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A SIGNIFICANT CHANGE IN THE COLORADO WORKMEN'S COMPENSATION ACT: "ACCIDENTS," "INJURIES" AND HEART ATTACK

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I. INTRODUCTION

In 1963 the Colorado Legislature added a new section to the Workmen's Compensation Act, providing legislative definitions of two key terms in the act — "accident" and "injury." The new section provides:

> Definitions. (1) The term "accident" as used in this chapter shall mean and include one or more determinate act or acts of a traumatic nature, which caused an injury.
>
> (2) The term "injury" or "injuries" as used in this chapter shall mean and include only trauma to the physical structure of the body and such disease or infection as naturally results therefrom. The terms shall not be construed to include disability or death due to natural causes occurring while the employee is at work.[1]

Many observers feel that the new amendment was intended primarily to restrict the possibility of compensation awards in heart attack cases.[2] An analysis of heart attack compensation cases in Colorado (Part II of this paper), and of the statutory changes in light of similar provisions in other states (Part III), indicates that the new statute may not change the compensability of heart attacks, but instead may drastically affect the outcome of cases concededly compensable before enactment.

In order to appreciate the effect of the new amendment on heart attack cases, we must necessarily examine the sometimes tortuous Colorado compensation cases attempting to bring the heart attack within the statutory condition for recovery "that the injury or death [be] . . . proximately caused by accident arising out of and in the course of his employment . . . ."[3]

II. COMPENSATION FOR HEART ATTACK IN COLORADO

A. *Causation*

If a heart attack could not be an injury within the meaning of the Workmen's Compensation Act, it could never be compensable. That simple solution, initially chosen by the Industrial Commission, was rejected by the Supreme Court of Colorado, which said: "By the term 'injury' is meant, not only an injury the means or cause of which is an accident, but also any injury which is itself an acci-

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[1] COLO. REV. STAT., § 81-2-9, Colo. Sess. Laws 1963, ch. 180, §1.

[2] Interview with James H. Murphy, Referee of the Colorado Industrial Commission, December, 1963.

[3] COLO. REV. STAT. § 81-13-2 (1953).

dent."[4] The court added that there is an accident if the "result was unexpected and unintended," and necessarily implied that whether there was an accident is a question of law, and that the Industrial Commission's answer to such question is not binding upon the courts of review.[5]

This first consideration by the Supreme Court of Colorado of the compensability of a heart attack involved the question of whether the injury was caused by an accident, but not whether the accident, if there was one, "arose out of" the employment. In the landmark case of *Ellerman v. Industrial Comm'n*,[6] the Commission ruled that "overexertion," without the presence of an externally produced blow or strain, or abnormal working conditions, as had been present in the *Carroll* case, could not be an "accident." The supreme court came to the rescue of the bereaved claimants, holding that if there were a heart attack due to overexertion, and if that overexertion had arisen out of the employment, and if the attack would not have occurred "save for such employment, then the 'overexertion' was an 'accident.' "[7]

Attempting to supply some guidelines for the resolution of future heart attack cases, the court went on to provide that whether there was an accident was a question of law, while whether the overexertion had arisen out of the employment (causation) was a question of fact, to be determined by the Commission. Furthermore, by remanding the case to the Commission for a determination of whether there had been overexertion arising out of the employment, the court logically implied that whether there was overexertion was a question of fact.

The *Ellerman* case marked the court's first mention of overexertion in discussing compensability of a heart attack. Although it did not there specifically make overexertion a requirement for an award of compensation, it did so subsequently.[8] Because of the court's many determinations of whether there was overexertion in heart attack cases, both prior to its specific requirement of overexertion[9] and after it,[10] there can be no doubt that Colorado follows

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[4] Carroll v. Industrial Comm'n, 69 Colo. 473, 475, 195 Pac. 1097, 1098 (1921).
[5] *Ibid.*
[6] 73 Colo. 20, 213 Pac. 120 (1923).
[7] *Id.* at 22, 213 Pac. at 121.
[8] Industrial Comm'n v. International Minerals and Chem. Corp., 132 Colo. 256, 287 P.2d 275 (1955).
[9] Peter Kiewit Sons' Co. v. Industrial Comm'n, 124 Colo. 217, 236 P.2d 296 (1951); United States Fid. and Guar. Co. v. Industrial Comm'n, 122 Colo. 31, 219 P.2d 315 (1950); Black Forest Fox Ranch, Inc. v. Garrett, 110 Colo. 323, 134 P.2d 332 (1943); Coors Porcelain Co. v. Grenfell, 109 Colo. 39, 121 P.2d 669 (1942); Industrial Comm'n v. McKenna, 106 Colo. 323, 104 P.2d 458 (1940); Wood v. Industrial Comm'n, 100 Colo. 209, 66 P.2d 806 (1937); United States Fid. & Guar. Co. v. Industrial Comm'n, 96 Colo. 571, 45 P.2d 895 (1935); Ellerman v. Industrial Comm'n, 73 Colo. 20, 213 Pac. 120 (1923).
[10] Skinner v. Industrial Comm'n, 381 P.2d 253 (Colo. 1963); University of Denver-Colorado Seminary v. Johnston, 378 P.2d 830 (Colo. 1963); Industrial Comm'n v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962); Watson v. Merritt, 149 Colo. 562, 369 P.2d 989 (1962); Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961); Industrial Comm'n v. Horner, 137 Colo. 368, 325 P.2d 698 (1958); Claimants in the Matter of the Death of Bennett v. Durango Furniture Mart, 136 Colo. 529, 319 P.2d 494 (1957); Industrial Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957).

