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Edward J. Scheunemann

THE OCCUPATIONAL DISEASE DISABILITY ACT FROM THE STANDPOINT OF THE CLAIMANT

EDWARD J. SCHEUNEMANN
of the Denver Bar

The Colorado Occupational Disease Disability Act[1] at first blush appears to be a humanitarian measure modeled after the accident compensation acts and designed to spread the risks and compensate the losses from diseases arising out of and in the course of employment. A disabled workman seeking compensation for an industrial disease under the Act, however, is likely to be thoroughly disillusioned the first time he consults a lawyer, for he will learn that the Act is extremely limited in coverage, that the burden of proof he must assume is virtually unbearable, and that his rights are rigidly confined by harsh procedural provisions.

The Act has been in effect for slightly over five years. In that period only an insignificant number of claims have been heard by the Industrial Commission, an even fewer number have been compensated, and the Colorado Supreme Court has not been called upon to decide a single case arising under the Act.

Substantially all of the compensation acts covering accidents, and a majority of the state laws covering occupational diseases, provide for compensation for any accident or disease arising out of and in the course of the employment whether the disability is total or partial, temporary or permanent.[2] The Colorado Occupational Disease Disability Act is restricted, however, in three important respects: *First,* not all diseases contracted as result of employment are covered but only a specific list of 21 selected diseases; *Second,* not all disabilities resulting from the selected diseases are compensable but only total disability; and *Third,* even total disability resulting from a covered disease is not compensable unless the disability is of 30 days duration or longer—or, in the case of silicosis and asbestosis—is total and permanent.[3]

Although the Colorado Act is above average among those listing specific diseases in the number listed, there are a number of recognized and fairly common occupational diseases which are not included such as anthrax, tularemia, various dermatoses, and conditions arising from muscular fatigue or continued and repeated small trauma, sometimes called synovitis or tenosynositis.[4] A very significant omission is the failure to list any of the diseases

[1] COLO. STAT. ANN., c. 97, § 23 (1935).
[2] United States Department of Labor, Bulletin No. 125.
[3] COLO. STAT. ANN., c. 97, § 456 and 458 (1935).
[4] In some states this condition has been compensated as an accident since it is traumatic in origin, but the Colorado Industrial Commission has held that it does not come within the Workmen's Compensation Act.

which arise out of work with radioactive materials and irradiating apparatus.[5]

New types of diseases resulting from occupational exposure are constantly being recognized, and with the continual change in materials used and working conditions in industry it is difficult to see how any act which relies solely on a specific list of diseases can provide effective coverage. The modern trend in such legislation is clearly away from the listing of specific diseases and toward general coverage under which any disease which can be shown to have its origin in the employment is compensable.[6] The National Conferences on Labor Legislation and other representative groups, such as the International Association of Industrial Accident Boards and Commissions, have repeatedly stressed the importance of general coverage instead of coverage limited to specified diseases.[7]

ONLY TOTAL DISABILITY COMPENSABLE

Even though the disabled workman may have one of the specific diseases listed in Section 9 of the Act, he may not be entitled to compensation because only total disability is compensable. Moreover, "disability" is defined in such a way in the Act as to give rise to endless litigation as to its meaning. The courts have customarily taken into consideration a claimant's ability to perform the work he was doing when he was injured and his training and experience to do other kinds of work in measuring disability under the Workmen's Compensation Act.[8] It is at least open to debate whether the courts could consider such factors in determining whether there is total disability under the Occupational Disease Act, for Section 4 (b) defines "total disability" as "the event of becoming physically incapacitated . . . from performing any work for remuneration or profit." Taken literally, the definition could be construed to mean that any man who is capable of selling newspapers on a street corner or sitting at a desk cannot be considered totally disabled.

From the standpoint of society there is far greater need for effective compensation for partial disability than for total disability because it is so much more common. In the accident field for instance, the 21st Report of the Colorado Industrial Commission reveals that there were ten times more cases of partial disability compensated during the period July 1, 1948 to June 30, 1950 than cases of total disability. Moreover, many occupational diseases, such as silicosis and lead poisoning, frequently result in

[5] The British Parliament in 1948 found the prevalence of these diseases sufficiently important to justify a separate act, the Radioactive Substances Act, 11 & 12 Geo., VI, c. 37.

