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# AIR HYGIENE FOUNDATION OF AMERICA, Inc.

*Legal Series, Bulletin No. 1, Part v*



## A Survey of the Statutes and Court Decisions Respecting Occupational Disease from Air Pollution

(For the Confidential Information of members. Not for reproduction, wholly or in part.)

PITTSBURGH, PENNSYLVANIA

AUGUST 10, 1936

# LEGAL SURVEY

PART v

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of States of the United States.

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

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## *FOREWORD*

This part (v) of Bulletin No. 1, Legal Series, Air Hygiene Foundation of America, contains an analysis of the statutes and court decisions, affecting occupational disease, of nine States.

Part i was a resume of workmen's compensation laws as they *affect occupational* disease, and common laws and liabilities; part ii included detailed reports on Alabama to California; part iii covered Colorado to Kansas, and part iv Kentucky to Montana.

The remaining sections will be published soon.

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Thackeray Ave. and O'Hara St.,
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August 10, 1936.

# CHAPTER XXIX
# NEBRASKA

I. **Workmen's Compensation Act.**

1. **Statutes.** Compiled Statutes of Nebraska, 1929, Sec. 48-101 through Sec. 48-161.

2. **Administration.** By an Act effective May 25, 1935, the administration of the Workmen's Compensation Act is vested in the Nebraska Workmen's Compensation Court, consisting of three judges appointed by the Governor for terms of six years each. One judge must be an attorney-at-law, another a representative of employers, and the third a representative of labor affiliated with the American Federation of Labor. Communications may be addressed to the Court, at Lincoln, Nebraska.

3. **Scope of the Act.** The Act is divided into five parts.

**Part I: Compensation by Action at Law—Modification of Remedies (Secs. 48-101 to 48-108).**

These sections provide a right of recovery by an employee against the employer "When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawful imputed negligence of the employer is the natural and proximate cause, * * *" unless the employee was guilty of wilful negligence.

In such action, the employer is denied the common law defenses of contributory negligence, negligence of fellow servant, and assumed risk.

But, if the employer elects to become subject to the provisions of Part II, and to pay compensation as therein required, he is not barred the common law defenses. Occasion to apply this rule would arise only when the employee has refused to operate under Part II, thus preserving his right of action under Part I.

By Sec. 48-105, the above provisions are made applicable to any claim for death of an employee arising under the wrongful death statutes of Nebraska.

**Part II: Elective Compensation (Secs. 48-109 to 48-115).**

Sec. 48-109:

"If both employer and employee become subject to Part II of this article (48-109 to 48-115), both

shall be bound by the schedule of compensation herein provided, which compensation shall be paid in every case of injury or death caused by accident arising out of and in the course of employment, except accidents caused by, or resulting in any degree from wilful negligence, as hereinafter defined, of the employee." (Bold face type ours.)

Sec. 48-110:

"When employer and employee shall by agreement, express or implied, or otherwise as hereinafter provided, accept the provisions of Part II of this article (48-109 to 48-115), compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer, according to the schedule hereinafter provided, in all cases except when the injury or death is caused by wilful negligence on the part of the employee; and the burden of proof of such fact shall be upon the employer." (Bold face type ours.)

Sec. 48-111:

"Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Part II of this article (48-109 to 48-115), and an acceptance of all the provisions of Part II of this article, and shall bind the employee himself, and for compensation for his death shall bind his legal representatives, his widow and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency."

The Act covers all but a few private employees.

Election by both employer and employee, to become subject to Part II, is presumed; but either may specifically elect not to be bound by Part II.

Parts III, IV, and V (Secs. 48-116, 48-160) contain the general and miscellaneous provisions, in large part administrative, usually found in Workmen's Compensation Acts.

Prior to May 25, 1935, the Act specifically excluded "occupational disease" from its terms. By amendment effective May 25, 1935, a rather ambiguous provision was added to Sec. 48-152, which apparently is intended to make compensable occupational diseases peculiar to the smelting or metal refining industries.



Sec. 48-152 (b) is quoted next below, with the amendment of 1935 enclosed with brackets:

"Throughout this act, the following words and phrases as used therein shall be considered to have the following meaning, respectively, unless the context shall clearly indicate a different meaning in the construction used: * * * (b) The word 'accident' as used in this act, 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 time objective symptoms of an injury. The term 'injury' and 'personal injuries' shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. **The said terms shall in no case be construed to include occupational disease in any form, (except occupational diseases which arise out of and during the course of employment and are peculiar to the smelting or metal refining industries and which are contracted by workmen employed in said industries and disability commencing during the period of employment or disability commencing within two years subsequent to the termination of said employment),** and shall not be construed to include any contagious or infectious disease contracted during the course of employment, or death due to natural causes, but occurring while the workman is at work. If an employee receives an injury, which, of itself, would only cause permanent partial disability, but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall only be liable for the permanent partial disability caused by the subsequent injury. 'Death' when mentioned as a basis for the right to compensation, means only death resulting from such violence and its resultant effects occurring within three hundred and twenty-five weeks after the accident. * * *" (Bold face type ours.)

No court construction of the 1935 amendment has been found.

The maximum compensation under Part II for total disability is the payment, for 300 weeks, of $15 weekly and thereafter $10 weekly for life; for temporary partial disability 300 weeks at $15 weekly; for permanent partial disability the amount payable for temporary partial disability until the extent of the permanent disability is ascertained, and thereafter as per schedule, not to exceed 225 weeks at $15 per week; and for death $150 for burial expenses, plus weekly payments of $15 for a period of not to exceed 325 weeks (Secs. 48-121, 48-122). The employer is also liable for reasonable medical and hospital expenses (Sec. 48-120).

An employer may insure his liability under Part II, or carry it himself, upon complying with the statutory requirements (Sec. 48-146).

An employee must give notice of an injury as soon as practical after the happening thereof and make a claim within six months after the same, except that, where death occurs, the claim may be made within six months after the death (Sec. 48-133). A claim is barred unless, within one year after the accident, either the parties have agreed as to the amount of compensation or a petition has been filed; where death occurs, the time is extended to one year after the death (Sec. 48-138).

If an employee subject to Part II files a claim with, or accepts any payment from, the employer or from the latter's insurer on account of a personal injury, or makes any agreement, or submits any question to the court under Part II, such constitutes a release to such employer of any action at law which the employee may have arising from such injury (Sec. 48-149).

4. **Court Construction.** By the express provisions of the Act, an injury or death resulting from an occupational disease is not compensable thereunder unless such disease is peculiar to and contracted in the course of employment in the **smelting or metal refining industries.** If however the disability results from a disease proximately caused by an accident, i. e., an unexpected or unforeseen event happening suddenly or violently, with or without human fault, and producing at the time objective symptoms of an injury, compensation will be granted. (Sec. 48-152).

Although no cases have been found involving an injury resulting from breathing noxious dusts, the following cases are included to show the situations wherein the courts have found accidental injuries to have been involved.

In **Kanscheit v. Garrett Laundry Co., 101 Neb. 702, 164 N.W. 708 (1917),** compensation was granted where the death of an employee resulted from a heat stroke arising out of and in the course of employment in defendant's laundry.

In **Blair v. Omaha Ice & Cold Storage Co., 102 Neb. 16, 165 N.W. 893 (1917),** the plaintiff, after six months' employment in the freezing room of defendant's ice plant, was transferred to the boiler room, where he worked under high temperature. The next week he was again put to work at certain pumps in the freezing room. Water dripped upon him; he became very cold; and, at the end of the week, as a result of the exposure, he contracted sciatic rheumatism. The court denied compensation for the disability because there was no event which happened suddenly and violently, producing at the same time objective symptoms of an injury, and no violence to the physical structure. The court also declared that this was not much different from the ordinary case where a man who has been engaged in indoor work for a time does outdoor work in cold weather and contracts a severe cold.



**Van Vleet v. Public Service Co., 111 Neb. 51, 195 N.W. 467 (1923),** involved a claim under the Act for death allegedly caused by the inhalation of gas in the course of employment by the defendant in making general repairs and in installing gas service. During four years' employment, the deceased had been quite severely gassed some seven or eight times. On November 1, 1921, while working underground, he was overcome by gas and had to be dragged out into the open air; and again on February 1st following, he had a similar experience. Thereafter his health declined rapidly until he was forced to cease work on March 1st and go to his home, where he remained until his death on March 18, 1922. The evidence showed that gassing in a mild form was not uncommon among those employed to do the work which deceased was doing, but that gassing to the extent of producing unconsciousness was very uncommon. In awarding compensation, the court said:

> "The fact that the accident occurred while the employee was in the performance of duties which subjected him to the danger of being the victim of an occupational disease does not convert the accident into an ordinary occurrence incident to the employment, nor the deleterious effects thereof upon the body of the employee into an occupational disease, even though the symptoms are identical, for the very obvious reason that the law awards compensation for accidental injuries, regardless of their character; and disease which is fairly attributable to an accident, and death resulting therefrom, is compensable, even though without the occurrence of the accident such disease would fall within the class occupational; otherwise, effect could not be given to the statute; it is the accident, not the disease, which is compensated."

In **Skelly Oil Co. v. Gaugenbaugh, 119 Neb. 698, 230 N. W. 688 (1930),** compensation was awarded claimant for disability resulting from a strain, when, at the time, the claimant was suffering from an occupational disease which contributed to his disablement. The court said that it was sufficient to show that the injury and pre-existing disease combined to produce disability, and that it was not necessary to prove that the injury accelerated or aggravated the disease in order to satis-

fy the requirement that the accident arose out of the employment.

II. Other Statutes.

1. Labor—Ch. 48 (Sec. 48-201 through Sec. 48-515).

A. Child Labor—(Sec. 48-301 through Sec. 48-313).

Sec. 48-301 prohibits the employment of children under fourteen years of age in many places, including any mercantile institution, store, office, hotel, laundry, manufacturing establishment, workshop or factory, etc.

Sec. 48-302 provides that no child between fourteen and sixteen years of age shall be employed in the above-listed establishments without an employment certificate.

Sec. 48-310 limits the number of hours which persons under the age of sixteen years shall be employed in the above establishments.

Sec. 48-313 prohibits the employment of children under the age of sixteen years in any work which, by reason of the nature of the work, or place of performance, is dangerous to life or limb, or in which its health may be injured or morals may be depraved.

B. Health and Safety Regulations—(Sec. 48-401 through Sec. 48-420).

Sec. 48-403:

> "If in any of the aforesaid places," (factory, mill, workshop, mercantile or mechanical establishment), "any process is carried on by which dust or fumes are caused, which may be inhaled by the persons employed therein, or if the air should become exhausted or impure, there shall be provided a fan or other such mechanical device as will substantially carry away all such dust or fumes or other impurities, subject to the approval of the department of labor." (Bold face type ours.)

Sec. 48-404:

> "All the aforesaid places shall be kept clean * * *, and shall be ventilated and kept in a sanitary condition. The department of labor or any person authorized by the department may require such changes or addition to be made in any of the aforesaid places as will promote the best measures of sanitation."

Sec. 48-405:

> "All persons, companies or corporations operating any factory or workshop where grinding wheels or grinding machines, emery wheels or emery belts of any description are used, either solid emery, leather covered, felt, canvas, linen, paper, cotton or wheels or belts rolled or coated with emery or carborundum or cotton wheels used as buffs, shall, when deemed necessary by the Department of Labor, provide such wheels or belts with blowers or similar apparatus, which shall be placed over, beside or under such wheels or belts in such a manner as to protect the person or persons using the same from particles of the dust produced and caused thereby, and to carry away the dust arising from or thrown off by such wheels or belts while in operation directly to the outside of the building or to some receptacle placed so as to receive and confine such dusts; Provided, grinding machines upon which water is used at the point of grinding contacts and other wheels used for tool grinding shall be exempt from the provisions of this article."



Sec. 48-407:

> "Each and every wheel and grindstone shall be fitted with a sheet or cast iron hood or hopper, of such form so adjusted that the dust or refuse therefrom will fall or be thrown into such hood or hopper by centrifugal force, and be carried off by the current of air into a suction pipe."

Sec. 48-408 specifies dimensions for suction pipes in relation to the size of the grinding wheels.

Sec. 48-412 provides that all safety appliances prescribed by this article shall be subject to the approval of the Department of Labor. This Department is empowered to formulate such safety codes and rules of standard as it deems necessary, in order that all employments and places of employment shall be in all respects so constructed, equipped, arranged, operated, and maintained as to provide reasonable and adequate protection to the lives, health, and safety of all persons employed therein. The section also provides for hearings for the adoption of such rules and regulations, for periodical inspection of the employments, and an appeal for those persons who are dissatisfied with the decisions of the Department of Labor.

Sec. 48-418:

> "Every person operating a plant where machinery is used who shall violate any of the provisions of this article, shall be liable in damages to any person injured, as a result thereof, or to the heirs of any person who shall have died as a result thereof."

Sec. 48-419:

"The continuance by any person in the employ of any such operator shall not be deemed an assumption of the risk of such employment."

Sec. 48-420 provides that the violation of the provisions of this article constitutes a misdemeanor, punishable by fine.

C. Safety Codes.

Pursuant to the authority of Sec. 48-412, the Department of Labor of Nebraska has issued a set of rules known as "Safety Codes." Attention is called to the following sections of those rules.

Rule 54 provides in part:

"(a) Employers shall furnish protectors of a type suitable for the work to be performed in the following processes or operations, or those of similar hazard:

"* * *

"2. Processes where protection from dust and small flying particles is required. Examples: Scaling and grinding of metals, stone dressing, and some woodworking operations.

"* * *

"4. Processes where protection from gases, fumes and liquids is required. Examples: Handling of acids and caustics, dipping in galvanizing tanks and some japanning operations.

"5. Processes where protection from an excessive amount of dust and small flying particles is required. Example: Sand blasting.

"* * *

"(b) Employers shall furnish protectors upon application of employees working in the following processes or operations, or those of similar hazard.

"1. Operations where protection from dust and wind is required. Examples: Automobile driving, locomotive driving and firing, and electric spot and butt welding, where there is no exposure to radiant energy.

"* * *."

Rule 56:

"Every workroom in which people are regularly employed, and in which any machinery or apparatus is operated generating steam, vapors, excessive heat, fumes or dust that is injurious to the health of the workers, shall be ventilated by an approved method of natural or mechanical ventilation, or both, as may be necessary to maintain proper and sufficient ventilation, proper degrees of temperature and humidity and to reduce excessive heat at all times during working hours.

"The mechanical means of ventilation, local or general, shall consist essentially of the following:

"A method of exhausting the air and vapors from the workroom through hoods, pipes and ducts located in such a manner and embracing the machinery or apparatus generating fumes, vapors, dust or radiating excessive heat, as will most effectively remove same. Such hoods, pipes and ducts to be connected to exhaust fans, which shall be kept running constantly while fumes, vapors, dust or excessive heat is being generated."



2. Civil Procedure—Ch. 20.

Sec. 20-1151. In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury.

