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Workmen's Compensation—Back Injuries—Absence of Unusual Strain or Exertion

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federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States.[6]

Defendants first argued that their combined intrastate and interstate activities in Washington could be regulated by the Attorney General of the United States in enforcing the Sherman Act. The court rejected this argument's premise that the state act was intended to apply only to cases outside the scope of the Sherman Act, finding that "such an interpretation would be overly restrictive, unreasonable, and would frustrate the clear intent of the legislature."[7] The court therefore held that the Attorney General of the United States was not a "regulatory... officer" within the meaning of section 17. Defendants also contended that they were exempt from the state act because they were presently being "regulated" by consent decrees obtained by federal authorities in an earlier suit against the motion picture industry.[8] The court rejected this contention, finding that "certain surveillance and enforcement activities undertaken . . . pursuant to consent decrees"[9] is not "regulation" within the meaning of the Consumer Protection Act.[10]

WORKMEN'S COMPENSATION

Back Injuries—Absence of Unusual Strain or Exertion. The Washington Supreme Court recently refused to apply the "unusual strain" test used in heart attack cases to back injury litigation. Claimant, a clerk-typist, suffered a herniated intervertebral disc when she twisted around to answer a telephone which rang as she was bending over in the opposite direction. Claimant's employer contended that her injury did not constitute a "sudden and tangible happening of a traumatic nature" within the statutory definition of "injury" in the Industrial Insurance Act. A compensation award by the Board of Industrial Insurance Appeals was upheld by the trial court. On appeal, *held:* Impairment of claimant's skeletal mechanism, sustained in a normal course of employment act without any unusual strain or exertion, is an

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[6] WASH. REV. CODE § 19.86.170 (1961).

[7] 64 Wn.2d at 766, 394 P.2d at 229.

[8] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). Action to prevent a discriminatory price fixing policy by national film distributors acting in concert with movie producers and national theatre chains culminated in that decision.

[9] 64 Wn.2d at 764, 394 P.2d at 229.

[10] WASH. REV. CODE § 19.86.170, *supra* note 6. *Accord,* State v. Texaco, Inc., 14 Wis.2d 625, 111 N.W.2d 918 (1961); State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 101 N.W.2d 133 (1960).

"injury" within the scope of the Industrial Insurance Act. *Boeing Co. v. Fine,* 65 Wash. Dec.2d 149, 396 P.2d 145 (1964).

Claimant's employer based its contention that Mrs. Fine's herniated disc was not an injury, as defined in the Industrial Insurance Act,[1] on the allegedly analogous situation of a heart attack suffered by a workman engaged in a routine course of employment activity. In *Windust v. Department of Labor & Indus.*,[2] the court had overruled prior cases by holding that a workman's fatal heart attack, sustained while he was performing an ordinary phase of his job, did not constitute a "sudden and tangible happening" within the statutory definition of injury. *Windust* laid down the rule that a heart attack would be a compensable injury only if it resulted from unusual strain or exertion. In the principal case, the employer argued that there was no difference between a heart attack and a herniated disc when both occurred in a normal and routine employment activity. However this argument was rejected by the court:

> [T]he thought that a heart attack suffered during accustomed exertion is really happenstance as to time and place is exemplified . . . in Windust. Contrast this to injuries of the back. It is quite possible that a slight or usual strain applied at an unusually difficult angle could . . . injure a normal back. Thus, the *unusual strain* requirement of the Windust case does not apply to injuries to mechanical structures to which the angle of application may be vastly more important than the general level of strain.[3]

The refusal of the Washington court to extend the unusual strain test of the heart cases to back injuries is in line with the general policy of workmen's compensation acts, which allows recovery for hernias, hemorrhages, ruptured vessels and organs, broken limbs, and other obvious structural or mechanical failures caused by routine exertion.[4] The Washington rule,[5] requiring unusual strain in order to find compensability for general heart conditions (*e.g.*, thrombosis, myocarditis, arteriosclerosis, and dilation of the heart) is not a majority position,

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[1] WASH. REV. CODE § 51.08.100: "Injury" means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and such physical conditions as result therefrom.

[2] 52 Wn.2d 33, 323 P.2d 241 (1958).

[3] 65 Wash. Dec.2d at 151-52, 396 P.2d at 147, citing 1 LAWYERS MEDICAL CYCLOPEDIA, § 7.6, at 345 (1953).

[4] 1 LARSON, WORKMEN'S COMPENSATION § 38.20 (1952).

[5] See Lawson v. Department of Labor & Indus., 63 Wn.2d 79, 385 P.2d 537 (1963); Williams v. Department of Labor & Indus., 54 Wn.2d 643, 343 P.2d 1028 (1959); Favor v. Department of Labor & Indus., 53 Wn.2d 698, 336 P.2d 382 (1959); Hodgkinson v. Department of Labor & Indus., 52 Wn.2d 500, 326 P.2d 1008 (1958); Kruse v. Department of Labor & Indus., 52 Wn.2d 453, 326 P.2d 58 (1958).

although the minority view adhered to by the Washington court has a respectable number of supporters.[6]

The court's rejection of the unusual strain test in back injury cases is doubtless sound. The "usual-unusual strain" test in heart cases is faulty in that it assumes that "there is a quantum of exertion or exposure in any occupation which is usual or normal—an assumption which is questionable at best and certainly difficult to apply. Any employee . . . knows that he will work long hours as well as short hours, in cold weather and hot, sometimes faster, and sometimes more slowly. . . ."[7] Both New York and New Jersey purport to apply the unusual strain test to heart cases, but the doctrine has been emasculated, if not eliminated, by the willingness of those states' courts to find an unusual strain from nothing more than a difficult part of claimant's ordinary labors.[8] A recent Washington case,[9] in which a lumber worker who suffered a coronary occlusion while working on the "roughest log he had ever peeled" was allowed to present his evidence of unusual strain to a jury, may indicate that Washington is embarking on a tortuous trail of exceptions and distinctions as to what is an "unusual" strain. Avoidance of a similar snare of technicalities in back injury cases is sufficient justification for the decision in the principal case.

[6] See, *e.g.*, Skinner v. Industrial Comm'n, 381 P.2d 253 (Colo. 1963); Friendly Frost Used Appliances v. Reiser, 152 So.2d 721 (Fla. 1963); Faline v. Guido & Francis, DeAscanis & Sons, 192 A.2d 921 (Del. 1963); Latimer v. Sevier County Farmers' Cooperative, Inc., 233 Ark. 762, 346 S.W.2d 673 (1961). See 1 LARSON, *op. cit. supra* note 4, § 38.30 and 1964 Supp. Michigan has joined the majority of states that do not require unusual strain. Mottonen v. Calumet & Hecla, Inc., 360 Mich. 659, 105 N.W.2d 33 (1960). See also, Comment, *Stress-Caused Heart Attacks*, 14 CLEV.-MAR. L. REV. 322 (1965).

[7] 1 LARSON, *op. cit. supra* note 4, § 38.63.

[8] *Id.* § 38.64(a) and 1964 Supp.

[9] Woods v. Department of Labor & Indus., 62 Wn.2d 389, 382 P.2d 1082 (1963).