[6] Note 2. *Supra.*

[7] Acee, *State Workmen's Compensation Legislation in* 1947, MONTHLY LABOR REVIEW, Oct. 1947.

[8] Globe Indemnity Co. v. Industrial Commission, 67 Colo. 526, 186 Pac. 522 (1920).

years of partial disability before the workman becomes totally incapacitated. During those years he will find it impossible to pass a medical examination for employment in practically any large industry in Colorado. Frequently, his condition bars him from any work for which he can qualify by training or experience—yet under the Colorado Act he is not entitled to any compensation whatever for the loss of his livelihood. The Colorado act in this respect too is more restrictive than those of a majority of the states having occupational disease legislation.[9]

Finally, even though the workman may be totally disabled from a disease listed in the Act, he still may not be entitled to compensation because the disability lasts less than 30 days or is total for less than 30 days and then becomes partial.[10] A workman under the Colorado Act who is totally disabled and loses his entire earnings for 6 weeks would be entitled to a total compensation award of $34.00. The amount involved hardy justifies the filing of a claim much less the tremendous expenditure of time, expense, and effort necessary to make the proof required under the Act in a contested case. Here again, in requiring such an extreme "waiting period," Colorado is out of step with a majority of the other states.[11]

RIGOROUS REQUIREMENTS OF PROOF

Even in the extremely limited number of cases where the workman is totally disabled from one of the listed diseases and where his total disability is of more than 30 days duration, he may well find that he is denied compensation because he cannot meet the rigorous requirements of proof set out in the Act.

He is required to prove that there is a direct causal connection between the disease and the conditions under which his work is performed; that the disease was a result of exposure occasioned by the nature of his employment and can be traced to the employment as a proximate cause; and that the disease was incidental to the character of the business and not independent of the relation of employer and employee. These requirements are not unusual and, in practice, amount to the requirement in accident cases that the disability arise out of and in the course of employment. However, the Occupational Disease Act adds a specific additional requirement—that the claimant "establish each and every fact by competent *medical* evidence."[12] This restriction of the type of proof to one particular kind of evidence seems inconsistent with the humanitarian purposes for which compensation acts are usually enacted.

Furthermore, he is required to prove that the disability resulted within 120 days from the last "injurious exposure"—or in

[9] U. S. Department of Labor, Chart VI—*Workmen's Compensation—Silicosis* (1946).
[10] COLO. STAT. ANN., c. 97, § 456 (1935).
[11] Note 9, *supra*.
[12] COLO. STAT. ANN., c. 97, § 451 (a) (1935).

the case of silicosis and asbestosis—within 2 years.[13] This provision undoubtedly eliminates a large number of cases which would otherwise be compensable. In cases of pulmonary fibrosis produced by exposure to toxic materials, for instance, the disability may not result until many months or even years after the exposure which introduced the toxic materials into the lungs.[14] The same principle is true in cases of lead poisoning and benzol poisoning which act slowly upon the blood supply, eventually producing an anemia which is totally disabling and sometimes fatal.[15] Similar unrealistic and unnecessary limitations are contained in the act with respect to death claims.[16]

This element of proof is further complicated by the definition of "injurious exposure" in Section 4 (g) of the Act as "that concentration of toxic materials which would, independently of any other cause whatsoever (including the previous physical condition of the claimant) produce or cause the disease for which claim is made." The definition is open to varying interpretations. One of them is that a man with an inherent or acquired susceptibility to certain toxic materials should be denied compensation unless he can show that the concentration was sufficiently great to have caused the disease in a man without such susceptibility. Another is that compensation should be denied in every case unless the claimant can show by scientific samples that there were sufficient toxic materials present in his working atmosphere to satisfy the so-called "standards of tolerance" established by expert medical testimony or published by such departments as the Department of Labor with respect to specified materials.