the minority rule in requiring overexertion, as opposed to mere exertion, as a condition to compensability. Compensation has been granted in cases in which there was no overexertion, but only when some other extraordinary circumstance, such as abnormal working conditions,[11] or, perhaps, externally produced blows or strains to the physical structure of the body, [12] existed. This requirement of something out of the ordinary as a prerequisite to compensability of heart attack cases is, of course, out of line with the requirements for compensability of other kinds of injuries in Colorado.[13]

B. *Overexertion*

Accepting the requirement of overexertion as the rule in Colorado, we might ask, "What if the sufferer normally overexerted himself? Is overexertion only work that is unusual by the sufferer's own standard, or does any work that is unusually heavy by an objective standard amount to overexertion, whether it be usual or unusual?" Surprisingly, the court appears regularly to have followed the theory that the presence of overexertion is to be determined by the subjective test. Although it has specifically said this only once,[14] it has consistently based its reasoning on the requirement of overexertion as measured by the subjective test.[15] In the only case that might indicate otherwise an externally produced blow was involved,[16] and the court has held that this in itself is sufficient to establish a presumption that the heart attack arose out of the employment.[17]

Whether, as a practical matter, the Industrial Commission is inclined to find the fact of overexertion more easily in cases involving habitually hard working victims[18] or whether the court is inclined to reverse a commission finding of no overexertion in such cases cannot be ascertained from the cases. One might suspect that the nature of the work has some influence in light of the harshness of the everexertion rule coupled with the subjective test. In fact, however, in a case that is difficult to reconcile with the general trend of Colorado cases in more aspects than one, the court reversed the Industrial Commission's award although the victim of the heart attack clearly had been involved in an exertion that was unusual to his employment. In this case, *United States Fid. & Guar. Co. v.*

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[11] Carroll v. Industrial Comm'n, 69 Colo. 473, 195 Pac. 1097 (1921).

[12] *Cf.* Industrial Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957).

[13] Central Sur. & Ins. Corp. v. Industrial Comm's, 84 Colo. 481, 271 Pac. 617 (1928).

[14] United States Fid. & Guar. Co. v. Industrial Comm'n, 96 Colo. 571, 45 P.2d 895 (1935).

[15] See Industrial Comm'n of Colo. v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962); Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961); Claimants in the Matter of the Death of Bennett v. Durango Furniture Mart, 136 Colo. 529, 319 P.2d 494 (1957); Industrial Comm'n v. Havens, 136 Colo. 111, 314 P.2d 698 (1957); Coors Porcelain Co. v. Grenfell, 109 Colo. 39, 121 P.2d 669 (1942); Wood v. Industrial Comm'n, 100 Colo. 209, 66 P.2d 806 (1937).

[16] See Industrial Comm'n of Colo. v. Havens, 136 Colo. 111, 314 P.2d 698 (1957).

[17] Industrial Comm'n of Colo. v. Horner, 137 Colo. 368, 325 P.2d 698 (1958); Industrial Comm'n of Colo. v. Hesler, 149 Colo. 592, 370 P.2d 428 (1962).

[18] See Peter Kiewit Sons' Co. v. Industrial Comm'n, 124 Colo. 217, 236 P.2d 296 (1951).

Industrial Comm'n,[19] the claimant, driver and guide of a tourist agency's car, was the victim of a mechanical breakdown on Lookout Mountain. The car caught fire, which the claimant quickly put out with sand he scooped from the mountainside. After finding a telephone, telephoning twice to his office for a replacement car, and waiting several hours, he suffered a non-fatal heart attack. Although the court reversed the Commission's award because the claimant's medical evidence as to whether the accident arose out of the employment was couched in terms of possibilities, the case is still difficult to reconcile with the trend of Colorado cases. Perhaps the statement that the court applies a subjective test of overexertion must be modified to the extent that while the court will not use an objective test in favor of a heart attack victim, it will do so to the detriment of the victim.