III. Common Law Liability.

The decision in Wiseman v. Carter White Lead Co., 100 Neb. 584, 160 N. W. 985 (1916), indicates that, in Nebraska, a right of action exists in favor of an employee to recover for injury or death resulting from an occupational disease caused by the inhalation of dust-polluted air in the course of employment so long as it is not in the smelting or metal refining industry. That case was an action at law to recover for injuries resulting from lead poisoning caused by the inhalation of poisonous fumes and dusts. The plaintiff alleged that the place of employment was dangerous to employees, and that he was unaware of the danger and had not been warned thereof. The defendant, besides pleading a general denial, alleged that the plaintiff was guilty of contributory negligence and had assumed the risk of his employment. The jury returned a verdict of $2,500 for the plaintiff. The plaintiff testified that he knew nothing about the disease of lead poisoning; that no one told him about such a disease; and that he knew the room was dusty and dirty, but was unaware of any danger.

The Supreme Court affirmed the decision, in plaintiff's favor, on the ground that there was sufficient evidence to justify the jury's finding that the plaintiff was sent to work under dangerous conditions without sufficient warning of the latent danger of his employment, and also that the defendant knew plaintiff

to be unexperienced in such work. As to the plaintiff's assumption of risk, the court said that he did not have to show entire ignorance of the latent danger to which he was exposed but that he was entitled to a verdict if he satisfied the jury that, although he had some knowledge of the dangerous character of the employment, he did not understand or appreciate its full nature or extent.

The law as established in this case was followed in **Grover v. Aaron Ferer & Sons, 122 Neb. 755, 241 N. W. 539 (1932).** The plaintiff therein brought an action at law alleging that, during five weeks' work in the defendant's metal plant, he contracted an occupational disease known as "lead poisoning." The jury rendered a verdict in defendant's favor in the lower court, and that verdict was affirmed for want of error. The court sustained an instruction to the jury to the effect that, if the injury was the result of a risk ordinarily incident to the performance of such work as the plaintiff was doing, or if you find that his injuries resulted from dangers which were open, obvious and apparent to him or one of his understanding, or were known by him, or in the exercise of ordinary care should have been known by him, then the plaintiff cannot recover and the verdict should be for the defendant.

The Grover case above was decided before the effective date of the recent amendment to the Workmen's Compensation Act, which provides for compensation for injury or death resulting from occupational diseases which are peculiar to the smelting or metal refining industries.

By Sec. 49-101, the common law of England is adopted and declared to be the law in Nebraska.

IV. **Miscellaneous Matters of Interest.**

1. **Statute of Limitations—Ch. 20.**

Under Sec. 20-207, an action for personal injury must be brought within four years after the cause of action shall have accrued. Where death occurs, Sec. 30-810 provides that the action must be commenced within two years after the death.

2. No official survey has been made of dust hazards in employments in Nebraska, and at the present time no bills are pending in the Legislature with respect to such hazards.



# CHAPTER XXX

# NEVADA

I. **Workmen's Compensation Act.**

1. **Statutes. Nevada Compiled Laws, 1929, Secs. 2680-2731.**

2. **Administration.** The Act is administered by the Nevada Industrial Commission, which is composed of three persons, each of whom holds his office for a term of four years. The Governor appoints two of the commissioners and designates one as chairman and the other as ex-officio labor commissioner. The third is appointed by the Industrial Commission Board, which consists of the Governor, Attorney Governor and Inspector of Mines. Communications may be addressed to the Commission at Carson City, Nevada.

3. **Scope of the Act.** The Act provides compensation for **personal injury or death by accident** (Secs. 2680 and 2680 (b)) and does not make any references to diseases, occupational or otherwise.

It covers practically all private employers and their employees (Sec. 2688) and is elective as to both. An employer is presumed not to have elected to be bound by the Act unless he gives proper notice of an election to accept (Sec. 2680 (c)), whereas an employee of an employer who has elected to accept is presumed to have elected to accept compensation thereunder until he gives notice to the contrary (Sec. 2683).

If an employer does not elect to be bound by the Act, he loses the defenses of assumed risk, negligence of fellow servant, and contributory negligence, except where wilful, in actions against him **for personal injury or death by accident.** Moreover, there is a presumption that the injury was the first result growing out of the negligence of the employer and that such negligence was the proximate cause of the injury; in such case, the employer has the burden of rebutting the presumption of negligence (Secs. 2680 (b) and 2685). If the employee of an employer who has elected to be bound by the Act rejects its provisions, there is no presumption of negligence and the common law defenses are available to the employer, except that the defense of assumed risk is lost where the employer fails to provide safety devices required by statute or rule, or violates any rule or regulation relating to the safety of employees (Sec. 2683 (b)).

The only method of providing compensation is through a state-managed fund into which the employer pays a percentage of pay rolls. This fund is administered by the Nevada Industrial Commission (Sec. 2702). Compensation cannot be paid by the employer directly to the employee.

Notice of an injury must be given to the Commission within thirty days after the happening of the accident, or, in case of death, within sixty days after the death. The claim must be filed within ninety days after the happening of the accident, or, in case of death, within one year after the death (Sec. 2716).

Sec. 2683 states:

> "The rights and remedies provided in this act for an employee on account of an injury shall be exclusive of all other rights and remedies of such employee, * * * at common law or otherwise on account of such injury; * * *"

Since the Act covers only accidental injuries, this section may very well be construed to be ineffective as to those causes of action not compensable under the Act. No court decisions on this point can be cited.

If a workman is injured because of the absence of a safeguard required by statute, rule or regulation, the employer will be liable to the Nevada Industrial Commission for a penalty of from $300 to $2,000. This is not so where the employee, or a fellow workman to his knowledge, removed the protection without order from the employer; under these circumstances, the penalty will be reduced 25% (Sec. 2720).

4. **Court Construction.** We find no decisions which discuss the applicability of the Act to disease and no constructions of the Act of sufficient importance to justify their inclusion in this report.

## II. Other Statutes.

### 1. Employment of Minors.

Sec. 1047 provides that it is unlawful to employ any child under fourteen years of age in any business whatever during the hours in which the public schools are in session.

Sec. 1048 prohibits the employment of children under sixteen years of age in connection with the preparation of any composition in which dangerous or poisonous acids are used; manufacture of paints, colors or white lead; dipping, drying or packing matches; manufacture of goods for immoral purposes; or in any mine, coal breaker, quarry, smelter, ore-reduction works, etc.; or in any other employment declared by the



State Board of Health to be dangerous to life or limb, or injurious to the health or morals of children under the age of sixteen.

Sec. 1051 prohibits the employment of children in connection with glass furnaces, smelters, or ore-reduction works, in the outside erection and repair of electric wires, in the running or management of elevators, etc.; or in any employment declared by the State Board of Health to be dangerous to the lives or limbs, or injurious to the health or morals of children under the age of sixteen years.

Sec. 1056 provides the penalty for a breach of these provisions.

### 2. Protection of Health of Employees.

Sec. 2802:

> "Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein, and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operation and processes as are reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employees."

Sec. 2803:

> "No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life and safety of such employees, and no such employer shall maintain any place of employment that is not safe."

Sec. 2805 provides that an employee shall not remove safeguards.

Sec. 2806 makes it the duty of the Industrial Commission:

> (1) To declare and prescribe safety devices, safeguards and other means of protection for safety of employees;
>
> (2) To fix reasonable standards and prescribe reasonable orders for the adoption, installation, use, maintenance and operations of safety devices, etc.

Sec. 2809 provides that a failure to comply with the safety provisions constitutes a misdemeanor.

3. Mines and Mining.

Sec. 4229 forbids the use of gas engines underground, except engines of less than eight-horsepower, at specified depths, which also comply with enumerated exhaust requirements.

Sec. 4241 provides that mine owners must furnish sufficient ventilation and also an adequate system of circulating the air.

Sec. 4295:

> "It shall be unlawful for any owner, operator or person in charge of any underground mine to cause to be drilled or bored by machinery a hole or holes in any stope or raise in ground that causes dust from drilling, unless said machinery is equipped with a water-jet or spray or other means equally efficient to prevent the escape of dust; provided, that when water-jets or sprays are used, water free from pollution with organic or other noxious matter, shall be furnished."

Sec. 4296 makes it unlawful for an employee not to use such appliance as is required by the previous section.

Sec. 4297: A violation of either of the two prior sections constitutes a misdemeanor punishable by fine or imprisonment, or both.

Sec. 4299:

> "Every corporation, company, owner or operator of a mine in this state shall equip all chutes from which dusty ore or rock is taken with a sprinkler or other device with which to effectively dampen said ore or rock to prevent the escape of dust into the air during removal, providing that whenever in the opinion of the inspector of mines the installation of such device in any property is impractical he shall have the power to exempt such property."

Sec. 4302: A failure or refusal to install the device under the previous section is a misdemeanor punishable by fine or imprisonment, or both.

4. Civil Practice—Personal Injuries—Action for.

Sec. 9196:

> "Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another



> person or corporation responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages."

Sec 9197:

> "That every common carrier engaged in trade or commerce in the State of Nevada and every mine and mill owner and operator actually engaged in mining, or in milling or reduction of ores, in the State of Nevada, shall be liable to any of its employees, or, in case of death of such employee, to his personal representative * * * for all damages which may result from the negligence of the officers, agents, or employees of said common carrier or mine or mill operator, or by reason of any defect or insufficiency due to their negligence in its cars, appliances, machinery, track, roadbed, ways, or works. * * * ."

Sec. 9198:

> "That in all actions hereinafter brought against any common carrier or mine or mill owner and operator to recover damages for personal injuries to or death of an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and the negligence of the employer, or its officers, agents or employees was gross in comparison. All questions of negligence and contributory negligence shall be for the jury."

III. Common Law Liability.

We find no helpful decisions as to whether or not there is a common law right of action in Nevada for ailments due to polluted air, negligently allowed to exist in a place of employment.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

Under Sec. 8524, "an action to recover damages for the death of one caused by the wrongful act of another" must be brought within two years. By virtue of Sec. 8534, such action may be brought within one year after the death even though the total time would thus be extended beyond two years.

No specific provision is made as the time within which an action for personal injury must be brought, but it is assumed that such action falls within the four-year class covered by Sec. 8527.

2. Legislation and Surveys.

Inquiries directed to the state departments do not develop any recent surveys with respect to occupational disease or any proposed legislation with respect thereto. Recognition of oc-

cupational disease appears in Secs. 2799 and 2800 of the Code, which sections became effective in March, 1925. They directed the Industrial Commission, through its chief medical examiner, to gather information and data from physicians, surgeons, hospitals, and state and county boards of health, as to the prevalence, causes, nature and extent of occupational diseases in Nevada, and to complete its report on or before October 1, 1926, and file the report with the thirty-third session of the Nevada legislature.

Apparently no legislation resulted from that survey.



# CHAPTER XXXI
# NEW HAMPSHIRE

## I. Employers' Liability and Workmen's Compensation Act.

**1. Statutes. Public Laws of New Hampshire, 1926, ch. 178, Secs. 1-38.**

**2. Administration.** No commission or board is created to administer the Act, but the Commissioner of Labor is given some supervisory power over employers and employees who come within its terms (Secs. 4, 5, and 6). Claims for compensation are heard by the courts (Secs. 25-30). Communications may be addressed to the Commissioner of Labor at Concord, New Hampshire.

**3. Scope of the Act.** This is an unusually brief Act and is a combination of statutes providing for "Employers' Liability," based upon the employer's negligence, and "Workmen's Compensation" provisions which do not necessitate negligence of the employer as a prerequisite to recovery.

No reference is made in the Act to disease, occupational or otherwise. Disease which is not the result of accidental injury is not compensable.

**A. Secs. 1, 2, and 3 provide for "Employers' Liability."**

**Sec. 1** limits the application of the entire chapter to "workmen engaged in manual or mechanical labor" in five specified employment groups, to-wit:

Railroads: (Text not pertinent to this survey):

Machinery:

> "Work in any shop, mill, factory or other place on, in connection with or in proximity to, any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor."

Electricity: (Text not pertinent to this survey):

Explosives: (Text not pertinent to this survey):

Quarries: "Work in or about any quarry, mine or foundry."

**Sec. 2** provides:

> "If, in the course of any of the employments above described, personal injury, by accident arising out of and in the course of the employment, is

caused to any workman employed therein, in whole or in part, by failure of the employer to comply with any statute, or with any order made under authority of law; or by the negligence of the employer or any of his officers, agents or employees; or by reason of any defect or insufficiency due to his or their negligence in the condition of his plant, ways, works, machinery, cars, engines, equipment or appliances, then such employer shall be liable to such workman for all damages occasioned to him, or, in case of his death, to his personal representatives for all damages recoverable under the provisions of chapter 302."
(Chapter 302 provides for survival of a cause of action after death.)

Sec. 3 provides:

"The workman shall not be held to have assumed the risk of any injury due to any cause specified in the preceding section; but there shall be no liability thereunder for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed. The damages hereby provided for shall be recovered in an action on the case for negligence."

B. *Compensation Provisions.*

The remaining sections provide the means to the employer of escaping the liability provisions of Secs. 1, 2, and 3. This is done by complying with the requirements with respect to payment of compensation.

We quote the following important sections:

Sec. 4:

"The provisions of sections 2 and 3 shall not apply to any employer who shall have filed with the commissioner of labor his declaration in writing that he accepts the provisions of this chapter as contained in the succeeding sections, and who shall have satisfied the commissioner of his financial ability to comply with its provisions; or who shall have filed with the commissioner a bond, in such form and amount as the commissioner may prescribe, conditioned on the discharge by such employer of all liability incurred under this chapter. Such employer shall thereafter be liable to all workmen engaged in any of the employments specified in section 1 for any injury arising out of and in the course of their employment, in the manner provided in the following sections."

Sec. 10:

"The employer shall, at the election of the workman or his personal representative, be liable under the provisions of sections 2 and 3 for all injury



caused in whole or in part by wilful failure of the employer to comply with any statute, or with any order made under authority of law."

Sec. 11:

"The right of action for damages caused by any such injury, at common law or under any statute, shall not be affected by this chapter; but in case the injured workman, or in event of his death his executor or administrator, shall avail himself of this chapter, either by accepting any compensation hereunder, by giving the notice hereinafter prescribed, or by beginning proceedings therefor in any manner on account of any such injury, he shall be barred from recovery in every action at common law or under any other statute on account of the same injury."

Sec. 12:

"If after such injury the workman, or in the event of his death his executor or administrator, shall commence any action at common law, or under any statute other than this chapter against the employer therefor, he shall be barred from all benefit hereof in regard thereto."

Sec. 25:

"Any question as to compensation which may arise under this chapter shall be determined by agreement or by a proceeding in equity. In case the employer fails to make compensation as herein provided, the injured workman, or his guardian, if such be appointed, or his executor or administrator, may petition the court having jurisdiction of an action for recovery of damages for negligence for the same injury between the same parties."

Sec. 29:

"Any employer who has declared his intention to act under the compensation features of this chapter shall have the right to apply by similar proceedings to the superior court, or to any justice thereof, for a determination of the amount of the weekly payments, or of a lump sum in lieu of such weekly payments, to be paid the injured workman."

C. Liability Insurance.

Although no reference is made in chapter 178 to covering compensation liability by insurance, the right is recognized in chapter 279, which requires that:

"Every insurance company or other insurer, which insures employers against liability for compensation under the workmen's compensation law, shall file with the insurance commissioner its

classification of risks and premium rates, together with basic rates and schedule or merit rating, if a system of schedule or merit rating be in use, none of which shall take effect until the commissioner shall have approved the same as just and reasonable and adequate for the risks to which they respectively apply."