Proof Out of Workman's Financial Reach

This type of proof is utterly beyond the reach of the average employee. In silicosis cases, for example, the proof necessary to show a sufficient concentration of free silica in the atmosphere requires the taking of dust samples from the air at the working level by expert operators using complicated and expensive machinery for weeks and even months, and the analysis of such dust samples to determine the number of dust particles per cubic foot of air and the number of particles of free silica in the dust are measured down to the fineness of twenty-five thousands of an inch (1 micron) in size.[17] Not only does the average disabled workman lack the financial resources to make such extremely expensive and complicated tests, but it is doubtful whether he has the legal

[13] Colo. Stat. Ann., c. 97, § 451, (c. and e.) (1935).
[14] Sappington, *Medico-Legal Phases of Occupational Diseases,* p. 112 (1939).
[15] See discussion of report by Dr. Paul Reznikoff in *Discussion of Industrial Accidents and Diseases,* Bulletin 105, U. S. Dept. of Labor pp. 91-112. Sappington, *op. cit.* n. 14.
[16] Colo. Stat. Ann., c. 97, § 452 (1935).
[17] One of the standards of "allowable concentrations" suggested by the Department of Labor for the guidance of employers in preventing silicosis, for instance, is 5,000,000 particles of free silica dust (under 10 microns in size) per cubic foot of air. *Anthraco-Silicosis Cause and Prevention,* Industrial Health Series No. 2, U. S. Department of Labor.

right to install such equipment and operators on his employer's premises in order to do so. Even then, he lacks the necessary control over the materials and methods used in his employment to make sure that the tests are truly representative of the conditions under which he was exposed, and, of course, he doesn't even know that such tests are necessary until after he has become totally disabled and has left the working atmosphere.

Some courts have recognized the injustice of this requirement of proof and have held that where the claimant shows that he is exposed to a toxic material and produces medical evidence that he is suffering from an occupational disease which results from such exposure he has a *prima facie* case, and the burden of proof then shifts to the employer to present evidence based on scientific tests of the atmosphere.[18] In simple cases where an employee has worked only for one employer and in one job such a prima facie case can be made because a medical expert can justifiably infer that the employee was "injurisously exposed" when he knows that the toxic material was present and that the employee has the disease which he could not have contracted elsewhere. However, when the employee has worked for several different employers or in several different jobs for one employer it is often impossible, on the basis of medical examination alone, to infer on conclude where the "last injurious exposure" occurred.

Other states have attacked the problem more directly by providing that any exposure to a toxic material is presumed to be injurious unless the employer proves otherwise.[19] In the light of the realities of occupational diseases, and in consideration of the employer's possession and control of the proof, this would seem to be a logical place for the burden of proof.

Time Limitations on Filing Disheartening

Perhaps the most disheartening provision of all to the disabled workman (and his attorney) is the limitation upon the time for filing claims. Section 11 of the Act provides that compensation is forever barred unless written claim is filed within 60 days after the date of disablement, or in the case of benzol and its deritive, 90 days, or in the case of silicosis and asbestosis, one year.[20] These limitations would seem to be reasonable enough in the case of accidents where in the usual circumstances the employee is immediately aware of the occurrence of the accident and the resultant disability, and is on notice that he should do something to obtain compensation. This is not true in many cases

[18] Oldman Boiler Works v. McManigal, 58 F. Supp. 697 (N.Y. 1944); Harbison-Walker Refractories v. Harmon, 114 Ind. App. 144, 51 N.E. 2d 398 (1943); UTA-Carbon Coal Co. v. Commission, 104 Utah 567, 140 P. 2d 649 (1943); Walter Bledsoe & Co. v. Baker, 83 N.E. 2d 620 Ind. App. (1949).

[19] 1939 Ariz. Code, 56-1213 (c) with respect to Silicosis; Laws of N. Y. '47 Supp. p. 1156.

[20] Colo. Stat. Ann., c. 97, § 453 (a) & (B) (1935).

of occupational disease. It is a characteristic of many such diseases that they are slow in onset and gradually cumulative in effect. There is often nothing in the external circumstances to indicate to the employee that he has incurred an occupational disease, and in many instances the disability is understandably attributed to non-compensable conditions such as colds, rheumatism, or arthritic. Moreover, even where the employee seeks medical advice and treatment he may not discover that he has a disease which is compensable until after the limitation for filing the claim has expired, because it is also characteristic of many occupational diseases that they are difficult to diagnose until after repeated medical examination and treatment.[21] Miss Mary Donlon, Chairman of the New York Workmen's Compensation Board and president of the International Association of Industrial Accident Boards and Commissions, has expressed the problem as follows:[22]

> Requirements for prompt claim filing which are fair enough in accident cases, are often unsuitable or manifestly unfair in cases where occupational disease develops slowly and where symptoms are latent for such long periods that diagnosis relating disability to occupational exposure often is made too late in the case history to permit claimants to file their claims within a short claim filing period.

