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AGGRAVATION OUTSIDE COVERED EMPLOYMENT OF PRIOR INDUSTRIAL INJURY IS COMPENSABLE

In 1955, claimant suffered a sacroiliac strain while working within employment covered by the Washington Industrial Insurance Act. His compensation claim was closed with an award of $1,800 and a determination of thirty per cent permanent partial disability. Three years later, while visiting a relative, claimant unloaded some heavy sacks of grain and carried them from a truck into a storage building. He was obliged to undergo medical treatment the next day for pain and stiffness in his back. Claimant's application to readjust his previous award was rejected by the Department of Labor and Industries on the ground that he had sustained a new injury while working outside covered employment.[1] The Department's position was upheld by the Board of Industrial Insurance Appeals and the trial court. On appeal, the Washington Supreme Court reversed and remanded. *Held:* If a claimant acts reasonably in light of a disability which has resulted from a previously compensated industrial injury, subsequent aggravation suffered outside covered employment is attributable to that disability. *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 653, 393 P.2d 631 (1964).

In the principal case, the primary industrial injury occurred within covered employment but the secondary, aggravating injury occurred outside covered employment. Two other aggravation fact patterns should be distinguished: First, if a particular industrial injury causes far more serious complications than it would cause normally, due to physical conditions peculiar to the workman, compensation is allowed for all disability if such disability can be medically shown to have resulted directly from the industrial injury.[2] Second, if an industrial injury increases a pre-existing disability which originated independently

[1] WASH. REV. CODE § 51.32.160 (1961): "Aggravation, diminution, or termination. If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated ... the division of industrial insurance, may, upon application of the beneficiary, made within five years after the establishment or termination of such compensation ... readjust ... the rate of compensation...." A claimant seeking to readjust a previous award is required to show by medical evidence based on objective symptoms a percentage increase in the degree of his established disability. Phillips v. Department of Labor & Indus., 49 Wn.2d 195, 298 P.2d 1117 (1956); Moses v. Department of Labor & Indus., 44 Wn.2d 511, 268 P.2d 665 (1954); State *ex rel.* Stone v. Olinger, 6 Wn.2d 643, 108 P.2d 630 (1940). Other states also require comparative evidence of aggravation which shows a percentage increase in the original degree of disability. See 2 LARSON, WORKMEN'S COMPENSATION § 81.33 (1952, Supp. 1964).

[2] See, *e.g.*, Lunday v. Department of Labor & Indus., 200 Wash. 620, 94 P.2d 744 (1939); 1 LARSON, WORKMEN'S COMPENSATION § 13.11, 192.60 (rev. 1964).

of the employment in which the workman's industrial injury arose, compensation is allowed for all disability if the disability can be medically shown to have resulted directly from the industrial injury.[3] The character of the claimant's conduct is immaterial in these two fact patterns because the activating force behind the claimant's entire disability originates within covered employment. However, the problem posed by the fact pattern in the principal case is to determine the limits of compensability when aggravation occurring subsequent to an industrial injury, and arising outside the course of covered employment, allegedly results from the claimant's contributory fault.

The only generally reliable statement about this problem is that "the legal principles involved are not capable of being reduced to some simple unitary formula."[4] Courts have frequently dealt with the problem in the confusing and artificial language of legal causation. For example, in *Matter of Sullivan v. B & A Constr., Inc.*,[5] the claimant had practically lost the use of his leg as a result of two industrial accidents. While driving on personal business, his knee locked, preventing use of the brake. The court held that compensation for the secondary injuries suffered in the auto crash was

> warranted only if . . . the consequent injuries resulted directly and naturally from claimant's prior injuries and the disability thereby produced. . . . If such injuries only remotely caused or contributed to the secondary injury, then claimant is not entitled to compensation; . . . if claimant is to recover, the disability occasioned by the earlier accidents must have been a proximate, not simply a 'but for' cause of his latest mishap.[6]

However, a California court has emphatically stated that reliance upon contributory fault to deny further benefits for subsequent aggravation not arising from covered employment is an example of "atavistic attempts to retain common-law concepts in the compensation field."[7] According to this court, only negligence that is "an intervening cause which itself is the sole and exclusive cause of the ultimate injury"[8] will bar further benefits. The New Hampshire court has based denial of further benefits upon the policy of the workmen's compensation laws to

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[3] See, *e.g.*, Miller v. Department of Labor & Indus., 200 Wash. 674, 682-83, 94 P.2d 764, 768 (1939); 1 LARSON, *op. cit. supra* note 2, § 13.11 at 192.62-.63.
[4] 1 LARSON, *op. cit. supra* note 2, § 13.11 at 192.65.
[5] 307 N.Y. 161, 120 N.E.2d 694 (1954).
[6] *Id.*, 120 N.E.2d at 695-96.
[7] State Compensation Ins. Fund v. Industrial Acc. Comm'n, 176 Cal. App.2d 10, 1 Cal. Rptr. 73, 78 (1959).
[8] *Id.*, 1 Cal. Rptr. at 78.