4. **Court Construction.** In order to ascertain whether or not there can be a recovery under the Act, either by an action on the case at law, based upon the employer's negligence, or by a claim under the elective compensation features thereof, for injury or death resulting from the inhalation of noxious dusts in the course of employment, it is necessary to examine certain decisions of the state Supreme Court.

**Secs. 2 and 3** of the Act, which relate to actions at law based on the employer's negligence, clearly declare that, in order to be recoverable, an injury or death must result from an accident. **Sec. 4**, on the other hand, which concerns the employee's claim under the elective compensation features of the Act, declares that the employer shall be liable "for any injury" arising out of the employment. That declaration created some doubt as to whether the latter section was confined to injuries or death by accident as were the prior sections.

It was definitely decided in **Guay v. Brown, 83 N. H. 392, 142 A. 697 (1928)**, that the entire Act covers only injuries or death by accident. In that case, an employee in the course of his work suddenly collapsed and died from the effects of hard manual labor on his weakened heart. The court, after declaring that the Act extended compensation only to accidental injuries, awarded compensation to the claimant on the ground that the death of the employee resulted from such an injury. By citations contained in the opinion and by the court's own statement, an accident is defined as an untoward and unexpected event, an unusual, undesigned, unexpected and sudden event, a fortuitous event.

**Lybolt v. W. H. Hinman, Inc., 85 N. H. 262, 157 A. 579 (1931)**, affirmed the holding that only **accidental** injuries or death is compensable under the Act. There the plaintiff had been employed by the defendant to operate a steam shovel and, by reason of the vibration of the machine, suffered a gradual breakdown of blood vessels. One evening several hours after the day's work was completed and while the plaintiff was about his own affairs, he suffered a cerebral hemorrhage which was caused by the weakened condition of the blood vessels. The claim for compensation was denied because the injury did not occur while the plaintiff was in the course of



his employment. The court did not decide whether or not, under the facts, the injury resulted from an accident.

**Thomson v. Amoskeag Mfg. Co., 86 N. H. 436, 170 A. 769 (1934)**, is directly in point. Therein, a claim was made for the death of an employee from tuberculosis aroused into activity by the inhalation of poisonous gases and fumes in the course of employment. It was determined that the injury was not due to any sudden breathing of a large amount of gases from acids and chemicals, but to the daily breathing of such gases over the whole period of his employment and from being frequently sent outside the plant on cold wintry nights, when perspiring, to do certain work. The court declared that it was no answer to the claim that the employee's unsound health contributed to the death, but denied compensation **because there was no accident involved.** The conclusion of the majority of the court was that, although the accidental feature might consist of either an unexpected or untoward cause or effect, it must be an event definitely located as to time and place.

There is a strong dissent which denies that, in order for an injury to be accidental, it must result from a single sudden occurrence.

In **George v. Morse & Molloy Shoe Co., 170 A. 776 (Supreme Court, 1934)**, the plaintiff, a shoemaker, was required to handle chemicals which frequently caused eczema. This was more likely to happen when white shoes were in process. The plaintiff had had an earlier attack which had forced him to quit work for a time; and, on his return, he was not bothered until he again handled white shoes. He objected, but was told to continue or be discharged. He thereupon undertook the work and contracted the disease which resulted in the disability for which his claim is filed. Compensation was denied on the authority of **Thomson v. Amoskeag**, supra.

In **Moore v. Rumford Printing Co., 185 A. 165 (Supreme Court, May, 1936)**, compensation was granted for death resulting from an accident, where the injury causing an employee's death resulted from "carbon monoxide contracted into his system by the intermittent inhalation of unconsumed illuminating gas for a period of about two hours while working in defendant's plant."

In view of these decisions, it is apparent that injury or death of an employee resulting from the inhalation of dust in the course of employment would be compensable under the Act **only** where such could be deemed to result from an accident, i. e., an untoward or unexpected event traceable to a definite time and place.

II. Other Statutes.

1. Safety and Health of Employees—Ch. 177, Secs. 1-34.

Sec. 1:

> "This chapter shall apply only to factories, mills, workshops or other manufacturing or mercantile establishments in which three or more persons are regularly employed. * * *"

Sec. 6:

> "Every employer shall provide and maintain reasonable and proper toilet facilities and reasonably sanitary and hygienic conditions for employees."

Sec. 7:

> "Whenever the nature or condition of any such place of employment, or the machinery or other appliances therein, are such as to render work therein or in proximity thereto dangerous to the safety or health of employees, it shall be the duty of the employer to provide and maintain such safeguards, safety devices, appliances and lighting facilities, and to do such other things as may be reasonably necessary and practicable to lessen the dangers of such employment."

Sec. 12 empowers the Commissioner of Labor to make and adopt reasonable rules and regulations of general application to give effect to Sec. 7.

Sec. 13 provides that, where special conditions of employment render the general rules and regulations so made inadequate or unreasonable as applied to such place of employment, the Commissioner may, by special order applicable to that place, modify or extend the requirements of the general rule or regulation so as to make the same reasonable and adequate.

Sec. 14 provides that, where the Commissioner is of the opinion that compliance with Sec. 7 under special conditions existing in an employment necessitates the use of a safeguard or the doing of an act not provided for in the general rules and regulations, he is empowered to require the adoption in that place of employment of particular safeguards, safety devices, appliances or other means as may be reasonable and practicable for the safety and health of employees.

Sec. 15:

> "The commissioner shall have like power, and it shall be his duty, by general or special orders, rules or regulations, to require compliance with section 6 with respect to toilet facilities and sanitary and hygienic conditions in any place of employment."



2. Rules and Regulations Adopted by the Bureau of Labor.

Under the provisions of the preceding chapter (chapter 177), the Bureau of Labor has adopted certain rules and regulations which are published in pamphlet form. They consist of eighteen separate divisions called "Standards." Copies may be had by addressing a request to the Commissioner of Labor, Concord, New Hampshire. Following are those provisions relating to dust hazards:

Standard No. 15—Abrasive Wheels:

> (A) requires metal hoods over abrasive wheels.
>
> (B) provides that hoods of abrasive or polishing wheels in continual operation, which throw off any appreciable amount of dust, should be fitted with dust exhaust systems. Specific regulations in regard to size of exhaust pipes are included. Sufficient suction must be maintained to remove effectively dust thrown off by the operation of the wheels.
>
> (E) provides that employees working on abrasive wheels should be furnished by the employer with goggles, preferably not to be interchangeable among the men. Care should be taken in choosing goggles to obtain those with good lenses and with good ventilation.

Standard No. 17—Woodworking Machinery:

> "(B) **Moulders.** All moulders should be equipped with exhaust hoods for removing shavings and dust. Hoods should be so constructed and placed as to effectively guard cutter heads."
>
> "(E) **Shapers.** * * * Suitable exhaust hoods should be provided and table kept clear of all waste material."
>
> "(H) **Sanders.** All sanding machines should be equipped with a suitable exhaust system to remove dust."
>
> "(I) **Tenoners.** Tenoners should be equipped with a suitable guard over outer head and with an exhaust system capable of removing shavings."

3. Child Labor—Ch. 118, Secs. 18-49.

Sec. 18 prohibits the employment of children under 14 years of age in any mill, factory, workshop, quarry, mercantile establishment, store, business office, etc.

Sec. 19 prohibits the employment of children under the age of 16 in any of the establishments named in the preceding section during the time in which the public schools are in session unless they can read understandingly and write legibly simple sentences in the English language.

Sec. 24 prohibits the employment of children under 16 years

of age in any of the aforementioned establishments unless the employer procures an employment certificate.

Sec. 39 provides the penalty for a violation of any of the foregoing provisions.

III. **Common Law Liability.**

The Employers' Liability and Workmen's Compensation Act does not affect the common law right of action, if it exists, for injury or death compensable under that Act, in the absence of an acceptance of compensation by the employee, or by his representative in case of death (Sec. 11).

That such a right of action does exist in favor of the employee is indicated by several decisions. In **Stevens & Sons Co. v. Daigneault, 4 F. (2d) 53 (C. C. A. 1, 1925)**, the plaintiff brought an action at law for damages resulting from his employment over a period of four months in the defendant's woolen mills, applying an emulsion composed of petroleum oil, water and alkali to wool and then carrying the wool to a machine for processing. As a result of his arm coming in contact with the emulsion, an infection developed which caused the injuries for which the action was brought. The gist of the claim was defendant's failure to warn of the dangers of the employment. The evidence disclosed that the average man could work in such a solution without danger of infection, but others, such as plaintiff, had a susceptibility thereto. The court held that, although a duty rests on the employer to warn his employees of defects or dangers not apparent which may arise in the course of employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself, there was no evidence that the defendant knew or ought to have known that the process in which plaintiff was engaged was dangerous and that the plaintiff was ignorant of the danger. The court reversed the decision of the lower court and held in favor of the defendant.

Although this case did not involve an injury resulting from the inhalation of dust, it did involve a disease arising gradually from the employment, and, in addition, contained the statements of the court in regard to the duty of employers to employees when there exists in the employment defects or dangers not apparent to workmen.

In **Harvey v. Welch, 86 N. H. 72, 163 A. 417 (1932)**, the plaintiff brought an action at law for injuries sustained from inhaling poisonous fumes and vapors in the course of his employment. The plaintiff was employed in defendant's automobile



service station cleaning and repairing radiators. He was required to boil a solution of oxalic acid and water which caused poisonous fumes and vapors to be given off. The court reversed a judgment previously rendered in plaintiff's favor because of a misstatement by plaintiff's counsel of evidence to the jury upon a vital point in the case. The court upheld the previous rulings denying defendant's motions for a nonsuit and for a directed verdict, and permitting the issue of defendant's negligence to go to the jury. The opinion stated that the employer was not absolved from liability because he had no actual knowledge of the danger, but that, being under a positive duty to exercise care for the safety of his servants, he was bound to make reasonable inquiry for the purpose of informing himself of the natural consequences of using the materials which he furnished. The employee, on the other hand, was entitled to assume that the instrumentalities and materials furnished by an employer were reasonably safe to use, so that, as a matter of law, he could not be held to have assumed the risks of inhaling the poisonous fumes.

In **Musgrave v. Great Falls Mfg. Co., 86 N. H. 375, 169 A. 583 (1933)**, the action was one at law to recover for the death of an employee alleged to have been caused by the defendant's negligence. Death resulted from a long continued ingestion of minute quantities of sulphuric acid taken in testing a "sour" solution used in a dyeing process. It had been the duty of the deceased to keep the solution at a uniform strength by testing it from nine to thirty-five times daily. Certain hydrometers were furnished for such tests, but the customary method was by tasting the solution by dipping a finger therein and applying it to the tongue, a practice known and acquiesced in by the defendant. It was well known to the medical profession that sulphuric acid taken internally in small quantities over a long period of time is injurious to the health. No warning had ever been given the deceased that there was any danger in conducting the tests by tasting the solution. There was a verdict for the defendant in the lower court, but the upper court reversed that decision and ordered a new trial. It was held that under the facts the defendant was chargeable with knowledge of the danger, and, in view of his being chargeable therewith, the evidence warranted a finding that the defendant was negligent in permitting the practice of testing without giving warning of the dangers incident thereto; that the deceased could not be held, as a matter of law, to have assumed the risk or to have been guilty of contributory negligence and the evidence was insufficient to support those contentions; that

rules and regulations habitually violated by employees to the knowledge of the employer become of no force and effect, and a charge to the jury is erroneous which declares that, where an employee breaches such a rule or regulation, the employer is not liable for the resulting injury; that a master does not discharge his full duty to an employee by furnishing suitable tools and appliances to carry on the required work but proper instructions must be given and enforced, and appropriate warnings given of the dangers of adopting an alternative method of doing the work; and that the duty to warn arises if the employer *has reason to know that some of the men employed* may be injuriously affected by the practice of tasting the acid solution even though it might not seriously affect the average man.

No decisions involving inhalation of silica dust have been found; but the principles of law, announced and followed in the foregoing decisions, are broad enough to justify the suggestion that a common law right of recovery for injury caused by inhaling such dust exists in New Hampshire, if the condition of employment is due to the negligence of the employer.

IV. **Miscellaneous Matters of Interest.**

1. **Limitations of Actions—Ch. 329, Secs. 1-10.**

Actions for personal injuries are included within that part of Sec. 3 which provides that those personal actions not enumerated must be brought within six years after the cause of action has accrued. Where death intervenes, the action may be brought within two years after the death, with recovery limited to $7,000, except where decedent leaves a widow, widower, minor child or children, or dependent father or mother, in which case recovery is limited to $10,000 (Secs. 9-13 of Ch. 302).

2. **Surveys.**

In 1935, the legislature authorized the creation of a commission to investigate occupational diseases. The commission has been appointed and is now engaged in such investigation, but as yet no report is available.



# CHAPTER XXXII
# NEW JERSEY

I. **Workmen's Compensation Act.**

1. **Statutes. New Jersey Laws of 1911, Chapter 95, Paragraphs 1-27, and Amendments.**

2. **Administration.** The Act is administered by the Workmen's Compensation Bureau of the Department of Labor. The Bureau is composed of the Commissioner of Labor, who is the acting chairman, three Deputy Commissioners of Compensation, and such Referees as the Commissioner of Labor deems necessary. The Deputy Commissioners and the Referees are appointed by the Commissioner of Labor. Communications may be addressed to the Workmen's Compensation Bureau at Trenton, New Jersey.

3. **Scope of the Act.** The Act is divided into three sections. "Section I" provides for recovery at law for personal injury by accident and for death covered by the wrongful death statutes, provided such injury or death be caused by the negligence of the employer. The defenses of negligence of fellow servant and assumed risk are denied the employer. Recovery by the employee is denied if he was guilty of wilful negligence at the time of receiving the injury. (Paragraphs 1-6) "Section II" provides elective compensation for personal injury or death by accident and for certain enumerated occupational diseases without regard to negligence on the part of the employer (Paragraphs 7-22). "Section III" covers numerous "General Provisions" (Paragraphs 23-27).

Section one controls as between private employers and their employees unless both parties, by agreement, accept the provisions of Section two. The Act however creates a presumption of election by both employers and employees to be bound by Section two in the absence of a stipulation to the contrary in the contract of employment or notification of rejection by either party (Paragraph 9).

The original Workmen's Compensation Act was passed in 1913. By amendment effective in 1924, the following provision was made for compensation for occupational disease:

> "Par. 22. (a) When employer and employee have accepted the provisions of section II as aforesaid, compensation for personal injuries to or for death of such employee by any of the compensable occu

pational diseases hereinafter defined arising out of and in the course of his employment shall be made by the employer to the extent hereinafter set forth and without regard to the negligence of the employer.

"(b) Definitions. When applicable in this act to occupational diseases the following words and phrases shall be construed to have the following meanings:

"A. Compensable occupational diseases shall not include any other than those scheduled below and shall include those so scheduled only when the exposure stated in connection therewith has occurred during the employment, and the disability has commenced within five months after the termination of such exposure.