Some states have sought to solve this problem by basing the limitation period on the "first distinct manifestation" of the disease; others use the first time upon which the employee knows or has occasion to know that he is suffering a disability from an occupational disease.[23] Both of these techniques, however, raise difficult problems of proof. Perhaps the most satisfactory method is that used in the Workmen's Compensation Act of Colorado where specific limits are provided for the filing of claims but with discretion in the Industrial Commission to excuse late filings where reasonable grounds exist and where the employer's rights are not thereby prejudiced.[24]

No Act at All May Be Preferable

The Colorado Occupational Disease Disability Act is so limited in coverage, so restrictive in application, and so harsh in its procedural provisions as to give rise to the possibility that a disabled workman and society in general would be better off if the Act was entirely repealed. At least before passage of the Act, the workman had the possibility of a common-law remedy against his employer. Under Section 8 of the Act, that remedy is now barred. The language of that section is so sweeping as to abolish the employer's liability:

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[21] Sappington. *op cit.*, Note 14, ch. IV.
[22] Note 15. *supra.*
[23] 1949 Gen. Stats. of Conn., § 7442 · 1949 Wisc. Stats., § 102.12.
[24] Colo. Stat. Ann., c. 97, § 363 (1935).

> on account of any disease or injury to health, or on account of death from any disease or injury to health, in any way contracted, sustained or incurred by such employee in the course of or because of or arising out of his employment, except only an injury compensable as an injury by accident under the provisions of the Workmen's Compensation Act of Colorado.

Taken at face value this section purports to wipe out common law liability even for diseases which are not compensable under the Act. The net result of five years of operation of the Act appears to be complete protection to employers and their insurance from any liability for occupational diseases whatever at the expense of the disabled workmen.

THE EXTENT TO WHICH TAFT-HARTLEY HAS SUPERSEDED STATE LABOR LAWS

PHILIP HORNBEIN, JR.
of the Denver Bar

When Congress has "occupied a field," state legislation therein is precluded since "a concurrent power in two district sovereignties to regulate the same thing involves ***** a moral and physical impossibility."[1] The Taft-Hartley law[2] is a comprehensive measure governing labor relations which affect interstate commerce. Many states, including Colorado, now have labor relations laws of their own, and the question of whether state or federal law is controlling in a particular case is arising with increasing frequency.

There are three types of cases in which this problem may occur: (1) representation cases—*i. e.* proceedings for the selection of a collective bargaining representative; (2) proceedings to authorize the execution of a union-shop agreement; (3) actions, either civil or criminal, growing out of statutory violations which are termed "unfair labor practices."

Of course there is no problem presented in any case where Taft-Hartley can definitely be ruled out of the picture because interstate commerce is not "affected."[3] However, the nebulous character of the concept of interstate commerce is well known and the power of the National Labor Relations Board and other federal agencies has, in recent years, been extended to activities formerly considered to be purely intrastate in character.[4] Still the courts reiterate that there is a line beyond which the federal

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[1] *Passenger Cases* 7 How. 283, 399 (1849); U. S. Constitution, Article VI.

[2] 61 Stat. 136, 29 U. S. C. sec. 141 *et seq.* (1947).

[3] The National Labor Relations Board can act only in cases "affecting commerce" which is defined to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." *Ibid*, sec. 2(7).

[4] *E.g.* Wickard v. Filburn, 317 U.S. 111 (1942); N.R.L.B. v. United Brotherhood of Carpenters, 181 Fed. 2d 126 (6th Cir. 1950). *Cf.* Groneman v. International Brotherhood of Electrical Workers, 177 Fed. 2d 995 (10th Cir. 1949).