe could be said finally to succumb to the poison.¹⁵⁰ The case of

¹⁴⁶ 158 Md. 116, 148 A. 246, 73 A. L. R. 479 (1930).

¹⁴⁷ 159 Md. 380, 150 A. 864 (1930).

¹⁴⁸ 163 Md. 412, 163 A. 886 (1933).

¹⁴⁹ See Part III, Section 6, *supra*.

¹⁵⁰ Cf. *Spence v. Bethlehem Steel Co.*, 173 Md. 539, 197 A. 302 (1938).

*Catherman v. Ennis*¹⁵¹ held that an employee who sustained an abrasion through constant rubbing over a long period of time could be entitled to compensation under the *Victory* case and finally, in *Foble v. Knefely*, also previously discussed, the constant rubbing of a knee press was held to be such an accidental injury as contemplated by the *Victory* case, and therefore compensable.

PART V

CONCLUSION

In the above brief discussion of cases, the writer has attempted to indicate some of the land mark cases in the compensation field. A consideration of these cases does, he believes, point at least to a few preliminary conclusions.

1. The case of *Gunter v. Sharp & Dohme* probably lays down the limit beyond which the Court of Appeals will not go in allowing compensation for diseases not caused by accident in the ordinarily understood sense of the word. It was there stated: “. . . an employe who, while at work, suffers or becomes ill from natural causes, cannot claim compensation unless such illness was brought on or accelerated by some act or event accidental in nature”.
2. The case of *Schemmel v. Gatch* showed the length to which the Court would go in deciding when an “act or event” is “accidental in nature”, by allowing compensation to an employe of a quarry who suffered a sunstroke or some other form of heat prostration. It held that the condition of an unusually hot day and a cloud from dynamite smoke or fumes overhanging the quarry were conditions “peculiar to the employment and not such as affected the public generally”—although one of the reasons for the decision in the *Gunter* case was that the disease *was* peculiar to the employment and hence *not* compensable, and

¹⁵¹ 164 Md. 519, 165 A. 482 (1933).

the definition of occupational disease in the *Victory* case was one having "its origin in the inherent nature and mode of work of the profession or industry", and also in spite of the holding in the *Misko-wiak* case that heat prostration, on the authority of *Slacum v. Jolley*, is not compensable as an accidental injury unless caused by "some unusual and extraordinary condition in (the) . . . employment, not naturally and ordinarily incident thereto".

3. The *Victory*, *Catherman*, and *Foble* cases show the limit of accidental injury coverage, under the Compensation Act, and these cases indicate that the Court will extend the Act to cover "occupational conditions" which are neither strictly speaking occupational diseases nor accidental injuries in the common acceptance of the term. And the rules of these three cases are based at least in part upon the negligence of the employer.
4. Finally, the *Sinsko* case shows the reliance the Court of Appeals places upon the negligence argument of the *Victory* case, the Court there holding that the disease was occupational. In so holding it pointed to the fact that the employe proved no negligence, and the inference is clear that had he proved negligence the Court would not have held the disease to be occupational.

The final conclusions to be drawn from all of the Maryland cases, and also from the above analysis of the Act, apparently are three in number. In the first place the Court of Appeals will probably be guided by its own definition of occupational disease, particularly since it is in approximately the language used in limiting compensation under the Occupational Disease Act, but also because the apparent intent of the Act is so clearly to delimit the occupational disease coverage to definite diseases contracted under definite circumstances. In the second place it is rea-

sonable to believe that the Court will continue to decide each case on accidental injury as it arises, and may well be expected to continue its trend of holding all injuries compensable if there is any legitimate basis for so holding, while remaining within the limits it has set for itself in deciding these cases. Thirdly, there is ground for the belief that the Court will stoutly maintain its distinction between occupational disease and accidental injury, and will formulate even more clearly than in the past a third classification of cases: those which involve diseases or disabilities neither occupational nor accidental in origin, and hence not compensable. This third classification would obviate the economically unsound situation of the Compensation Act becoming a health insurance statute, and would heed the warning given by an Ohio judge—in a dissenting opinion, by the way—in a recent important case in which the Ohio Court of Appeals abolished an apparently soundly established and well settled precedent in Ohio case law:

“Paraphrasing the language of an eminent jurist in a recent cause celebre, it may be well stated that if experience is any guide the present decision will give momentum to kindred litigation and reliance upon it far beyond the scope of the special facts of this case, for legal doctrines have, in an odd kind of way, the faculty of self-generating extension”.¹⁵²

The language of an Ohio dissenting opinion, however, no matter how eloquently true (as the above quotation undoubtedly is), does not strike as close to home as that of an unanimous opinion of the Maryland Court of Appeals. Therefore in closing this paper, the writer is grateful for the opportunity of being able to quote the language of Judge Digges, which appears in the case of *Cambridge Mfg. Co. v. Johnson*,¹⁵³ and which lends force to his conclusion that the Court of Appeals will interpret the Occupational Disease Act as its authors apparently intended it should

¹⁵² Judge Matthias' dissenting opinion in the case of *Triff, Adminx. v. National Bronze & Aluminum Foundry Co.*, 135 O. S. 191, 20 N. E. (2d) 232 (1939).

¹⁵³ 160 Md. 248, 153 A. 283 (1931).

be: for the economic, social and moral benefit of employes and employers.

“ . . . the statute was designed to benefit both parties: The employers, by making it impossible to have exorbitant and unreasonable judgments obtained against them; and the employees, by providing for them definite and certain compensation for bona fide injuries sustained during their employment, without the danger of being defeated by the application of the hard and fast rules of the common law. The cost to the employer of the proper operation of such a system is not onerous, if by the administration of the law its subjects are confined to those provided in the statute and in the manner therein provided. There is an undoubted tendency on the part of commissions and the courts, due to the persistent application of injured persons, to broaden the provisions of the law through administrative or legal interpretations. This, it seems to us, is a real danger to be guarded against, lest the economic benefit sought to be accomplished by such enactments be practically frustrated by employers being driven to the necessity of employing only those who are physically perfect, thereby excluding entirely competent and efficient persons, who may have some slight ailment or disease, from receiving any employment at all. This was not the purpose of the Legislature; and if an interpretation be given which is tantamount to health insurance, it will become more and more difficult for employees who have passed middle age, or who from one cause or another are not perfect physical specimens, to obtain and keep employment”.¹⁵⁴

¹⁵⁴ Grateful acknowledgment is made, for their generosity in reading the manuscript, and for their helpful suggestions, to Messrs. Rignal W. Baldwin, Jr., Thomas N. Bartlett, H. A. Idleman, Joseph A. Sullivan, Theodore C. Waters, and C. E. Wilde.