"Occupational Diseases;
"Anthrax;
"Lead poisoning;
"Mercury poisoning;
"Arsenic poisoning;
"Phosphorus poisoning;
"Benzene, and its homologues, and all derivatives thereof;
"Wood alcohol poisoning;
"Chrome poisoning;
"Caisson disease;
"Mesothorium or radium poisoning.

"B. Willful self-exposure to occupational diseases shall include (1) failure or omission to observe such rules and regulations as may be promulgated by said Department of Labor and posted in the plant by the employer, tending to the prevention of occupational diseases, and (2) failure or omission to truthfully state to the best of the employee's knowledge, in answer to inquiry made by the employer, the location, duration and nature of previous employment of the employee in which he was exposed to any occupational disease as herein listed.

"(c) The compensation payable for death or disability total in character and permanent in quality resulting from an occupational disease shall be the same in amount and duration and shall be payable in the same manner and to the same persons as would have been entitled thereto had the death or disability been caused by an accident arising out of and in the course of the employment.

"A. In determining the duration of temporary and/or permanent partial disability, and the duration of payment for the disability due to occupational diseases, the same rules and regulations as are now applicable to accident or injury occurring under section II of the act to which this act is an amendment or supplement, shall apply."



Silicosis is not included in the schedule of compensable diseases. A bill is now pending in the New Jersey legislature to make silicosis compensable by adding "pneumoconiosis" to the list of compensable diseases.

Recovery for occupational disease is barred unless the employer, during the continuance of the employment, had actual knowledge that the employee had contracted the disease, or unless the employee or someone on his behalf shall have given the employer written notice or claim of the contraction of the disease within five months after the date when the employee ceased to be subject to exposure (Paragraph 22 (b)).

Furthermore, claims for compensation for occupational disease are barred unless a petition is filed in duplicate with the Secretary of the Workmen's Compensation Bureau within one year after the date on which the employee ceased to be exposed, or, in case of agreement as to compensation between the employer and the claimant, then within one year after the failure of the employer to make payment pursuant to such agreement (Paragraph 22 (e)).

Because of the peculiar wording of Paragraph 22 (c), the conclusion might well be reached that compensation for occupational disease is limited to cases resulting in death or disability which is total in character and permanent in quality. No decision has been found which construes Paragraph 22 (c) so as to decide this specific question. In **Sutkowski v. Mutual Chemical Company of America, 178 A. 71**, however, the Supreme Court of New Jersey, in April, 1935, affirmed an award by the Workmen's Compensation Bureau on the basis of 5% of total disability for disability resulting from an occupational disease. The injury sustained was a perforation of the nasal septum "about the size of a half dollar" as the result of the use of chrome in the performance of the employee's duties. The court stated that it was conceded that the condition was the result of a compensable occupational disease. The injury was concededly permanent in character, but it was found that it did not incapacitate or disable the employee with respect to the performance of his usual work. It was therefore clearly not a case of disability total in character and permanent in quality. Nevertheless, compensation on the basis of 5% of permanent total disability was awarded.

For disability total in character and permanent in quality, the maximum compensation provided in the Act is $20.00 weekly for 400 weeks, with further weekly payments of the same amount but diminished by the employee's earnings where the employee has submitted to rehabilitation. The maximum com-

pensation for temporary disability is $20.00 per week for a maximum of 300 weeks. Burial expense is also provided and additional payments in the form of penalties are required in certain cases of injury to minors. (Paragraphs 11, 12, and 14)

An employer subject to Section one or Section two of the Act may carry his own liability thereunder by satisfying the Commissioner of Banking and Insurance of his financial ability; otherwise he must insure and keep insured his liability in a stock company or mutual association authorized to carry such risks in the state. The failure to take one of these steps constitutes a misdemeanor punishable by a fine of not more than $5.00 for the first offense, and thereafter by a fine or imprisonment or both. (Ch. 178, Laws of 1917, Secs. 3, 4, and 5)

4. **Court Construction.** The Act, as originally enacted (Ch. 95, Laws of 1911), provided compensation only for injury or death by accident. By a later amendment (Ch. 124, Laws of 1924), Paragraphs 22 (a) through 22 (f) were added which made compensable the following occupational diseases: anthrax; lead poisoning; mercury poisoning; arsenic poisoning; phosphorus poisoning; benzene, and its homologues, and all derivatives thereof; wood alcohol poisoning; chrome poisoning; and caisson disease. Mesothorium or radium necrosis was added by Ch. 31, Laws of 1926; and those medical terms were later changed to the present terms of mesothorium or radium poisoning by Ch. 33, Laws of 1931. This brief history of the provisions dealing with occupational disease makes possible a clearer understanding of the decisions rendered by the court.

### A. Compensation under the Workmen's Compensation Act for Injuries by Accident and for Occupational Disease.

"Accident," as used in the Act, was first construed by the courts in **Liondale Bleach, Dye & Paint Works v. Riker, 85 N. J. Law 429, 89 A. 929 (1914).** In that case, the plaintiff brought his action under the Workmen's Compensation Act for disability resulting from a rash caused by ten days' employment in defendant's bleachery, handling certain dampened goods. The court, in refusing compensation, declared that no injury by accident was involved because no specific time or occasion could be fixed upon as the time when the alleged accident happened.

**In A. Fishman Hat Co. v. Rosen, 6 N. J. Misc. 667, 142 A. 559 (1928), affirmed at 146 A. 912 (1929),** by the Court of Error and Appeals of New Jersey, which is the court of last resort, compensation was granted the claimant under the Workmen's



Compensation Act for a disability resulting from mercury poisoning contracted during the course of his employment by the defendant. The court upheld the constitutionality of the 1924 amendment making certain occupational diseases compensable under the Act.

**In Pearson v. Armstrong Cork Co., 6 N. J. Misc. 976, 143 A. 449 (1928),** compensation under the Workmen's Compensation Act was awarded the claimant for the death of an employee from alcohol poisoning contracted during two years' employment by the defendant in a room permeated with alcoholic fumes.

**In Carlton v. Celluloid Co., 151 A. 641 (Supreme Court of New Jersey, 1930),** the plaintiff filed his claim under the Workmen's Compensation Act for disability resulting from being gassed on three separate occasions in the process of repairing a hydrochloric acid gas line while employed in defendant's plant. Compensation was granted on the ground that the plaintiff had sustained an injury by accident.

For other actions involving occupational diseases compensable under the Act, see:

**Textileather Corp. v. Great American Indemnity Co., 108 N. J. Law 121, 156 A. 840 (1931), benzol poisoning;**
**Farrell v. Ferry Hat Co., 10 N. J. Misc. 319, 159 A. 153 (1932), mercury poisoning;**
**Renzi v. General Leather Co., 163 A. 137 (Compensation Bureau, 1932), benzol poisoning;**
**Phillips v. Federated Metals Corp., 12 N. J. Misc. 160, 170 A. 209 (1934), lead poisoning;**
**Sutkowski v. Mutual Chemical Co., 178 A. 71 (Supreme Court, 1935), chrome poisoning;**
**Gamon Meter Co. v. Sims, 178 A. 92 (Supreme Court, 1935), lead poisoning; and**
**United States Radium Corp. v. Globe Indemnity Co., 13 N. J. Misc. 316, 178 A. 271 (1935), radium poisoning.**

### B. Exclusiveness of the Act.

**Paragraph 8** of the Act provides:

> "Such agreement" (to accept the provisions of Section II) "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Section II of this act. * * *"

This paragraph was first construed by the courts in **Smith v. International High Speed Steel Co., 98 N. J. Law 574, 120 A. 188 (1923).** In that case, the action was at law to recover for the death of an employee caused by the inhalation of fine

particles of metallic dust during twenty-two months' employment in defendant's plant, polishing and boring steel tubing. In the lower court, the defendant's motion to strike the petition on the ground that the Workmen's Compensation Act provided the exclusive remedy for the claimant was denied. The court, after declaring that no injury by accident was involved which would give rise to a claim under the Workmen's Compensation Act, held that that Act was exclusive only as to those injuries compensable thereunder, and, as to others not falling within its terms, the common law remedy was unaffected. The lower court's ruling denying defendant's motion to strike the petition was affirmed.

**Szalkowski v. C. S. Osborne & Co., 9 N. J. Misc. 538, 154 A. 611 (1931), affirmed by the Court of Error and Appeals of New Jersey at 182 A. 632 (Jan. 31, 1936),** involved facts similar to those of **Smith v. International High Speed Steel Co.,** supra. The latter case, however, was decided before the Workmen's Compensation Act was amended in 1924 to make compensable the scheduled occupational diseases, whereas the present case was decided after the effective date of that amendment. In this case, the plaintiff brought an action at law to recover damages for injuries to his lungs caused by the inhalation of steel dust over a long period of time while employed in defendant's factory. The plaintiff alleged that the defendant had been negligent in failing to provide proper safeguards to protect its employees against breathing the impure air. The defendant contended that no cause of action was stated in view of the fact that the plaintiff was suffering from an occupational disease not set forth in the schedule of compensable occupational diseases in the Workmen's Compensation Act, and that the provisions in the Act, that no other diseases shall be compensable and that the remedy under the Act is exclusive, preclude plaintiff from maintaining his action at law. The court held that the plaintiff's injury did not arise by accident since it could not be ascribed to any particular point of time and was therefore not compensable under the Act, and that, notwithstanding the provisions in the Act, the common law remedy of the plaintiff was unaffected thereby. The action at common law could therefore be maintained.

In **Downing v. Oxweld Acetylene Co., 112 N. J. Law 25, 169 A. 709 (1933), affirmed by the Court of Error and Appeals at 174 A. 900 (1934),** the plaintiff brought an action at common law alleging that, while employed by the defendant to repair and test blowpipes, he contracted an occupational disease as the result of exposure to noxious gas, fumes and other injurious



matter caused by the defendant's negligence in failing to provide a reasonably safe place to work. There was a judgment in the lower court for the plaintiff which was appealed by the defendant who claimed error in the denial of his motion for a nonsuit and in the refusal to direct a verdict in his favor. The court, in affirming the decision for the plaintiff, held that there was ample evidence of negligence on the part of the defendant to take that issue to the jury; that the plaintiff could not be held, as a matter of law, to have assumed the risk of the injury since:

> "It is not the obviousness of the physical situation or condition that charges the servant with the assumption of the risks which arise from it, but the obviousness of the dangers which the physical condition or situation produces.";

and that, although the parties were bound by the Workmen's Compensation Act, that Act is exclusive only as to those injuries and occupational diseases which are compensable thereunder, and other common law actions for occupational diseases not specified therein are unaffected by its terms.

### II. Other Statutes.

It is difficult to cite the statutes of New Jersey for the reason that no general codification of the New Jersey laws has been published since 1910. A supplement was published in 1924 and another in 1930, but they do not follow the scheme of paragraph numbering followed in the 1910 codification. It is necessary, in most instances, to cite the original acts identified by the year of enactment.

In 1921, the Department of Labor of New Jersey, in accordance with statutory authority, published a compilation of the Labor Laws of New Jersey. This volume comprises 239 pages, is arranged under chapter headings adopted by the Department of Labor, and the paragraphs in the entire volume are numbered consecutively irrespective of chapter heading. Because of its convenient form, reference is made in this portion of this chapter to the sections of the aforesaid copy of "Labor Laws." That volume is published by the Department of Labor, Trenton, New Jersey, for distribution to the public upon request.

#### 1. Employment of Children (Labor Laws, Secs. 44-62).

#### A. Factories, Workshops, etc.

Children under the age of 14 are prohibited from working in any newspaper plant, printery, factory, workshop, mill, commercial laundry or place where printing or the manufacture of

goods of any kind is carried on, or in any mine or quarry. A violation of this provision is punishable by a fine of $50 for the first offense, $100 for the second offense, and not to exceed $1,000 for continued offenses. (Sec. 44, as amended, Laws of 1923, p. 158)

Minors under 16 years of age are prohibited from operating saws, wood choppers, jointers or planers, sand-paper or wood polishing machinery, picker machines, rolling mill machinery, washing, grinding, or mixing machinery, etc., or in proximity to any machinery which in the judgment of the Commissioner of Labor is a menace to the safety of such minor. Children under 16 years of age are prohibited from working in any connection with any process in which dangerous or poisonous acids are used; or in the manufacture of paints, colors, white or red lead; or in occupations causing mineral, animal or vegetable dust in injurious quantities, including flint, clay, metal and talc dust; tobacco, rubber and cotton dust; silk, fur, wool and leather dust; or in the manufacture of compositions with dangerous or poisonous gases or fumes, etc. No minor under 18 years of age is permitted to work in any occupation or trade process which may or shall, after public hearing thereon, be determined and declared by the Commissioner of Labor to be a menace to the physical safety or harmful to the health and present or future working efficiency of such minor. A violation of this section is punishable by a $50 fine for the first offense, a $100 fine for the second offense, and a maximum $1,000 fine for habitual violations. (Labor Laws, Sec. 50, as finally amended, Laws of 1933, p. 709)

B. Mercantile Establishments.

Children under 16 years of age are prohibited from working in any mercantile establishment within this Act in any employment detrimental to health or dangerous to life and limb, or that is detrimental to health and strength, or in the handling of any goods, wares or merchandise that give off dust, fumes, or gases, or in working around any heated metal that gives off any dust, fumes, or gases, etc. There is a penalty of $50 for each offense, except that, where there are habitual violations, the penalty is a fine of not more than $1,000 or imprisonment for not more than three years, or both. (Labor Laws, Sec. 60)

"Mercantile establishment" means any employment of any person for wages or other compensation other than in a factory, workshop, mill, place where the manufacture of goods is carried on, mine, quarry, or in agricultural pursuits (Labor Laws, Sec. 62).



2. Hygienic and Sanitary Provisions, Secs. 150-161.

A. Factories, Workshops, etc.

Employers in whose establishments emery wheels or belts are used must provide the same with blowers or similar apparatus to protect employees from the dust produced and arising therefrom and to carry off such dust. Where water is used at the point of grinding contact and where small emery wheels are used temporarily for tool grinding in small shops employing not more than three men at such work, an exemption is permitted if so ordered by the Commissioner of Labor. (Labor Laws, Sec. 150)

Proper hoods or hoppers must be provided for each wheel so that dust thrown off will fall into the hood or hopper and be carried off by a suction of air (Labor Laws, Sec. 151). Provision is also made for the size of suction pipes (Labor Laws, Sec. 152), and for the connection and operation of fans or blowers (Labor Laws, Sec. 153).

An employer must supply not less than 250 cubic feet of air space for each employee at work between the hours of 6:00 A. M. and 6:00 P. M., and not less than 400 cubic feet between the hours of 6:00 P. M. and 6:00 A. M. (Labor Laws, Sec. 155).

An employer must provide in each workroom proper and sufficient means of ventilation, and must maintain proper and sufficient ventilation; if excessive heat be created, or if steam, gases, vapors, dust or other impurities that may be injurious to health be generated, the room must be so ventilated as to render them harmless, so far as is practicable; in case of failure, the Commissioner of Labor shall order such ventilation to be provided, fixing also the time within which such is to be done. The failure to observe the order subjects the employer to a fine of $10 for each day after the expiration of the time given by such order to make the change. (Labor Laws, Sec. 156)

Factories and workshops where dusty work is carried on must be limewashed or painted at least once in every twelve months (Labor Laws, Sec. 158).