If this conclusion is correct, the *United States Fid. & Guar. Co.* case is clearly out of line with the general philosophy of compensation cases, which the court has thus expressed: "[The Workmen's Compensation Act] is highly remedial in its purpose and must be given a liberal construction to accomplish its beneficial purposes."[20] It might be well to reiterate that the requirement of overexertion itself, besides being the minority rule[21] and inconsistent with the philosophy cited above, is inconsistent with the Colorado rule in cases involving other types of injuries that "to constitute an accidental injury, it is not necessary that there should be anything extraordinary occurring in or about the work itself. . . ."[22]

In reference to the possibilty of distinguishing the *United States Fid. & Guar. Co.* case on any basis other than the one used, it might be well to point out that the fatal or nonfatal nature of the Colorado cases has never altered the applicability of the law involved. Neither, for that matter, has the particular medical nature of the heart attack, except insofar as the question of causation is involved, *i.e.*, whether the particular type of heart attack in question is likely to have been due to the employment.[23]

Our consideration has indicated that if overexertion, abnormal working conditions, or any externally produced blow to or strain in the physical structure of the body (other than the heart attack itself) is present, the accident will be deemed to have arisen out of the employment, barring the existence of such complicating questions as whether the victim recovered from the extraordinary circumstance before the alleged accident, or whether there was an

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[19] 122 Colo. 31, 219 P.2d 315 (1950).

[20] Industrial Comm'n v. Havens, 136 Colo. 111, 119, 314 P.2d 698, 702 (1957).

[21] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.30 (rev. ed. 1962).

[22] Central Sur. & Ins. Corp. v. Industrial Comm'n, 84 Colo. 481, 490, 271 Pac. 617, 621 (1928).

[23] See Skinner v. Industrial Comm'n. of Colo., 381 P.2d 253 (1963); Huff v. Aetna Ins. Co., 146 Colo. 63, 360 P.2d 667 (1961); Marrote v. State Compensation Ins. Fund, 145 Colo. 99, 357 P.2d 915 (1961); Industrial Comm'n of Colo. v. Daniels, 124 Colo. 329, 236 P.2d 291 (1951); Peter Kiewit Sons' Co. v. Industrial Comm'n, 124 Colo. 217, 236 P.2d 296 (1951); Black Forest Fox Ranch v. Garrett, 110 Colo. 323, 134 P.2d 332 (1943); Coors Porcelain Co. v. Grenfell, 109 Colo. 39, 121 P.2d 669 (1942); Industrial Comm'n v. Wetz, 100 Colo. 161, 66 P.2d 812 (1937).

intervening cause. Of what, then, does overexertion, abnormal working condition, or blow or strain consist?

These being questions of fact,[24] and determined by the Commission according to the singularities of each case, it is impossible to delineate accurately the conditions that will satisfy the Commission or the court. Of course, any exertion that is unusual to the victim's work should meet the test for overexertion.[25] But the difficulty of foreseeing the result of litigation revolving around this problem can be easily understood through a comparison of two

[24] Ellerman v. Industrial Comm'n, 73 Colo. 20, 213 Pac. 120 (1923).
[25] United States Fid. and Guar. Co. v. Industrial Comm'n, 96 Colo. 571, 45 P.2d 895 (1935).

cases. In *Industrial Comm'n. v. Wetz*,[26] in which the decedent, a city garage mechanic, incurred his heart attack on an unusually cold morning, apparently while attempting to start a truck by cranking its engine, the state supreme court reversed the Commission to find overexertion as a matter of law. Yet, in *Industrial Comm'n. v. Hesler*,[27] in which the decedent, a highway worker, died of a coronary thrombosis after having considerable difficulty starting a road grader on a very cold morning, the court affirmed the Commission's denial of an award because "starting the road grader, even on cold mornings, was a 'normal part of the decedent's duties.' "[28] In both cases there was evidence of a prior heart condition. There was no indication in the *Wetz* case that starting cold motors had been anything but normal to the decedent's duties, but the *Hesler* court did not attempt to distinguish the two cases.

In the highly publicized case of *University of Denver, Colo. Seminary v. Johnston*,[29] the supreme court was able to avoid the very difficult question of whether overexertion could be found in the case of a hard-working law school dean who suffered a heart attack while making a public address after several days of extraordinarily strenuous activities by finding that the speech was not in the course of employment.

III. "ACCIDENT" AND "INJURY" DEFINED BY STATUTE.

By defining the terms "accident" and "injury," the Colorado Legislature has put into some doubt the status of heart attacks as industrial accidents. Whether the overexertion rule and the subjective test will continue to be the Colorado approach depends upon the manner in which the courts construe the new statute. To shed some light on the question the new statute will be discussed first in a general sense (non-heart attack cases) examining the construction of similar statutes in other jurisdictions and then as applied to heart attack cases. The authors hope this approach will not only illustrate the alternative interpretations that have been used but that it will aid the courts in construing the new Colorado statute.