grant benefits solely for injuries which arise from the course of covered employment.[9]

In the principal case the Washington court propounded a theory of foreseeability drawn from negligence law:

> The test to be applied, in cases such as the present, is whether the activity which caused the aggravation is something the claimant might reasonably be expected to be doing, or whether it is something that one with his disability would not reasonably be expected to be doing.... We cannot... say that because an individual has a thirty per cent permanent partial disability based on a back injury, that he is thereby precluded from doing any lifting, and that any injury sustained from any lifting is not attributable to his prior injury because it is an intervening cause. Whether it was a reasonable thing for this particular claimant to do, is a different question —never considered by the department, the Board, or the trial court."[10]

Although the court stated that testimony of the claimant's physician "clearly met the requirements for reopening for further medical care,"[11] it refused to order the claimant's prior award reopened, taking the position that the compensation authorities disposed of the case incorrectly because no finding was made as to the reasonableness of the claimant's conduct in carrying the heavy sacks of grain. The court therefore remanded the case to the compensation authorities.

In cases like the principal case, it would appear extreme to hold that the character of the claimant's conduct is irrelevant if a medical connection can be shown between the primary injury and the aggravation. Such a holding in a recent California case[12] makes the employer a con-

[9] Neault v. Parker-Young Co., 86 N.H. 231, 166 Atl. 289 (1933).

[10] 64 Wn.2d 653, 658-59, 393 P.2d 631, 635 (1964). A contradiction is revealed when one compares the reasonableness test in the principal case with the Washington court's language in Anderson v. Industrial Ins. Comm'n, 116 Wash. 421, 199 Pac. 747 (1921). In this early case, a workman received a serious axe cut. Although being cared for at work, he insisted upon going home, in spite of extremely cold weather. Evidence showed that his exposure to the cold in his weakened condition made him more susceptible to the pneumonia which caused his death. In allowing an award to his widow, the court said: "There is, of course, no question of contributory negligence or fault involved. The workman's compensation act allows compensation regardless of questions of fault, and the fact that Mr. Anderson may have been imprudent in exposing himself to the weather in his weakened condition does not militate against the right of his widow to compensation for his death." 116 Wash. at 423, 199 Pac. at 748. This language suggests that the workman's own negligence outside employment, which increases the severity of his industrial injury, will never bar a further award for increase in the injury. The reasonableness test in the principal case would require the attempt of the decedent to go home after suffering the axe wound to be "something that the claimant might reasonably be expected to be doing." 64 Wn.2d at 658, 393 P.2d at 635. New York once adopted the *Anderson* approach, Colvin v. Emmons & Whitehead, 216 App. Div. 577, 215 N.Y. Supp. 562 (1926), but apparently has abandoned it. Sullivan v. B & A Constr., Inc., 307 N.Y. 161, 120 N.E.2d 694 (1954). See generally Note, 38 CORNELL L.Q. 99 (1952).

[11] 64 Wn.2d at 656, 393 P.2d at 634. See note 1 *supra*.

[12] State Compensation Ins. Fund v. Industrial Acc. Comm'n, 176 Cal. App.2d 10, 1 Cal. Rptr. 73 (1959).

tinuing insurer of the claimant after an industrial injury has occurred. On the other hand, it would appear equally extreme to hold that any negligent conduct on the part of the claimant will cut the causal link between the primary injury and the aggravation. Such a holding seems to ignore the intent of workmen's compensation acts to abolish common law defenses based upon fault of the employee. The Washington court's "reasonableness" test, though at odds with the policy of granting benefits without regard to fault which underlies workmen's compensation legislation, is preferrable to such confusing artificialities as "proximate cause," "contributory cause," and "independent intervening cause." Ambiguities are inherent in the reasonableness test and semantic difficulties will doubtless be created in its application. But once it becomes clear that an all-or-nothing rule will work injustice either to the claimant who suffers aggravation of an injury sustained within covered employment, or to an employer who must bear the cost of the aggravation, a test based upon the reasonableness of the claimant's conduct seems inevitable.