B. Mercantile Establishments.

The employer must furnish proper and sufficient means of ventilation; in case of failure, the Commissioner must order such ventilation to be provided; the employer must, within twenty days after service upon him, provide the required ventilation, and, in case of failure, is liable to a fine of $10 for each day after the expiration of the time given by the order (Labor Laws, Sec. 162).

C. **Foundries, Labor Laws, Secs. 166-167.**

Whenever a foundry is so constructed or operated that smoke, steam, dust or noxious gases are not promptly carried off by the general ventilation, exhaust fans must be provided (Labor Laws, Sec. 166, as amended, Laws of 1925, p. 340, Sec. 1).

Any place or establishment where metal castings or cores are made shall be deemed a foundry within the meaning of this Act (Labor Laws, Sec. 177, as amended, Laws of 1925, p. 340, Sec. 5).

The employer violating any of the provisions of this Act is liable to a penalty of $100 for each offense (Laws of 1925, p. 340, Sec. 6).

3. **Lead Poisoning Law, Labor Laws, Secs. 168-181.**

Each employer, without cost to his employees, must provide effective devices to prevent the contraction by his employees of any illness or disease incident to the work in which the employees are engaged (Labor Laws, Sec. 168).

The manufacture of white lead, red lead, arsenate of lead, lead sulphate, lead or fluo-silicate and the manufacture of pottery, tiles or porcelain enameled sanitary ware, wherein employees are exposed to lead dust or lead solution, are declared to be especially dangerous works or processes (Labor Laws, Sec. 169).

Employers engaged in especially dangerous works or processes must furnish, without cost to employees, adequately ventilated working rooms with proper hoods, air exhausts, washing facilities, dressing rooms, eating rooms, drinking fountains, clothing, and, where an employee is engaged in any work or process producing lead dust, two reasonably effective respirators for each such employee (Labor Laws, Sec. 170).

Employees must keep clean the respirators furnished them, and use one at all times while engaged in any work or process in which they are exposed to such dusts (Labor Laws, Sec. 171).

The employer must post notices, explaining the dangers from exposure to lead dust, lead fumes or lead solutions (Labor Laws, Sec. 172).

The employer shall cause every employee who is exposed to lead dusts, etc., during his employment to be examined at least once a month to determine if symptoms of lead dust appear. The employee must submit to the monthly examinations and to such other examinations as are reasonably requested, and he must answer fully and truly all questions asked by the examining physician bearing on lead poisoning.

It is provided that the physician must report what he believes to be symptoms of lead poisoning to employer, to the Department of Labor, and to the Board of Health. Five days after such proof is received, the employer is prohibited from continuing such employee in any work where he will be exposed to lead dusts, etc. (Labor Laws, Sec. 174)



Penalties for breaches of the various sections are provided (Labor Laws, Sec. 176).

4. **Mines, Labor Laws, Secs. 216-252.**

An adequate amount of pure air must be made to circulate through the working places of every mine in such a quantity as will maintain the same in a fit state for working and passing therein, and, in all dry places where the operation of a power drill will produce dust, all power drills used therein must be equipped with a spraying device, and an adequate spraying system must be installed and used to settle all dusts or gases that may be created (Labor Laws, Sec. 237).

Boys under 18 years of age shall not be employed underground in a mine (Labor Laws, Sec. 240).

5. **Sanitary and Engineering Industrial Standards.**

In 1927, the Commissioner of Labor published a 52-page pamphlet entitled "Sanitary and Engineering Industrial Standards." Inquiry of the Department of Labor develops that these standards are still in force and that this pamphlet has not been superseded by a more recent issue. It is important that every industry where dust hazard of any degree exists become familiar with and conform to these standards. This pamphlet contains detailed specifications for dust hoods and exhausts to be used in many industries, including buffing, polishing and grinding of metals, woodwork machinery, shoe working machinery, flint grinding, pottery manufacturing, celluloid goods manufacturing, felt batting, fur dressing, leather making, and several others.

III. **Common Law Liability.**

As decided in **Smith v. International High Speed Steel Co., 98 N. J. Law 574, 120 A. 188 (1923), in Szalkowski v. C. S. Osborne & Co., 9 N. J. Misc. 538, 154 A. 611 (1931), affirmed at 182 A. 632 (1936), and in Downing v. Oxweld Acetylene Co., 112 N. J. Law 25, 169 A. 709 (1933), affirmed at 174 A. 900 (1934),** included in Section I, 4-B., of this chapter, a common law right of action, if based upon negligence, exists in New Jersey for injury to or death of an employee which results from an occupational disease not included among those scheduled occupational diseases for which compensation is provided in the Workmen's Compensation Act. This is so,

even where both employer and employee have elected to be bound by Section II of the Act.

Other decisions have been rendered which involve actions at common law for injury or death resulting from occupational diseases. In **Ducjack v. New Jersey Zinc Co., 104 N. J. Law 575, 141 A. 791 (1928)**, the plaintiff brought his action at law for disability from rheumatism allegedly sustained while employed in defendant's mine and caused by the constant dripping of water upon him from the roof of the mine. The allegations of negligence were that the defendant, with knowledge of such condition, permitted him to work in the mine without exercising reasonable care to furnish him with a safe place to work, without furnishing him with proper appliances to protect himself from such injury, and also assured him that the place where he worked was not dangerous to his health. A judgment of nonsuit was affirmed on the grounds that there was insufficient evidence to support the contention of the plaintiff that the defendant had assured him that the place of employment was not dangerous to his health and also that the defendant, as a matter of law, assumed this obvious risk of his employment.

In **Pennsylvania Pulverizing Co. v. Butler, 61 F. (2d) 311 (C.C.A., 3, 1932)**, the plaintiff contracted silicosis during two years' employment in defendant's plant wherein grading and pulverizing sand for commercial purposes was carried on. The plaintiff brought his action at law, alleging negligence on the part of the defendant "in failing to use reasonable care to provide the plaintiff with a reasonably safe place to work," in failing "to use reasonable care to provide the plaintiff with proper masks or other appliances or safeguards in said work," and in failing "to give the plaintiff proper warning, information and knowledge of the dangerous character of its work with the sand silica dust." On the evidence as presented, the court submitted the case and allowed the jury to determine whether the defendant was negligent as alleged. From a judgment in plaintiff's favor, the defendant appealed, claiming that the trial court erred in refusing his motion for a directed verdict.

The court first stated that, although the manufacture of the powder or dust involved serious hazards to health, it was not per se unlawful and the operations were not per se negligent, and that the real issue was whether or not there was sufficient proof of negligence on the part of the defendant to have that issue submitted to the jury, that is, sufficient proof to sustain an affirmative finding by the jury that the defendant was negligent.



The court held that the trial court erred in refusing to direct a verdict for the defendant on the ground that the plaintiff had failed to prove sufficiently by his evidence any of the allegations of negligence. The court declared that proof of much dust at a particular place without proof that the defendant could have provided efficient means to overcome it was not sufficient; that plaintiff had failed to contradict the defendant's evidence as to its exercise of reasonable care in selecting ventilating machinery and respirators; and that, as regards failure to warn of the danger,

> "* * * We find it difficult to believe that an employee of normal intelligence working in dust has to be told that inhaling dust of any kind in large quantities is injurious for, obviously, when he is handed a mask and put to work with other men wearing masks in a place equipped with artificial ventilators, that is a plain enough warning that dust is deleterious. * * *"

In **Davis v. New Jersey Zinc Co., 182 A. 850 (Court of Error and Appeals of New Jersey, January, 1936)**, the plaintiff became disabled as the result of breathing manganese dust while employed in defendant's plant for a period of approximately five years. The court affirmed the verdict of the jury in the court below awarding the plaintiff $25,000 damages, declaring that it was sufficiently shown that the defendant was negligent in not making reasonable provision to protect the plaintiff from the dangerous condition which it had reason to believe existed and in failing to eliminate the dust as far as reasonably practicable.

**Cichocki v. Geigy, 183 A. 463 (Circuit Court of New Jersey, January, 1936)**, involved a common law action for the death of an employee, at the age of sixty-four, from silicosis contracted by the decedent during a year's employment in the defendant's dye works as an engineer and fireman. The plaintiff alleged that the defendant had been negligent in failing to provide a safe place to work with proper ventilation, in failing to furnish proper appliances, and in failing to inform the decedent of the hidden dangers of his employment. The court granted defendant's motion for a nonsuit on the ground that there was no proof that the dust existing in the room where plaintiff worked contained any silica, that if silica was present it was of a size of ten microns or less and existed in concentrated amounts, and that the decedent was exposed thereto for a sufficient length of time to cause silicosis. The court also declared that the existence of dust in large or small quantities in an industry does not in itself constitute negligence per se

## IV. Miscellaneous Matters of Interest.

### 1. Statute of Limitations.

An action for personal injuries must be brought within two years after the cause of action has accrued (R. S. 1910, p. 3164, Sec. 3); where death occurs, the action must be brought within two years after the death (*R. S. 1910, p. 1904, Sec. 8*).

### 2. Pending Legislation.

There is now pending in the New Jersey state legislature a *bill, known as Senate Bill No. 63, to bring pneumoconiosis* under the Workmen's Compensation Act. The proposed amendment would add "pneumoconiosis" to the scheduled compensable occupational diseases now included in the Act, thereby bringing it within the provisions set out in Section 1, 3 of this chapter. The following statement appears in Senate Bill No. 63:

> "The object of this bill is to make pneumoconiosis, which is a *pulmonary* disease due to the inhalation of dust, compensable as an occupational disease under the Workmen's Compensation Law when there shall be exposure during the course of employment to the inhalation of dust thereafter resulting in injury. The bill, by using the general term pneumoconiosis, will include all kinds of dust, if injurious to the lungs, and so will include injuries to the lungs by silica dust, which injuries are known as silicosis."

The proposed amendment is contrary to the suggestions of the report made to the New Jersey legislature by the Commission on Silicosis and Pneumoconiosis pursuant to Assembly Concurrent Resolution Number 6 of the 1933 legislature, submitted February 15, 1934. That report in part concluded that a medical board should be created at the expense of industry with the purpose of

> (a) aiding employers and employees in preventing and controlling dust hazards;
> (b) assisting the Compensation Rating and Inspection Bureau in determining the hazards of individual risks due to dust diseases;
> (c) advising the Department of Labor in measures calculated to prevent and control dust disease; and
> (d) cooperating with the Workmen's Compensation Bureau in the determination of liability and compensation in all matters of silicosis coming before the Bureau for adjudication;

that pneumoconiosis should not be made compensable; and that silicosis, broadly defined to include injury to the lung by free



silica, combined silica, or both, should be made compensable. A copy of the report of the Commission on Silicosis and *Pneumoconiosis can be obtained by a communication addressed* to the Commissioner of Labor, Trenton, New Jersey.

Senate Bill No. 63 was referred to the Labor and Industries Committee of the senate and was not reported out of committee. The legislature has now adjourned sine die and there will be no further sessions unless the Governor should call a special session. It is therefore highly improbable that the bill will be passed by this legislature.

# CHAPTER XXXIII

# NEW MEXICO

## I. Workmen's Compensation Act.

**1. Statutes. New Mexico Statutes, compilation of 1929, Chapter 156, Sections 101-127.**

2. **Administration.** No Board or Commission is created by the Act to administer its provisions. To a large extent it is *administered by the District Courts of the state. Undertakings* in the nature of insurance or security for the payment of compensation and showing of financial solvency are filed in the District Court for the county in which the workman is employed. Foreign corporations may file the required documents in the District Court of Santa Fe County. (Section 103). Notice of accident must be given by the workman to the employer and claim for compensation must also be filed with the employer. Upon failure or refusal of the employer to pay compensation it is provided that the workman shall file a claim with the Clerk of the District Court. This claim may be informal in character and a form which may be used is set forth in the Act. Hearing is had in the District Court and a finding in favor of the workman has the status of a judgment. (Secs. 113 and 124). It is also required that all accidents be reported by the employer to the Insurance Department of the State Corporation Commission within thirty days after knowledge of the accident. (Sec. 125). The Labor Commissioner also assists in the enforcement of the Act (Chapter 9, Sec. 9 Laws of 1931). *Communications may be addressed to the Labor* Commissioner, Capital Building, at Santa Fe, New Mexico.

3. **Scope of the Act.** The Act provides compensation for injury or death by accident arising out of and in the course *of employment in any one of the extra-hazardous* occupations or pursuits named in the Act, provided four workmen are employed or the employer and employees elect to come under the Act where less than four are employed (Sec. 102).

No mention is made of disease, occupational or otherwise.

The enumerated extra-hazardous occupations include among others "factories, mills and workshops where machinery is used; foundries, blast furnaces, mines, oilwells, gas works, natural gas plants, waterworks, reduction works, breweries, elevators, dredges, smelters, power works, laundries operated by power, quarries, engineering works, logging, roadbuilding and

construction, lumbering and sawmill operation, street railways, buildings being constructed, repaired, moved or demolished; * * *" (Sec. 110). Elaborate definitions of "factories", "workshops", "quarries" etc. are contained in Section 112.

To be bound by the Act, both the employer and the employees must accept its terms (Sec. 102), but there is a presumption of acceptance in the absence of a statement in the contract of employment that the provisions of the Act are not intended to apply, or notice to that effect given by either party (Sec. 104).

Where an employer otherwise governed by the provisions of the Act elects not to be bound by its terms he loses the defenses of contributory negligence (except where wilful), negligence of fellow servant, and assumed risk in any suit against him for injury or death by accident. These defenses remain available to the employer only where he has elected to be bound by the Act and the employee has rejected its terms (Sec. 6).

Section 105 provides this Act shall be construed as creating a new right and special procedure for the enforcement of the same, and the rights and remedies provided in this Act for workmen * *, on account of injuries suffered by accident arising out of and in the course of the employment of such workman, shall be exclusive of all other rights and remedies of such workman, * *, at common law or otherwise; and all other laws and parts of laws relating to, or providing damages for injuries, or death from injuries, or under which the same are recoverable, otherwise than as herein provided, and which are in conflict herewith, shall not apply as to the employments, employers and workmen in cases in which such employers and workmen are bound by this act.

Although the Act applies only to accidental injuries and makes no provision for disease, the following paragraph appears in Section 117:

> "When by reason of infection or other cause not due to neglect or misconduct of the injured workman he is actually disabled longer than the time specified in the foregoing schedule from earning wages, compensation shall be paid such workman for such loss of wages within the limits otherwise provided."

The organization of mutual insurance companies by employers who carry the workmen's compensation risk is authorized by Chapter 156, Sections 201-218. Such companies operate under the supervision of, and their rates must be approved by, the Superintendent of Insurance.

4. **Court Construction.** No decisions have been found in



which there is any suggestion that the Act applies to occupational disease. The following cases are cited as indicating the attitude on the part of the New Mexico Court in construing the Act.

In **Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 25 N. M. 686, 186 P. 560 (1920)** compensation was demanded under the act for the death of an employee. Important questions of venue were raised and passed upon. The question should be consulted by any one interested in that question.