A. "Accident" in Other Jurisdictions

The requirement that an injury be accidental in nature to merit workmen's compensation has been adopted either legislatively or judicially by all but four states: California, Iowa, Massachusetts and Rhode Island.[30] The Federal Employers Compensation Act omits the requirement.[31]

The Colorado act includes the accidental prerequisite in the section which sets forth the conditions precedent to recovery:

> The right to compensation provided for in this chapter, . . . shall obtain in all cases where the following conditions occur: . . . (3) Where the injury or death is proximately caused by

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[26] 100 Colo. 161, 66 P.2d 812 (1937).
[27] 149 Colo. 592, 370 P.2d 428, 431 (1962).
[28] *Id.* at 600, 370 P.2d at 431.
[29] 151 Colo. 465, 378 P.2d 830 (1963).
[30] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.10 (rev. ed. 1962).
[31] 5 U.S.C. § 751 (Supp. Pamph. 1951-1961).

accident arising out of and in the course of his employment, and is not intentionally self inflicted.[32]

It appears that the legislature, in adopting the 1963 amendment, deemed it necessary to modify the judicial construction that has been placed upon the terms "accident" and "injury" by the Supreme Court of Colorado. This brings us to the basic philosophical conflict among the jurisdictions which have adopted the "accident" requirement. The principal difference in application has been whether the *sine qua non* of compensation was that the cause of injury be accidental or that the result be so. Colorado clearly followed the accidental result theory until the new definition was adopted in 1963.[33]

Two indispensable ingredients are found in the usual workmen's compensation statute — unexpectedness and a definiteness of time, place, or cause. Professor Larson breaks down the potential component parts of the accident concept under the usual statutory language to:

1. Unexpectedness
   (a) Of cause
   (b) Of result
2. Definite time
   (a) Of cause
   (b) Of result.

If both parts of both elements are present, we have the typical industrial accident; if all the elements are missing, we find the typical occupational disease, the cause being the characteristic harmful condition of the particular industry.[34] The voluminous litigation in the area results from the absence of one or more of the component parts. Prior to the enactment of the 1963 Amendment, the Supreme Court of Colorado allowed compensation in non-heart attack cases upon the showing of an accidental result, that is, the unexpected consequence of routine exertion arising out of and in the course of employment.

A case in point, *Wesco Elec. Co. v. Shook*,[35] is worthy of examination, particularly as it may have been a factor in the accident amendment of the Colorado statute. An electrician, in previous good health, suffered severe pain in his back and loss of full use of a leg when he was required to assume an unnatural position in performing his assigned work for a period of several days. The disability subsequently was described as a herniation of an intervertebral disc. The court reversed the denial of compensation, holding that the electrician suffered an accident. In effect, the unexpected result itself was the accident. Whether the same ruling would obtain under the present statute depends upon the judical construction placed upon the statutory language.

Colorado is the eighth state to provide a statutory definition of the term "accident." The other seven states are Alabama,[36]

[32] COLO. REV. STAT. § 81-13-2 (1953).
[33] Central Sur. & Ins. Corp. v. Industrial Comm'n, 84 Colo. 481, 271 Pac. 617 (1928).
[34] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 37.20 (rev. ed. 1962).
[35] 143 Colo. 382, 353 P.2d 743 (1960).
[36] ALA. CODE tit. 26, § 262(i) (1958).

Florida,[37] Idaho,[38] Louisiana,[39] Missouri,[40] Nebraska,[41] and Nevada.[42] All but Colorado have included in their definition of "accident" the language "an unexpected or unforseen event happening suddenly" or words of similar import. Four states, Alabama, Missouri, Nebraska, and Nevada, require that the event must occur "suddenly and violently." Florida and Idaho require only that event occur "suddenly." Louisiana employs the language "suddenly or violently." None of them have utilized language in any way identical to that of Colorado: "One or more determinate act or acts of a traumatic nature, which caused an injury."[43]

Examination of cases in these seven jurisdictions indicates that Florida and Idaho adhere to the accidental result theory, while the others require the showing of an accidental cause. The Florida court, allowing recovery to a cook who injured her arm while lifting a can of waffle batter, stated:

> It is the unexpected and unintentional effect of the strain or exertion that is covered by the Workmen's Compensation Law as an injury "by accident," and a literal showing of an "accident" such as a slip, fall or misstep is *not* a prerequisite to recovery.[44]

Similarly, the Idaho statute, which states:

> "Accident" as used in this law, means an unexpected undesigned, and unlooked for mishap, or untoward event, happening suddenly and connected with the industry in which it occurs, and which can be definitely located as to time when and place where it occurred, causing an injury, as defined in this law,[45]

has been construed as requiring only an accidental result. The Idaho court has said: "nothing more is required than that the harm that plaintiff has sustained shall be unexpected. It is enough that causes themselves known and usual, should produce a result which on a particular occasion is neither designed nor expected."[46] In another case, the same court held: "an 'accident' occurs in doing what the workman habitually does if any unexpected, undesigned, unlooked-for or untoward event or mishap, connected with or growing out of the employment, takes place."[47]

These decisions are clearly in accord with the philosophy underlying the *Shook* case, discussed earlier, but we submit that such result must be contra to the legislative purpose in enacting Colo. Rev. Stat. § 82-2-9. Had the legislature intended that the Colorado court continue to follow the accidental result theory, it would have had no reason to amend the act.