Dr. Larson has attempted to formulate a comprehensive standard defining the limits of compensability in cases like the principal case.[13] Pointing out that compensability for a work-connected injury is ordinarily governed by the tests "arising out of employment" and "in the course of employment," Larson concludes that compensability in such cases cannot be determined by tests based on causation. He finds it necessary

> to contrive a new concept, which we may for convenience call 'quasi-course of employment.' By this expression is meant activities which, although they take place out of the time and space limits of the employment ... are nevertheless related to the employment in the sense that they are necessary or reasonable activities which would not have been undertaken but for the compensable injury. 'Reasonable' at this point refers not to the method used, but to the category of the activity itself.[14]

To implement this "quasi-course of employment" test, Larson proposes two corollaries:[15] (1) When an aggravating injury arises out of a "quasi-course" activity as when the claimant receives negligent medical treatment for the primary injury or is injured while traveling to a hospital to obtain treatment for the primary injury, the second injury's causal connection to the primary injury can be severed only by

[13] 1 LARSON, *op. cit. supra note* 2, § 13.11, at 192.67-71.
[14] *Id.* at 192.68.
[15] *Ibid.*

the claimant's intentional misconduct which would have been expressly or impliedly prohibited by his employer. (2) If the aggravation does not occur in a "quasi-course" activity, the second injury's causal connection to the primary injury can be severed by *any* intentional or negligent misconduct on the part of the claimant.

A major defect in Larson's "quasi-course of employment" test is reliance upon "express or implied" employer prohibitions. Such prohibitions, as safety rules or regulations against drinking on the job, if wilfully violated, may result in denial or reduction of compensation for injuries arising within covered employment.[16] However, it seems oppressive to rely upon an employer's prohibitions to determine compensability for claimant's later conduct outside the course of employment. To minimize costs, any employer would at least "impliedly" prohibit an injured employee from doing anything in the "quasi-course of employment" which would increase the risk of aggravation.

In the principal case, the claimant's lifting of heavy grain sacks three years after the original injury was not an activity which he would not have been engaged in "but for the compensable injury." Thus, under the second corollary to Larson's test, *any* negligence by the claimant would have cut the causal connection between the primary injury and the subsequent aggravation. Indeed, because only aggravation which occurs in a "quasi-course" activity would be compensable, Larson's test is nearly as restrictive as a test based upon contributory negligence, and represents the harsh all-or-nothing approach which should be avoided.

In the principal case, the Washington court did not make clear whether "reasonable" refers only to the kind of activity in which the claimant was engaged when the aggravating injury occurred, or also to the manner in which the claimant actually performed that activity. The court noted that a person with a disability such as the claimant's could be anticipated to "engage in many . . . activities—including recreation, taking care of his home, helping his neighbors, and in gainful employment—*all commensurate with his existing physical ability.*"[17] Because an activity will be "reasonable" if commensurate with the claimant's existing physical ability, the method by which the claimant attempts to carry out a particular task should also be subject to this test. The court's categories—recreation, care of the home, aiding the neighbors, gainful employment—are too general to be helpful. "Recreation" en-

[16] 1 LARSON, *op. cit. supra* note 1, §§ 31.11, 32.20, 34.31.
[17] 64 Wn.2d at 654, 393 P.2d at 632. (Emphasis added).

compasses a wide range of activities, and "gainful employment" includes jobs requiring no abnormal physical movement as well as work that is very strenuous. At some point within each one of the court's extremely general categories of "reasonable" activities, the boundary must be drawn between reasonableness and unreasonableness of the method chosen by the claimant to carry out the activity.

The ruling in the principal case will present troublesome questions to an attorney representing a claimant whose alleged increase in disability did not occur in covered employment: Does the workman have the burden of proof to show his conduct was reasonable? A claimant does have the burden of proof to establish a medical connection between the primary injury and the aggravation.[18] However, once that connection has been established, the remedial standards of workmen's compensation legislation suggest that unreasonableness of a claimant's conduct should be proved by the compensation authorities or the employer. To what extent will medical testimony be conclusive of "reasonableness," as well as of the relation between the primary injury and the subsequent aggravation? The testimony of the claimant's physician in the principal case indicated that any strain placed on the claimant's back would temporarily aggravate his condition, and the Washington court stated vaguely that "such testimony may have a bearing on whether the claimant acted reasonably."[19] If the claimant, at the time the aggravation is sustained, is engaged in an activity which has been approved by his physician, it is likely that such an activity would be considered "reasonable."[20] On the other hand, if the claimant, at the time the aggravation is sustained, is engaged in an activity which has been forbidden by his physician, it is likely such an activity would be considered "unreasonable." Otherwise medical testimony will probably be confined to medical issues.[21] Because "reasonableness" of claimants' conduct is basically a question to be answered by careful evaluation of the facts and circumstances of each case, the courts may be expected to defer to the judgment of the compensation authorities.

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[18] See note 1 *supra*.

[19] 64 Wn.2d at 659, 393 P.2d at 635.

[20] In State Compensation Ins. Fun v. Industrial Acc. Comm'n, 176 Cal. App. 2d 10, 1 Cal. Rpt. 73 (1959), the claimant, a carpenter who suffered a serious eye injury which caused blurred and double vision, was ordered by his physician to engage in rehabilitative work at home; additional compensation was allowed when he cut off a finger while operating a power tool.

[21] *But cf.* Naillon v. Department of Labor & Indus., 65 Wn.2d 527, 529, 398 P.2d 713, 714 (1965).