In **Merrill v. Penasco Lumber Co., 27 N. M. 632, 204 P. 72 (1922)** claim was made for the death of Merrill, who was killed by a falling tree during a fierce gale. The accident happened at the place where he was employed as a teamster in logging operations; compensation was allowed and affirmed.

The Court adopted a very liberal attitude in construing the Act and the following statement is of interest:

> "Appellants further contend that the accident which caused Merrill's death did not arise out of his employment and argue that the tree fell through no act or negligence of the employer, but because of a violent storm, for which no human agency could be responsible, and it is argued that the employee was in no greater danger from such accident than were the other employees or the general public. If we were dealing with a common-law action for personal injuries to an employee, the negligence of the employer would be the first subject of inquiry, for it would be the basis of the liability. But no such question arises under the Workmen's Compensation Law. The economic theory of its enactment is to place upon the industry instead of upon the individual the loss resulting from injuries to its employees, and the loss is to be thus shifted in the case of all accidents arising out of and in the course of the employment. It is a new liability created entirely by statute, and having no relation in principle or effect to that which arose at common law for injuries, or under statutory provisions covering death by wrongful act."

The case of **Gonzales v. Chino Copper Co., 29 N. M. 228, 222 P. 903 (1924)**, decides a claim for compensation for the death of Miguel Gonzales, Jr., at seventeen years of age, while employed by the Copper Company. The question at issue was the fact as to the dependency of the father and mother, who were the claimants. Aside from the decisions that dependency was proven the following general comments of the Court might well be noted. The first is a statement as to the purpose and humanitarian aspect of the Act:

"It may well be kept in mind that the theory upon which the Workmen's Compensation Acts of the several states were adopted was to substitute a more humanitarian and economical system of compensation for injured workmen or their dependents in case of their death; to provide a speedy and inexpensive method by which such compensation might be made to such employees or those dependent upon them which is more in harmony with modern methods of industry than the common-law liability for torts, which usually involved long, tedious, and expensive litigation, and often produced ill feeling between employer and employee. In addition it was designed to substitute a more uniform scale of compensation in cases of accidental injury or death than the ordinary varying and widely divergent estimates of juries, and to avoid the application of certain well-established rules of law which oftentimes worked seeming harsh results, the most common of which was that of contributory negligence."

The second statement is with respect to the exclusiveness of the remedy resulting from the enactment of this law:

"With these elevating and progressive considerations which prompted the passage of this class of legislation in mind, we think a liberal construction in favor of a claimant under its terms should be favored, as the theory of the legislation is compensation, not the denial of it. Such a claimant no longer has the common-law right to sue in tort to recover damages for wrongful injury or death, as that right is abrogated by such statutes, and he is relegated to the terms of the Compensation Act for all remuneration ever obtainable for the wrongful or negligent death of the 'breadwinner'."

In the case of **Caton v. Gilliland Oil Co. of New Mexico, 264 P. 946 (1928)**, a claim for compensation was denied and the denial was affirmed by the court because of the failure of the workman to file his claim within the period specified in the Act. He was injured May 29, 1925, and did not file his claim until March 25, 1926. This case demonstrates the importance of strict conformance to the procedure outlined in the Act.

In **Martin v. White Pine Lumber Co., 284 P. 115 (1930)** the Court stated that even though the Act is remedial and must be liberally construed, the claimant must nevertheless prove his case. In this instance claim was being made for hernia and it was held that the burden was upon the claimant to prove that the hernia was of recent origin and that it did not exist prior to the date of the alleged injury. Because of failure to carry



this burden of proof the claim was denied.

**II. Other Statutes.**

**1. Labor. Statutes of 1929—Chapter 80 (Secs. 101-210).**

**Sec. 101** forbids employment of children under fourteen years of age in "any mine * * manufacturing establishment * * factory or workshop."

**Section 104** forbids employment of any child under sixteen years of age between 9 p. m. and 6 a. m. or for more than 48 hours per week, or more than eight hours per day.

**Section 108**, which was enacted subsequent to the enactment of Section 104, requires a special permit to employ children under sixteen for more than 44 hours per week and forbids their working between 7 p. m. and 7 a. m.

**Section 110** forbids the employment of children under sixteen in a long list of occupations and any other occupations which are "dangerous to lives and limbs, or injurious to health or morals".

**Section 111** forbids employment of any one under eighteen years of age in mines.

Article 2 of that Chapter, which comprises paragraphs 201-210 relates to the employment of females and limits their employment in industry to eight hours per day.

**2. Coal Mines—Statutes of 1929, Chapter 88 (Secs. 601-626).**

Section 620, entitled: "Safety Provisions" contains among others the following provisions:

" * * * * *

"6. Every operator of any coal mine which shall have attained a distance of one hundred feet in depth of shaft or length of slope, entry or drift from the surface, or from the bottom of the shaft, shall use all reasonable means to provide an adequate amount of ventilation of not less than 100 cubic feet of pure air per minute for each person at work in said mine and not less than 300 cubic feet of pure air per minute for each mule, horse or burro used in said mine, and to cause such air to be forced by proper appliances through said mine to the face of each and every working place in such a manner as to render harmless and expel therefrom all dangerous or poisonous gases; and shall use reasonable care at all times to keep all workings in operation in said mine free from standing gas.

"7. At least four safety lamps, four electric hand lamps and four masks or helmets provided with a supply of oxygen or air sufficient to sustain respiration for the user thereof for at least one hour, shall be kept for rescue work by each company or operator at every coal mining camp where twenty-

five or more men are employed."

This section contains other detailed requirements designed to prevent gas explosions and fires.

III. **Common Law Liability.**

No decisions are found with respect to the question as to whether common law liability exists in New Mexico for diseases contracted by a workman because of the negligence of the employer. It is clear from the Workmen's Compensation Act that for accidental injuries which are covered by the Act there can be no common law recovery.

IV. **Miscellaneous Matters of Interest.**

1. **Statute of Limitations**—Chapter 36, Section 102 provides for survival of a right of action for death. Section 103 of the same chapter provides:

> "Every action instituted by virtue of the provisions of this * * * section must be brought within one year after the cause of action shall have accrued."

Chapter 83, Section 104 requires actions for personal injury to be brought within four years.

2. **New Legislation and Surveys.** Inquiry direct to State Departments in New Mexico fails to develop any pending legislation with respect to dust hazards and no evidence has been found of any official survey in the state upon that subject.



# CHAPTER XXXIV

# NEW YORK

## I. Workmen's Compensation Act.

1. **Statutes. Cahill's Consolidated Laws of New York (1930), ch. 66, Secs. 1-72.**

2. **Administration.** The administration of the Act is vested in the Industrial Commissioner, who is appointed by the Governor, by and with the advice and consent of the Senate, to hold office until the end of the term of the Governor by whom he was appointed and until his successor takes office. The Commissioner is the head of the Department of Labor.

The power to hear and determine all claims for compensation under the Act is placed in the Industrial Board which is composed of five members appointed by the Governor, by and with the advice and consent of the Senate, for terms of six years each. The Commissioner is not a member of the Board, but he may sit with them in certain cases without a right to vote; he is also the custodian of the records of the Board. Communications may be addressed to the Department of Labor, Office of the Industrial Commissioner, 80 Centre Street, New York City.

3. **Scope of the Act.**

A. **Preliminary Analysis.**

The New York Workmen's Compensation Act is divided into articles as follows:

**Article 1** (Secs. 1-9) which, besides defining terms used in the Act, enumerates the "hazardous" employments covered therein and the occupational diseases for which compensation is provided;

**Article 2** (Secs. 10-34) which contains general provisions relating to **accidental injuries or death**, the amount of compensation payable, limitations on the right to claim compensation, procedure, etc.;

**Article 3** (Secs. 37-48) containing provisions relating to occupational diseases;

**Article 4** (Secs. 50-57) providing measures for securing compensation and the effect of failing to so comply;

**Article 4-A** recently added, containing provisions relating to **silicosis and other dust diseases;**

**Articles 5, 6, 7, and 8** (Secs. 60-73, 90-106, 110-130, and 140-141) dealing respectively with workmen's compensation security funds, the state insurance fund, certain miscellaneous provisions,

and the effective date of the Act with certain repealing provisions.

The Act is compulsory to all private employers and their employees engaged in hazardous employments, the list of which is so inclusive that it covers practically all employments (Sec. 3, subdivision 1). Compensation is provided for personal injury or death sustained in such employments (Sec. 3, subdivision 1), for disabilities sustained or death incurred from scheduled occupational diseases (Sec. 3, subdivision 2), and from silicosis or other dust diseases (Article 4-A). "Injury," as used above, is defined to mean: "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom" (Sec. 2, subdivision 7), and "death," to mean: "only death resulting from such injury" (Sec. 2, subdivision 8).

Prior to September 1, 1935, twenty-seven types of diseases were included in a schedule of occupational diseases, which comprised Sec. 3, subdivision 2 of the Act. Those twenty-seven types included anthrax; poisoning from lead, zinc, mercury, phosphorus, arsenic, wood alcohol, benzol, carbon bisulphide, nitrous fumes, nickel carbonyl, dope, and formaldehyde; chrome ulceration; epitheliomatous cancer; glanders; compressed air illness; miners' diseases; cataract in glassworkers; poisoning by radium, methyl chloride, carbon monoxide, and sulphuric, hydrochloric or hydro-fluoric acid; disorders due to contact with petroleum products and their fumes; blisters or abrasions; bursitis or synovitis; and dermatitis.

The amendment effective September 1, 1935, added group 28, which includes "any and all occupational diseases," resulting from any of the employments enumerated in the previous section of the Act (which includes almost all employments), provided the last injurious exposure to the hazard of the disease occurred not earlier than September 1, 1935.

Dissatisfaction with the amendment of September, 1935, resulted in another amendment effective June 6, 1936, which took silicosis and other dust diseases from group 28 above-mentioned and placed them under a new and separate article known as "Article 4-A," which comprises seven sections and deals fully with the subject of silicosis and other dust diseases. A more detailed analysis of this most recent amendment will be found later in this chapter in paragraph identified as "I.3-C."

**B. Provisions Relating to Occupational Diseases before Silicosis Bill Became Effective.**

In order to appreciate what changes were brought about by the 1936 amendment relating to silicosis and other dust dis-



cases, the provisions existing prior thereto with regard to occupational diseases must first be studied. Application of the Act to occupational diseases as though the disease were an accidental injury was effected by Sec. 38 of the Act, which reads:

> "The disablement of an employee resulting from an occupational disease described in sub-division two of section three **shall be treated as the happening of an accident** within the meaning of this chapter and the procedure and practice provided in this chapter shall apply to all proceedings under this article, except where specifically otherwise provided herein." (Bold face type not in text.)

In order for one of the diseases mentioned in Sec. 3, subdivision 2, to be compensable, it must be, "due to the nature of the employment and contracted therein, or in a continuous employment similar to the one in which he (the employee) was engaged at the time of the disablement, whether under one or more employers." The time limit does not apply where the employee contracted the disease, "in the same employment with the same employer by whom he was employed at the time of his disablement and who has continued in the same employment with the same employer from the time of contracting the disease up to the time of his disablement thereby" (Sec. 40).

Compensation will be barred by an employee's willful and false representation, in writing, at the time of his employment, that he has not previously suffered from the disease which caused disability or death (Sec. 43)

The total compensation is recoverable from that employer who last employed the employee under conditions causing the disease, but such employer may appeal to the Board for an apportionment from other employers who likewise exposed the employee to such conditions (Sec. 44).

Notice of death or disability, and a claim therefor, must be made against the employer who last employed the employee during the twelve months under conditions causing the disease; the notice and claim are deemed seasonable as against prior employers. The notice must be given within ninety days after the disablement; and, if death occurs, within thirty days after the death (Secs. 45 and 18). Since no provision is made as to the time within which the claim must be filed, it is assumed that, by virtue of Sec. 38, the provisions fixing the time for accidental injuries or death would apply, i.e., within one year after the accident, or, if death occurs, within one year after such death, with the right in the Board, by a unanimous

vote, to extend such period to two years thereafter, in the interest of justice (Sec. 28).

The employee or his dependents, upon request, must furnish the last employer or the Board with such information as to names and addresses of other employers during the said twelve months, as he or they may possess; if not furnished, or if insufficient to enable the employer to take action against prior employers for apportionment, unless the disease was actually contracted in the last employment, the last employer will not be liable to pay compensation, or, the last employer shall be liable only for such part of the total compensation as under the particular circumstances the Board may deem just; but a false statement made under the circumstances does not impair the employee's right unless the last employer was prejudiced thereby (Sec. 46).

If, prior to disablement, the employee contracted one of the scheduled occupational diseases while employed in the process enumerated opposite the scheduled disease, as set out in the Act (Sec. 3, subdivision 2), there is a presumption that the disease was due to the nature of that employment (Sec. 47).

The provisions of Article 3 do not affect an employee's right to recover compensation for a disease to which the article does not apply, if the disease is an accidental personal injury within the meaning of the Act (Sec. 48).

The maximum amounts of compensation recoverable under the Act for injury or death by accident or resulting from the occupational diseases enumerated in Sec. 3, subdivision 2, are as follows: for total permanent disability, $25 weekly for life; for temporary total disability, $5,000; for permanent partial disability, certain scheduled injuries at $25 weekly for from 15 to 312 weeks, and all others, $25 weekly during the continuance of such partial disability; for temporary partial disability, $4,000; for death, $200 for funeral expenses, and $100 monthly, with provision for termination upon the remarriage or death of the surviving dependent spouse, or, if children, upon their reaching 18 years of age, or, if mentally or physically infirmed, upon the removal of such infirmity (Secs. 15 and 16). Where the employee is expected to be totally or partially incapacitated and is, under the state Department of Education, being rendered fit to do other work, he shall be paid out of a special fund, in addition to other compensation, not more than $10 weekly for the rehabilitation (Sec. 15, subdivision 9). The employer must also promptly provide, and is liable for the payment of reasonable expenses of, such medical, surgical or



other treatment as the injury or recovery therefrom requires (Sec. 13).

The liability of the employer under the Act

> "* * * shall be exclusive and in place of any other liability whatsoever, to such employee, * * * at common law or otherwise on account of such injury or death, except that if an employer fails to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from an injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee." (Bold face type not in text.)

C. **Provisions of the Recent Silicosis Bill—(Effective June 6, 1936).**

The new Act first provides that nothing in Sec. 3, subdivision 2, paragraph 28, making any and all occupational diseases resulting from any and all hazardous employments compensable under the Act, should apply to disability or death from silicosis or other dust diseases.

Provision is then made for inserting Article 4-A, which provides, in substance, as follows:

The legislative policy is expressed as prohibiting, as a prerequisite to employment, any requirement compelling applicants for employment undergoing medical examinations.

The Commissioner and Industrial Board are instructed to adopt rules governing the installation, maintenance and operation of approved devices designed to eliminate harmful dusts and to control the incidence of silicosis and similar diseases.