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[37] FLA. STAT. § 440.02 (19) (1959).
[38] IDAHO CODE ANN. § 72-201 (1949).
[39] LA. REV. STAT. § 23:1021 (1) (1951).
[40] MO. ANN. STAT. § 287.020 (2) (Supp. 1960).
[41] NEB. REV. STAT. § 48-151 (2) (Reissue 1960).
[42] NEV. REV. STAT. § 616.020 (Supp. 1959).
[43] COLO. REV. STAT. § 51-2-9, Colo. Sess. Laws 1963, ch. 180, § 1.
[44] Gray v. Employers Mut. Liab. Ins. Co., 64 So. 2d 650, 652 (Fla. 1953).
[45] IDAHO CODE ANN. § 72-201 (1949).
[46] Aldrich v. Dole, 43 Idaho 30, 249 Pac. 87 (1926).
[47] Laird v. State Highway Dept., 80 Idaho 12, 323 P.2d 1079, 1086 (1958).

B. *The Legislative Intent*

This brings us to the question of just what the legislature did have in mind when it enacted the new provision. Unfortunately, no records are retained of the legislative debate concerning the legislation in Colorado. Although individual members of the legislature are willing to discuss their private understanding of the meaning of a statute, they are not competent to offer legally relevant testimony as to the intent of the legislature.

Perhaps some indication of the intent of the legislature may be gained by comparing the draft of Senate Bill No. 255 as originally introduced with the form of the bill ultimately enacted. The probative value of this "before and after" approach is dubious, but courts frequently make use of such comparisons to ascertain the intent of the legislature.

The proposed form of COLO. REV. STAT. 81-2-8 (1) contained the language "a single or determinate act," which was amended to read "one or more determinate act or acts." This revision may have been in recognition of the fact that some injuries are the cumulative result of repetitious causes, no one of which could have caused the injury by itself. The Supreme Court of Idaho expressed itself on that subject by stating: "The accident, need not occur at one instant, but . . . there may be repetitious causes all relatively slight which culminate and result in as serious and fatal an injury as though the disabling or lethal blow or incident occurred at one time."[48]

On the other hand, this "straw that broke the camel's back" proposition has been considered and flatly rejected by the Washington court, which held: "Cumulative effect, however injurious, is noncompensable unless it constitutes industrial disease."[49]

The phrase, "of a sudden, tangible, and traumatic nature," in the proposed bill was amended to "of a traumatic nature." Whether the words "sudden" and "tangible" were deleted because they were considered redundant or because the legislature considered the possibility of compensating an intangible trauma of some sort remains to be seen. At the least, the door appears to be open for cases of "emotional trauma," which we shall discuss later.

The construction to be placed upon the words "of a traumatic nature" will be of the greatest importance in the determination of the compensability of future cases. The state of Washington, although not providing a statutory definition of "accident," has defined the term "injury" as: "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."[50] The Washington court has held that the word "traumatic" means " 'of or pertaining to trauma' " while "trauma" is defined as " 'any injury to the body caused by violence.' "[51] In a subsequent case, involving the meaning of the entire phrase, the

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[48] Brown v. St. Joseph Lead Co., 60 Idaho 49, 87 P.2d 1000, 1004 (1938).
[49] Haerling v. Department of Labor and Industries, 27 Wash. 2d 403, 301 P.2d 1078, 1080 (1956).
[50] WASH. REV. CODE, § 51.08.100 (1961).
[51] Metcalf v. Department of Labor and Industries, 168 Wash. 350, 11 P.2d 821, 823 (1932).

same court held that sudden and tangible happening, of a traumatic nature, means that there must be a definite and particular happening, which can be fixed at point of time, to which injury can be attributed.[52]

Washington does not, however, require that the violence must emanate from an external source entirely. Thus an employee's death from a cerebral hemorrhage, caused by the bursting of a blood vessel as the result of hardened arteries and overexertion in sawing a log to clear a road, was compensable within the statutory definition. The court likened the cerebral hemorrhage to a dislocated shoulder, torn tendon, or sprained wrist. [53]

The Washington court has also allowed compensation for heart conditions. The elements which must be established in order to connect death or disability from a heart condition with the employment of a decedent or claimant are an acute heart condition with death or disability resulting therefrom, and a shock or exertion, either great or slight, occurring in the course of employment, by which the heart was subjected to strain beyond its capacity to withstand.[54]

Other jurisdictions have considered the legal definition of "trauma." The North Carolina court defined "trauma" as "injury to the body inflicted by some form of outside force and divided into four categories: (1) Physical trauma: caused by physical violence; (2) Thermal trauma: caused by heat or cold; (3) Electrical trauma: caused by electrical energy; (4) Chemical trauma: caused by poisons,"[55] while the Ohio court has stated that "the medical trauma . . . is not such trauma as is contemplated by the Workmen's Compensation Law."[56]

We feel that it may be significant that the legislature amended the proposed language of COLO. REV. STAT. 81-2-9 (2), which read: "The term 'injury' or 'injuries' as used in this chapter shall mean and include only *physical violence to the physical structure of the body* and such disease or infection as naturally results therefrom." (Emphasis supplied). "Physical violence" was deleted and the

[52] Higgins v. Department of Labor and Indus., 27 Wash. 2d 816, 180 P.2d 559 (1947).
[53] *Ibid.*
[54] Cyr v. Department of Labor and Indus., 47 Wash. 2d 92, 286 P.2d 1038 (1955).
[55] Henry v. A. C. Lawrence Leather Co., 234 N.C. 126, 66 S.E.2d 693 (1951).
[56] Burns v. Employers Liab. Ass'n, 31 N.E.2d 690, 692 (Ohio Ct. App. 1938).

word "trauma" substituted, raising the inference that the word "trauma" was to be given a broad construction. The proposed form of the same section continued: "The terms shall be construed to include disability or death due to emotional trauma, traumatic neurosis, or natural causes occurring while the employee is at work."

In the final form, "emotional trauma" and "traumatic neurosis" were deleted and "occupational diseases" added, so that only death due to natural causes and occupational diseases are not to be construed as "injuries." In our opinion, therefore, both emotional trauma and traumatic neurosis may be held to be "injuries" compensable within the meaning of the statute, assuming that a causal relationship can be shown. The two concepts may be distinguished if we consider emotional trauma as mental stimulation causing a nervous injury, and a traumatic neurosis as a physical trauma causing a nervous injury. Thus, a traumatic neurosis may increase or extend a claimant's disability following an accident; the neurosis itself is compensable.[57] Since an emotional trauma lacks initial physical contact it might be more difficult to reconcile with the act. But as we mentioned in the discussion of the deletion of the word "tangible," it may have been the intent of the legislature to allow compensation for emotional trauma. Thus, where injury is sustained as the result of fright or excitement, resulting in hysterical paralysis or blindness, a claim for compensation would be well worth pursuing.[58]

All of the above mentioned amendments were made by the Committee on Labor between February 19, 1963, and March 21, 1963.[59] It is unfortunate that no records were maintained of the legislative debate concerning them.

C. Accidental Cause — The New Colorado Rule

In our opinion, it is certain that Colorado will no longer be able to follow the accidental result theory. Therefore we shall examine some of the cases in accidental cause theory jurisdictions. Missouri appears to be typical.

The Missouri statute defines the term "accident" as follows: "The word 'accident' as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault and producing at the same time objective symptoms of an injury."[60] In 1932 the Missouri court construed the word "event" as synonymous with "occurrence," including all of the steps or connected incidents from the first cause to the final result, and stated that an event may include both cause and effect.[61] The same court in 1942 held that:

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[57] 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 42.21-42.24 (rev. ed. 1962).

[58] But see Classen v. Mountain States Tel. & Tel. Co. 387 P.2d 264 (Colo. 1963). A Texas court has interpreted a statute defining injury as damage to the physical structure of the body as allowing recovery for emotional trauma. See Bailey v. American General Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955).

[59] Senate Journal, Forty-fourth General Assembly, First Regular Session, State of Colorado, 1963 pp. 272 and 562-563.

[60] MO. STAT. ANN. § 287.020 (2) (Supp. 1960).

[61] Rinehart v. F. M. Stamper Co., 27 Mo. App. 653, 55 S.W.2d 729 (1932).

> . . . [T]he injury itself does not constitute the "event" or "accident" . . . [within this section.] [W]here the employee's injury results from his exertion of force in lifting or pulling upon some inanimate object, there must be some unusual occurrence, such as a slip, or fall, or abnormal strain, in order to bring the case within the contemplation of the act [citations omitted].[62]

Similar language was used in another case: "Injury . . . due to necessary and customary physical exertion incident to the normal duties of the workmen . . . is not an 'accident' within the Workmen's Compensation Law."[63] The death of an employee caused by overexertion in the course of his employment, however, is an "accident" compensable under the Missouri act.[64] We feel that "event" may be deemed synonymous with "act or acts" in the Colorado statute.

The word "suddenly" as used in defining an accident has been held not to mean "instantaneous," so that an "accident" may consist of a single occurrence or a series of occurrences resulting in an injury.[65] As discussed above, in our opinion the same should hold true in Colorado.