Because of its importance, we quote the following:

> "Compensation shall not be payable for partial disability due to silicosis or other dust disease. **In the event of temporary or permanent total disability or death from silicosis or other dust disease, notwithstanding any other provision of this chapter, compensation shall be payable under this article to employees in the employments enumerated in section three of this chapter or to their dependents in the following manner and amounts:**

If disablement or death occur during the first calendar month in which this act becomes effective not exceeding the sum of five hundred dollars; if disablement or death occur during the second calendar month after which this act becomes effective not exceeding the sum of five hundred and fifty dollars; thereafter the total of compensation and benefits payable for disability and death shall increase at the rate of **fifty dollars** each calendar month. The aggregate amount payable shall be determined by the total amount payable in the month in which disablement or death occurs. In no event shall such compensation exceed an aggregate total of **three thousand dollars.** The requirement as to payments into the special funds provided for in subdivisions eight and nine of section fifteen for each case of injury causing death in which there are no persons entitled to compensation shall not apply to any claim arising under this article." (Bold face type not in text.)

All claims for compensation, where the last exposure occurred between September 1, 1935, and the effective date of the Act, are barred unless filed within 180 days from the day on which the Act became effective.

Another important paragraph is as follows:

"An employer shall be liable for the payments prescribed by this article for silicosis or other dust disease when disability of an employee resulting in loss of earnings shall be due to an employment in a hazardous occupation in which he was employed, and such disability results within **one year** after the **last injurious exposure** in such employment; or, in case of death resulting from such exposure, if such death occurs within five years following continuous disability from such disease. The provisions of section forty-four of this chapter shall not apply to claims arising under this article.

"The employer in whose employment the employee was last injuriously exposed in a hazardous occupation and the insurance carrier, if any, which was on the risk at the time of the last injurious exposure in such employment, shall be liable for any payments required by this article; the notice of injury and claim shall be made to such employer." (Bold face type not in text.)

Medical treatment is limited to a period of 90 days from the date of disablement, but the period may be extended not to exceed 90 additional days upon order of the Industrial Board.

The false representation, in writing, by an employee that he has not previously been disabled from the disease which is the cause of disability or death, or has not received compensation or benefits under this article, bars a right to recover compensation.



In order that necessary medical and X-ray examination of the claimant may be made by an impartial physician, when desired by any party in interest, provision is made for the appointment, by districts, of medical examiners who must be licensed physicians experienced in pulmonary diseases.

For the purposes of adjudication under this chapter, the Industrial Board is to adopt rules of practice and procedure, and also to prescribe methods and standards for the conducting of physical examinations, X-rays, etc.

The Industrial Commissioner is directed to appoint, as expert consultants, three licensed physicians having, at the time of appointment and immediately prior thereto, ten years' experience with pulmonary diseases along with the interpretation of X-ray films thereof. Those expert consultants are to make examinations, review findings and files of compensation cases and inform the Industrial Commissioner or Industrial Board of their findings.

The liability of the employer prescribed herein is exclusive of any other liability at common law or otherwise, except that, where the employer fails to secure the payment of compensation as provided in the Act, the employee, or his legal representative in case of death, may, at his option, elect to claim compensation under this chapter or to maintain an action in the courts for damages; in such action, it will not be necessary to plead or prove freedom from contributory negligence and the defendant may not plead as a defense the negligence of a fellow servant, contributory negligence, or assumed risk.

The bill which created Article 4-A also amended Chapter 31 of "Consolidated Laws," by adding a paragraph to be numbered 222-a entitled "Prevention of Dust Hazard in Public Works." This necessitates the insertion of a provision in each contract for the construction of public works, requiring the installation, maintenance, and effective operation of appliances and methods for the elimination of harmful dusts. Particular mention is made of the necessity for providing in such contracts for the elimination of silica dust. That provision should be studied by anyone interested in contracts for public works.

### D. Other Miscellaneous Provisions of the Workmen's Compensation Act.

The employer may insure his compensation in the state fund, with any stock corporation or mutual association authorized to carry such risks in the state, or by furnishing satisfactory

proof to the Commissioner of his financial ability to pay directly, together with the furnishing of proper security, as required by the Commissioner (Article 4, Sec. 50). Failure to secure compensation constitutes a misdemeanor punishable by a fine of not more than $500, or by imprisonment for not more than one year, or by both. When the employer is a corporation, the president, secretary and treasurer are liable for the failure to secure the payment of compensation (Sec. 52). Payment into the state fund relieves the employer of all liability under the Act; otherwise he is not relieved from such liability, except by the payment thereof by himself or his insurance carrier (Sec. 53).

Where an injured employee at the time of the accident is a minor under 18 employed in violation of the labor law or of a rule of the Industrial Board adopted pursuant to subdivision 11 of Sec. 146 of the labor law, compensation will be double the amount otherwise payable. The employer alone is liable for the increased amount and any provision in an insurance policy attempting to shift such liability to the insurance company is void. This provision does not apply where a minor misrepresents his age in an employment certificate and the employment is lawful for the age and sex as declared therein (Sec. 14-a).

4. **Court Construction.** Because of the recent amendment making silicosis and other dust diseases compensable under a separate article of the Workmen's Compensation Act, an examination of prior court decisions becomes of less importance so far as silicosis and dust diseases are concerned.

For such use as may be made of them the following cases are submitted, in which the courts have construed the word "accidental" as used in the Act.

In **Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. S. 767 (1917)**, the plaintiff sought compensation under the Act for disability resulting from anthrax contracted while handling diseased hides. In granting compensation for this as an accidental injury, the court said:

> "There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation, or is a natural outcome thereof. It is expected, usual, and ordinary. This disease incurred by the claimant was unexpected, unusual, and extraordinary, as much so as if a serpent concealed in the hides had attacked him. * * *"

In **O'Dell v. Adirondack Electric Power Co., 223 N. Y. 686, 119 N. E. 1063 (1918)**, the deceased, an electrician in defendant's employ, became ill from breathing coal gas on a fixed day while stringing wires in an ash cellar under defendant's boiler. Three months thereafter he died of pulmonary tuberculosis. Compensation was granted for the death as by accident.



**Woodruff v. Howes Construction Co., 228 N. Y. 276, 127 N. E. 270 (1920)**, involved a claim under the Act for disability which resulted when the constant pressing of a screwdriver in the palm of claimant's hand caused a frog felon to develop. The court, in denying compensation on the ground that no accidental injury was involved, declared:

> "* * * An accidental event takes place without one's foresight or expectation; an event that proceeds from an unknown cause, or is an unusual effect of the known cause, and therefore not expected. * * * "

In **Gray v. Semet-Solvay Co., 231 N. Y. 518, 132 N. E. 870 (1921)**, compensation was granted for the death of one of defendant's employees, a night watchman, from mineral poisoning due to the inhalation of poisonous chemical fumes. Such fumes were constantly given off in the process of manufacturing chemical preparations. The evidence does not disclose whether the poisoning developed gradually over a long period of time or was the result of a sudden, unexpected exposure to an excessive amount of the fumes.

In **Jeffreyes v. Sager Co., 198 App. Div. 446, 191 N. Y. S. 354 (1921), affirmed at 233 N. Y. 535, 135 N. E. 907 (1922)**, the claimant had been employed by the defendant in the development of photographic plates. In the process, it was necessary to dip plates held in the hand into an acid solution more than 500 times daily. After a week's work, the hand became diseased, necessitating amputation. The court, in denying compensation, held that no injury by accident was involved, first, because the contact between the hand and the solution was voluntary and intentional, and, secondly, because the injury did not result from an occurrence which was definite and referable to a particular moment of time. The court said:

> "The word 'accident' is derived from the Latin verb 'accidere,' signifying 'fall upon, befall, happen, chance' (Century Dictionary), and denotes an event which occurs upon the instant, rather than something which continues, progresses, or develops."

In **Guyon v. Standard Wall Paper Co., 209 App. Div. 708, 205 N. Y. S. 280 (1924)**, the claimant sought compensation for an in-

jury to his eye caused by the lodging of gilt dust therein. In affirming an award granting compensation, the court said:

> "* * * That occurrence was referable to the particular time when the claimant first experienced trouble with his eye, about a month after he began to work. That occurrence was not the result of volition on his part; it was not expected; it was not usual. It was an accident."

In **D'Oliveri v. Austin, Nichols & Co., 211 App. Div. 295, 207 N. Y. S. 699 (1925)**, the claimant developed pneumonia as a result of working in an ice box for half a day, a job which he was accustomed to doing. The defendant furnished heavy coats for such work, and the claimant had worn a coat on the day in question. The court denied compensation because,

> "* * * There was no special, unusual, or increased hazard. The hazard, if it might be so called, was a continuous one, known fully to the claimant, and his act a voluntary one; therefore, not accidental, and referable to no moment of time which was definite. * * *"

In **Connelly v. Hunt Furniture Co., 240 N. Y. 83, 147 N. E. 366 (1925)**, compensation was granted for the death of an employee, an undertaker's assistant, when general blood poisoning set in as a result of the injection of gangrenous matter from a corpse into a cut in the hand of the deceased. The court held that death had resulted from an accident. In its opinion, the court said that in **Jeffreyes v. Sager Co.**, supra, the important element which caused the rejection of the claim was that the injury was not referable to any particular moment of time which was definite. As to whether or not the voluntary doing of an act would prevent the resulting injury's arising by accident, the court said that, to have such effect, there had to be foresight of the peril and an acceptance of its consequences.

In **Lerner v. Rump Bros., 241 N. Y. 153, 149 N. W. 334 (1925)**, the death of an employee came as the result of a chill brought about by ten minutes' work in a refrigerator room. The court laid down the rule that, in order for a disease to be compensable, its inception must be assignable to a determinate or single event, identified in space or time, and assignable to something catastrophic or extraordinary. Compensation was accordingly denied, for, although the exposure occurred at a definite time and place, there was nothing catastrophic or extraordinary.

In **Cantor v. Elsmere Garage, 241 App. Div. 351, 212 N. Y. S. 327 (1925)**, compensation was granted where death resulted



from the inhalation of carbon monoxide gas while at work on a definite day in defendant's employ, repairing automobiles. There was no gradual or continuous inhalation, but the infliction was quick and of short duration.

In **Rosenthal v. National Aniline & Chemical Co., 216 App. Div. 588, 215 N. Y. S. 621 (1926)**, a claim was filed for disability resulting from the inhalation of acid fumes in the course of employment. The court denied compensation on the ground that the injury did not result from an accident because no definite time or place of contracting the disease could be fixed. The contracting was gradual, extending over a period of months or years.

In **Michelfelder v. Van Alstyne, 245 N. Y. 569, 157 N. E. 860 (1927)**, an award granting compensation was affirmed where disability resulted from inhaling carbon monoxide gas in the course of employment. For a similar holding, see **Reichard v. Franklin Mfg. Co., 223 App. Div. 797, 228 N. Y. S. 17 (1928), affirmed at 249 N. Y. 525, 164 N. E. 570 (1928).**

In **Wright v. Used Car Exchange, 221 App. Div. 154, 223 N. Y. S. 245 (1927)**, compensation was awarded for disability resulting from contacts with sulphuric acid in the course of employment as a battery repairman. The poisoning developed gradually and was due to frequent contacts with the acid; the beginning of the affliction could not be attributed to any single contact with the acid; and no particular time or happening could be pointed out as the beginning of the affliction.

For similar definitions of "accident," see:

> **Jackson v. Employers' Liability Assurance Corp., 139 Misc. 686, 248 N. Y. S. 207 (1931), affirmed at 254 N. Y. S. 1010 (1931), affirmed at 182 N. E. 180 (1932); and**
> **Senoff v. Savage Arms Corp., 185 N. E. 767 (1933).**

II. Other Statutes.

1. **Employers' Liability Law—Ch. 17, (Secs. 1-18).**

A discussion of this chapter seems unnecessary, since it applies only to employers and employees who do not come within the terms of the Workmen's Compensation Act, and who have not, if outside its terms, elected to be bound thereby. Only a very limited number of employers would come within this classification.

2. **Labor Law—Ch. 32, (Secs. 1-505).**

A. **The Department of Labor, Article 2, (Secs. 10-41).**

Sec. 28—(2):

"Whenever the board," (Industrial Board) "finds

that an industry, trade, occupation, or process involves such elements of danger to the lives, health, or safety of persons employed therein as to require special regulation for the protection of such persons, the board may make special rules to guard against such elements of danger by establishing requirements as to temperature, humidity, the removal of dust, gases, or fumes, by requiring licenses to be applied for and issued by the department as a condition of carrying on any such industry, trade, occupation, or process, by requiring medical inspection and supervision of persons employed or applying for employment, and by other appropriate means."

Sec. 28—(4):

"The rules of the board shall have the force and effect of law and shall be enforced in the same manner as the provisions of this chapter."

B. *Employment of Children and Females*, Article 4, (Secs. 130-150).

These sections deal at length with the employment of minors and children, expressly excluding them from enumerated occupations, with exceptions under certain conditions. Employers affected by these sections should examine them in full.

C. General Provisions, Article 7, (Secs. 200-212).

Sec. 200:

"All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

Sec. 206:

"Every physician attending any person whom he believes to be suffering from poisoning by lead, phosphorus, arsenic, brass, wood alcohol, mercury or other compounds, or from anthrax, or compressed air illness, contracted as the result of the nature of such person's employment, shall send to the commissioner a report stating the name and address and place of employment of such person and the disease from which he is suffering, with such further information as may be required by the commissioner."

D. Factories, Article 11, (Secs. 250-316).

(1) Title 4, Sanitation, (Secs. 290-300).

Sec. 290:

"Every room in a factory and every part thereof and all fixtures therein shall at all times be kept



in a safe and sanitary condition and in proper repair. * * * The walls and ceiling of the rooms and hallways in every factory shall be kept in a clean condition."

Sec. 291:

"Every part of a factory building and of the premises thereof and the plumbing therein, shall at all times be kept in a safe and sanitary condition and in proper repair. The walls and ceiling of the rooms and hallways in every factory building shall be kept in clean condition."

Sec. 299:

"1. Every work room in a factory shall be provided *with proper and sufficient means of ventilation*, natural or mechanical or both, as may be necessary and there shall be maintained therein proper and sufficient ventilation and proper degrees of temperature and humidity at all times during the working hours. If owing to the nature of the manufacturing process carried on in the factory work room excessive heat be created therein, there shall be provided, maintained and operated such special means or appliances as may be required to reduce such excessive heat.

"2. All machinery creating dust or impurities shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dust or impurities; such fan shall be kept running constantly while such machinery is in use. If in case of woodworking machinery the board decides that such apparatus is unnecessary for the health and welfare of the employees, it may adopt rules excepting such machinery from the operation of this subdivision.

"3. If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any workroom of a factory, in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the workroom, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released.

"4. *The board shall make rules for and fix standards* of ventilation, temperature and humidity in factories and shall prescribe the special means, if any, required for removing impurities or for reducing excessive heat, and the machinery, apparatus or appliances to be used for any of said purposes, and the construction, equipment, maintenance and operation thereof.

"5. If any requirement of this section or any rule

adopted thereunder be not complied with, the commissioner shall issue an order directing compliance therewith within thirty days after the service thereof. He may in such order require plans and specifications to be filed. In such case, before providing or making any change or alteration in any machinery or apparatus for any of the purposes specified in this section, the person upon whom such order is served shall file with the commissioner plans and specifications therefor and shall obtain his approval of the same."