Although the Missouri court has consistently denied compensation for injuries arising in the normal course of employment, when an injury is sustained as the result of an unexpected and abnormal strain while the injured employee is engaged in doing something beyond and different from his normal routine, and not as a result of orderly natural causes, an "accident" results within the meaning of the act and is compensable. This has been true even though the force which caused the abnormal strain emanated entirely from physical exertion by the injured employee and not from sources external to his body and was not accompanied by any slip or fall.[66]

This distinction is apparent in the Missouri hernia cases. Compensation was denied to a workman who suffered a hernia while lifting an oil barrel in the normal manner,[67] and to a ditch digger who was throwing a shovel of mud in the usual manner, without slipping or falling,[68] but was allowed to a workman who received his hernia while removing a lug on an auto tire by an unusual method.[69]

It appears from a perusal of the cases in the accidental cause jurisdictions that any deviation in the normal work routine or any abnormal strain or exertion will be sufficient to show an "accident." The tendency appears to be to award compensation where there is the slightest justification, but it is absolutely mandatory in the accidental cause jurisdictions that the justification be shown. We expect this to be the rule in future Colorado cases as well.

Although this construction makes recovery by an injured em-

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[62] Kendrick v. Sheffield Steel Corp., 166 S.W.2d 590, 593 (Mo. Ct. App. 1942).
[63] Smith v. General Motors Corp., Fisher Body, St. Louis Division, 189 S.W.2d 259, 263, 264 (Mo. 1945).
[64] Delille v. Holton-Seelye Co., 334 Mo. 464, 66 S.W.2d 834 (1933).
[65] Vogt v. Ford Motor Co., 138 S.W.2d 684 (Mo. Ct. App. 1940).
[66] Williams v. Anderson Air Activities, 319 S.W.2d 61 (Mo. Ct. App. 1958).
[67] Higbee v. A. P. Green Fire Brick Co., 191 S.W.2d 257 (Mo. Ct. App. 1945).
[68] Keller v. Bechtel, McCone, Parsons Corp., 174 S.W.2d 925 (Mo. Ct. App. 1943).
[69] State *ex rel.* United Transports v. Blair 352 Mo. 1091, 180 S.W.2d 737 (1944).

ployee more difficult and appears to work to the benefit of the employer, it may have unusual results where the injury is proximately caused by the employer's negligence. A 1960 Nevada decision[70] presents a case in point.

The Nevada act provides: "'Accident' shall be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."[71]

The plaintiff, who sought to avoid the exclusive remedy of the act, was employed in a printing shop which was left unheated during an unseasonably cold period. She became chilled, suffered severe chest pains, was treated by her doctor and hospitalized. Subsequently, she was treated for pleurisy, then ideopathic pericarditis, and then for systemic lupus erythemotosis. Medical testimony was received that her being subjected to the cold while at work had triggered the disease's process. As she was unable to work as steadily as before she became ill, her earnings were reduced from $100.00 to $35.00 per week.

The employer relied upon a medical parallel: an injured employee had developed systemic lupus erythemotosis following exposure to the sun, which can also trigger the disease, and had been awarded compensation under the Longshoremen's and Harbor Worker's Compensation Act.[72]

The Nevada court rejected this precedent. It found that the federal act did not require the same standard of proof of an "accident" as did Nevada, and that the facts in the case did not constitute an accident within the meaning of the Nevada act, lacking the elements of "suddenly and violently." Nor was the plaintiff's illness an occupational disease, as members of the general public were as likely to contract the disease as the plaintiff. Therefore, the disease was not compensable under the act and the plaintiff had the right to pursue a common law remedy against the employer. The court then obligingly found that the evidence disclosed that the employer had violated two sections of the Nevada safety code, requiring the employer to provide a safe place to work and not to permit the employee to work in an unsafe place, violation of which constituted negligence per se.[73] It thus appears that an act that is susceptible to too narrow a construction might well fail to provide as much protection to the employer as the legislature intended.

D. *The New Act and Heart Attack Cases*

The amendments to the Workmen's Compensation Act enacted in 1963 were initiated primarily by the Denver Chamber of Commerce and Colorado employers who insure themselves.[74] Republi-

[70] Smith v. Garside, 76 Nev. 378, 355 P.2d 849 (1960).
[71] NEV. REV. STAT. § 616.020 (Supp. 1959).
[72] Pan American Airways, Inc. v. Willard, 99 F. Supp. 257 (S.D.N.Y. 1951). The Act is 44 Stat. 1424 (1927), 33 U.S.C.A. §§ 901-50 (1957).
[73] Compare Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957) where the Supreme Court of Colorado made a similar determination in a case involving a loaned employee.
[74] Interview with Harold Clark Thompson, counsel for the State Compensation Insurance Fund and secretary-treasurer of the American Association of State Compensation Insurance Funds.

can and Democratic legislators and others who worked on the bill, both in committee and on the floor, agree that the amendments, Senate Bill 255, were sponsored by Republican members of the legislature with the general intent of "tightening up" the requirements for compensability.[75] The bill contained other provisions, but one of the most controversial, and the one most opposed by union lobbyists, was the redefinition of "accident" and "injury" or "injuries."[76]

Despite an attempt by members of the state senate's labor committee to kill the bill, it was brought to the floor of the senate and passed, albeit amidst considerable turmoil. After debate, an amended bill was passed by both houses in an atmosphere of bipartisanship.

House member William Myrick, a Republican, led the opposition to the bill, and introduced the words pertaining to "trauma" in the redefinitions of both "accident" and "injury." His intent was to leave such injuries as heart attacks "compensable to the same extent they were without the redefinitions."[77]

Others are not so certain of the result of the redefinitions. They think the supreme court conceivably may find that the new terms either rule out compensability of heart attacks entirely, or make any heart attack compensable, whether or not it was induced by overexertion.[78]

The new definition, by equating "accident" with one or more determinate traumatic acts causing an injury, could be read to include heart attacks caused by overexertion if overexertion is viewed as a trauma definite as to time and space. Ordinary exertion, however, is a priori untraceable to a specific event and could never be "one or more acts of a traumatic nature" unless the word "trauma" is open to judicial redefinition. Referees of the Industrial Commission will treat future heart attack cases just as they have treated past ones, unless and until the supreme court tells them to do otherwise.[79] While the Commission thinks the legislators intended to change the result of some heart attack cases, it does not think the words adopted in the bill will carry out that purpose.[80]

In contrast to the Commission's opinion of legislative intent, however, at least one Republican proponent of the bill states that the redefinitions, as finally approved, were neither intended to affect the compensability of heart attacks, nor will they have that result, except, possibly, in "unforeseeable and exceptional cases."[81]

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[75] Interview with State Senator Joseph B. Schieffelin, Republican, in December, 1963; interview with Representative Ted Rubin, Democrat, in December, 1963.

[76] Colo. Sess. Laws 1963, ch. 180, §1.

[77] Interview with Representative William Myrick, Republican, in December, 1963.

[78] Booklet, *News and Exhibits of The American Association of State Compensation Insurance Funds*, by Harold Clark Thompson, Secretary-Treasurer, July 1, 1963.

[79] Interview with James H. Murphy, Referee of the Colorado Industrial Commission, December 1963.

[80] *Ibid.*

[81] Interview with State Senator Joseph B. Schieffelin, Republican, in December, 1963.

IV. Conclusion

Upon a careful consideration of the new Colorado enactment, in light of prior heart attack cases and cases from other jurisdictions involving non-heart attack "injuries," one becomes painfully aware that the Colorado legislators may be on the wrong track. If the legislative intent was to decrease the range of compensation for heart attacks, such purpose may not have been accomplished by defining "accident" and "injury." Furthermore, a more rational approach to heart attack cases could easily be accomplished by a statute dealing specifically with this type of injury, as the legislature has done for hernias.[82]

If the legislative intent, on the other hand, was to "tighten up" the requirements of the act[83] the new provisions may have gone too far. By requiring traumatic acts of a determinate nature (accidental cause) and eliminating from the concept of "injury" natural causes, the new amendment creates an aura of doubt in cases which were formerly compensable as a matter of routine. For example, the following types of cases were usually compensated prior to the amendment—are they no longer compensable?: (1) traumatic neurosis, including "compensation neurosis;"[84] (2) injuries due to sunstroke, heat exhaustion, frostbite and freezing;[85] (3) injuries due to being struck by lightning;[86] (4) injuries due to bacterial infection contracted by, e.g., hospital employees peculiarly exposed.

The new amendments, as can be easily seen, do more than "tighten up"; they remove from consideration by the Industrial Commission whole areas of cases previously compensated. The legislature probably did not consider whether this would open up the area of tort suits against employers[87] which, of course, is one possibility resulting from removal of certain types of cases from the act. More likely than not, however, the injuries defined out of the act by the new amendment will go uncompensated. This result, unfortunately, flies in the face of trends toward increasing the scope of workmen's compensation coverage thereby spreading the risk of occupational injury instead of letting the loss lie where it may fall.

A final observation is in point. The Supreme Court of Colorado, at this writing, has not passed upon the new provisions, although several cases are pending. In addition there is a strong movement to repeal or re-amend the provisions in question as soon as the January 1965 legislature convenes. If this is so, the court may refrain from interpreting the act until the legisature has acted. If the court does consider the cases, however, we submit the language in other jurisdictions interpreting similar phrases will be very persuasive precedent.

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[82] Colo. Rev. Stat. § 81-12-11 (1953).

[83] See note 28 *supra*.

[84] Arvas v. McNeil Corp., 119 Colo. 289, 203 P.2d 906 (1949); National Lumber Creosoting Co. v. Kelly, 101 Colo. 535, 75 P.2d 144 (1937).

[85] Gates v. Central City Opera House Ass'n, 107 Colo. 93, 108 P.2d 880 (1940). Compare Wood v. Industrial Comm'n, 100 Colo. 209, 66 P.2d 806 (1937).

[86] Aetna Life Ins. Co. v. Industrial Comm'n, 81 Colo. 233, 254 Pac. 995 (1927).

[87] See notes 73 and 76 *supra*.