Sec. 300:

"No greater number of persons shall be employed in any room of a factory between six o'clock in the morning and six o'clock in the evening than will allow each person so employed two hundred and fifty cubic feet of air space nor, unless by written permit of the commissioner, than will allow four hundred cubic feet of air space for each person employed between six o'clock in the evening and six o'clock in the morning. Such rooms shall be lighted by electricity whenever persons are employed therein between six o'clock in the evening and six o'clock in the morning."

**(2) Title 5, Foundries, (Sec. 310).**

Sec. 310:

"Foundries shall conform to the provisions of this chapter relating to factories and also to the following requirements:

"1. Entrances and windows shall be constructed and maintained so as to minimize drafts.

"* * *

"3. Smoke, steam or gases generated in foundries shall be effectively removed therefrom in accordance with rules adopted by the board. The milling and cleaning of castings and the milling of cupola cinders shall be done under such conditions to be prescribed by the rules of the board as will adequately protect the employees from dust. The use of heaters discharging smoke or gas into the work rooms is prohibited except that open fires may be used under conditions prescribed by the board in its rules. Suitable provision shall be made for drying the working clothes of employees.

"4. All apparatus, tools, implements and equipment shall be kept in proper condition and repair.

" * * * * "

**F. Bakeries and Manufacture of Food Products, Article 12, (Secs. 330-339).**

Sec. 331-(2):

"A bakery shall have adequate windows, and, if



required by the rules of the board, hoods and types or other means for ventilating ovens and ash pits."

**F. Mercantile and Other Establishments, Article 14, (Secs. 375-391).**

Sec. 382:

"Every mercantile establishment and every restaurant shall be provided with proper and sufficient means of ventilation by natural or mechanical means or both, as may be necessary, and there shall be maintained therein proper and sufficient ventilation and proper degrees of temperature and humidity at all times during working hours. The board shall make rules for and fix standards of ventilation, temperature and humidity in mercantile establishments and restaurants."

Sec. 383 prohibits the employment of children under the age of sixteen years and also females in the basements of mercantile establishments or restaurants unless a permit therefor is granted by the Commissioner. Such permit will be granted if the basement is sufficiently lighted, ventilated, and sanitary

**G. Mines, Tunnels and Quarries, Article 15, (Secs. 400-437).**

Sec. 417:

"An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place."

**3. Industrial Codes.**

Pursuant to statutory authorization, the Industrial Board has adopted certain rules and regulations in regard to dust hazard in industry which must be complied with by employers. These rules appear in pamphlet form in Industrial Code Bulletins, copies of which may be procured by communication addressed to the Department of Labor, 80 Centre Street, New York, New York. The following bulletins relate specifically to dust hazards.

**A. Bulletin No. 10; Equipment, Maintenance and Sanitation of Foundries and the Employment of Women in Core Rooms, (Rules 550-599).**

**(1) III. Removal of Smoke, Steam, Gases and Dust in Iron or Steel Foundries.**

Rule 556:

"Where smoke, steam, gases or dust arising from any of the operations of the foundry are dangerous to health and where a natural circulation of air

does not carry off such smoke, steam, gases or dust, there shall be installed and operated hoods, ventilators, fans or other mechanical means of ventilation approved by the Commissioner of Labor."

**Rule 557:**

"Where fumes, gases and smoke are emitted from drying ovens in such quantities as to be detrimental to the health or comfort of employees, hoods and pipes or exhaust fans or other mechanical means shall be provided over the doors of such ovens; hoods and pipes will not be required where they would interfere with the operation of traveling cranes, but other effective means shall be provided for the removal of such smoke, gases and fumes."

Rule 558 makes certain provisions in regard to the room where cleaning and chipping of castings are carried on.

**Rule 559:**

"Where tumbler mills are used, exhaust systems shall be installed to effectively carry off the dust arising from the cleaning of castings, except where the mill is operated outside the foundry. This rule shall not prohibit the use of a water barrel to clean castings. Sand blast operations shall be carried on in the open air or in a separate room used solely for such purpose. The milling of cupola cinders, when done inside the foundry, shall be carried on by an exhaust mill or water mill, each of a type approved by the Commissioner of Labor."

**Rule 560:**

"The floor beneath and immediately surrounding the cupola shall slope and drain away from the base of same."

**Rule 561:**

"No cores shall be blown out of castings by compressed air unless such work is done outside the foundry or in a special room or dustproof enclosure approved by the Commissioner of Labor. Men employed in cleaning castings by compressed air or sand blast shall wear eye guards and helmets."

(2) IX. **Regulations for Coremaking Rooms in Which Women Are Employed.**

**Rule 583:**

"All openings in partitions between the core oven room and the room in which females are employed shall be vestibuled with a revolving device or double doors which shall be self-closing, or any other self-closing device equally effective, which shall be approved by the Commissioner of Labor. Such device shall be kept in such condition that gases, fumes



and smoke shall be effectually trapped."

(3) X. **Brass Foundries.**

**Rule 587:**

"The rules relative to dust, smoke, gases or fumes, ventilation, sanitation, heat, light, gangways and aisles, safety appliances, washrooms, cleaning rooms, drying and locker accommodations, as specified for iron and steel foundries, shall apply to brass foundries, * * *."

**Rule 592:**

"Hoods shall be provided directly above all brass melting furnaces using gas or oil as fuel, which will effectually trap all gases and fumes generated in the melting of the metal; such hoods shall be provided with outlet pipes to lead the gases or fumes to outer air.

"Ventilators shall be provided over all other furnaces used for melting brass or composition metal, to effectually remove the gases above the furnaces."

**Rule 595:**

"Gangway dirt and floor scrapings shall not be riddled in the room where workmen are employed, unless it is so dampened as to prevent dust arising therefrom."

B. **Bulletin No. 12; Rules Relating to the Removal of Dust, Gases and Fumes, (Rules 700-757).**

This bulletin comprises twenty pages of specific rules governing employers with regard to protection against dust hazards in their establishments; space does not permit our setting them out in full. After defining the terms used therein, certain general rules for the filing of plans and specifications, for the operation and maintenance of exhaust systems, and specifications for piping, hoods, and separators are set out. Separate rules are provided for grinding, polishing and buffing wheels, straps and belts, for machines or other equipment creating dust or fumes, for lead dust, dust created by woodworking machinery, dust created by granite tools or machines, and for silica dust. It is important that employers having dust hazards in their establishments make a careful study of the bulletin in its entirety.

III. **Common Law Liability.**

Inasmuch as silicosis and other dust diseases are now expressly covered by the Workmen's Compensation Act, the question as to whether or not a right of action exists at common law in this state for injury, or death resulting therefrom, will not be of great importance as to such disability which may

arise in the future. Under some circumstances, however, the question may still be important; for example, when, under the 1936 amendment, the employer fails to secure the payment of compensation for silicosis or other dust diseases, the employee may elect to maintain an action for damages.

For reference, if and when the question may arise, citation is herein made to several New York cases from which it will be seen that the courts of that state have consistently held that a cause of action at common law exists for disease negligently caused by an employer. It should be borne in mind, however, that the common law right has been greatly curtailed, and, in many instances, eliminated, by the Workmen's Compensation Act.

In **Naud v. King Sewing Machine Co., 223 N. Y. 567, 119 N. E. 1061 (1918)**, a demurrer to the plaintiff's petition was overruled where the action was at law to recover damages for injuries alleged to have been caused by the inhaling of poisonous fumes, vapors and dusts in the course of employment and to have been sustained through the negligence of the defendant.

In **Trout v. Wickwire Spencer Steel Co., 195 N. Y. S. 528 (Supreme Court, Monroe County, 1922)**, the plaintiff became afflicted with chlorine poisoning as a result of inhaling chlorine gas while employed over a period of several months in the defendant's filtration plant. The plaintiff, in his suit for damages, alleged negligence on the defendant's part in failing to warn him of the danger. The court denied defendant's motion to dismiss the complaint, declaring that the Workmen's Compensation Act is exclusive only as to those actions coming within its scope, but that, where the common law right of action is not covered by its terms, such action is unaffected thereby and still exists.

In **Wager v. White Star Candy Co., 217 App. Div. 316, 217 N. Y. S. 173 (1926)**, the plaintiff contracted tuberculosis as a result of working for six months in a damp, unsanitary and unventilated cellar. She brought her suit at law, alleging that the defendant was negligent in failing to provide a safe place to work. The court held that, although a right of action existed at common law for such injury, since no accidental injury was involved and since the Workmen's Compensation Act was exclusive only as to such actions as were expressly compensable thereunder, the plaintiff must fail in her action because she, as a matter of law, assumed the risk of the danger. She knew of the wet walls, the vile odors, the draft and the dampness, and was chargeable with the common knowledge that such conditions are deleterious to health.



In **Scheerens v. Edwards & Son, 133 Misc. 616, 232 N. Y. S. 557 (1929)**, the court denied the defendant's motion for a judgment on the pleading, where plaintiff's action was at law to recover damages for disability from typhoid fever contracted as a result of drinking contaminated water during his three months' employment by the defendant. The court held that, since no accidental injury was involved, the Workmen's Compensation Act did not affect the plaintiff's common law right of action.

In **O'Donnell v. Elmira Foundry Co., 133 Misc. 629, 233 N. Y. S. 9 (1929)**, defendant's motion to dismiss the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that plaintiff had assumed the obvious risks of his occupation, was denied. The plaintiff's action was for damages to his lungs caused by the inhalation of iron dust in the course of his employment. The court declared that the plaintiff could not be held, as a matter of law, to have assumed such risk.

In **Repka v. Fedders Mfg. Co., 239 App. Div. 271, 267 N. Y. S. 709 (1933), affirmed at 264 N. Y. 538, 191 N. E. 553 (1934)**, it was held that, where an employee has contracted one of the enumerated occupational diseases but has not been disabled therefrom, he is not entitled to bring a common law action based upon his employer's negligence for injury to his person.

In **Jacque v. Locke Insulator Corp., 70 F. (2d) 680 (C. C. A., 2, 1934)**, the court affirmed a judgment, in favor of the plaintiff, for slightly over $15,000. The plaintiff had contracted silicosis after several years' work in defendant's plant. It was established that the defendant neglected to install a proper exhaust system as required by statute, to prevent the escape of dust by other means, to supply plaintiff with a respirator, and to instruct him of the danger of silicosis and how to avoid it. The court, besides pointing out that the statute furnished a standard of care for the elimination of dust and warned defendant of the necessity of taking certain precautions in regard thereto, said:

> "* * * Irrespective, however, of any statute, there is a duty at common law to warn and instruct employees and furnish them with means to avoid inhaling elements that are poisonous or injurious to their health, and there was proof that silica dust is such an element. * * *"

In **Barrencotto v. Cocker Saw Co., 266 N. Y. 132, 194 N. E. 61 (1934)**, the plaintiff brought an action for disability resulting from breathing dust in the course of employment due

to defendant's failure to exercise reasonable care and to perform its statutory duties in the operation of its factory. The disease was neither an injury by accident nor one of the enumerated occupational diseases. The court held that a good cause for action was stated at common law which was unaffected by the Workmen's Compensation Act, and accordingly denied defendant's motion to dismiss the complaint.

The most recent expression of the existence of a common law right of action for injury from the inhalation of dust, predicated upon the employer's negligence, is found in **Schmidt v. Merchants Despatch Transportation Co., 270 N. Y. 287, 200 N. E. 824 (March, 1936).** The opinion contains a comprehensive discussion of the application of the statute of limitations to actions involving such disability.

### IV. Miscellaneous Matters of Interest.

#### 1. Statute of Limitations.

**Sec. 48, subdivision 2, of Cahill's New York Civil Practice Act (1928),** provides that an action to recover upon a liability created by statute, except a penalty or forfeiture, must be brought within six years after the cause of action has accrued. **Sec. 49, subdivision 6,** provides that an action to recover damages for a personal injury resulting from negligence must be brought within three years thereafter.

In **Schmidt v. Merchants Despatch Transportation Co., 270 N. Y. 287, 200 N. E. 824 (1936),** the plaintiff brought his action at law for damages resulting from pneumoconiosis caused by the inhalation of dust in the course of employment and due to the negligence of the employer. At the time of filing suit, such disability was not compensable under the Workmen's Compensation Act. More than three years had elapsed between the time of the last exposure and the time of filing suit, but not between the time the plaintiff knew that the injury had occurred and the time of filing suit. It was the defendant's contention that the plaintiff's action was barred by the three-year statute of limitations. The court held that the *statute began to run at the time when, through lack of care* by the employer, the deleterious substance entered the lungs of the employee although the development of consequential damages was long delayed; that, as to the causes of action based upon the ordinary negligence of the defendant, the three-year statute of limitations applied; but that, as to the cause of action based upon the defendant's failure to provide the safeguards required by the Labor Law, the six-year period applied, since it was an action "upon a liability created by statute."



Where death occurs, the action to recover damages for wrongful death must be commenced within two years after the death (Ch. 13, Decedent Estate Law, Sec. 130).

#### 2. Other Recent Statutory Enactments.

In addition to the recent bill relating to the compensability of silicosis and other dust diseases under the Workmen's Compensation Act, two other bills were enacted, likewise effective June 6, 1936. One appropriated $100,000 to the Department of Labor for the payment of expenses necessary to carry out the provisions of Article 4-A and also the provisions relating to the prevention of dust hazard in public works. The other amends **Sec. 15, subdivision 9** of the Act, relating to the rehabilitation of injured employees, by providing that there may be expended annually, from the vocational rehabilitation fund, for a period of five years, the sum of $50,000 for the purpose of making a study of the means and methods of eliminating hazards to life and health from dust and other occupational diseases, and disseminating information on such subject.

# CHAPTER XXXV

# NORTH CAROLINA

## I. Workmen's Compensation Act.

1. **Statutes. North Carolina Code of 1935, Sections 8081 (h) to 8081 (hhhh).** For convenience, reference in this Chapter will be made to the section designations of the Act instead of the complicated letter designations used in the Code.

2. **Administration.** The Act is administered by an Industrial Commission composed of three persons appointed by the Governor for terms of six years each. Not more than one may be a representative of either the employers or the employees. Communications may be addressed to the Commission at Raleigh, North Carolina.

3. **Scope of the Act.**

A. **General Provisions.**

With few exceptions the Act covers all private employments wherein five or more employees are regularly employed in the same business (Sec. 2 (a)).

The Act in its original form provides compensation for injury or death by accident (Sec. 2 (f), 2 (a), and Section 10.) By amendment effective March 26, 1935, occupational diseases were made compensable. A detailed discussion of that amendment is included herein.

Employers and employees are presumed to have accepted the provisions of the Act unless notice to the contrary is given by either party (Sections 4 and 6). Where both the employer and employee elect not to operate under the Act, or where only the employer so elects, the employer loses the defense of assumed risk, contributory negligence, and negligence of fellow-servant in any action at law instituted by an employee to recover damages for personal injury or death by accident (Secs. 15 and 17). Where the employer is bound by the Act and the employee has elected to reject its terms, then such defenses are available to the employer (Sec. 16).

Every employer accepting the Act must insure and keep insured his liability thereunder in an authorized corporation, association, organization, or mutual insurance association of employers, or he may carry his own risk upon satisfying the Industrial Commission of his ability to pay the compensation directly. In the latter case the Commission may require him

to deposit acceptable security, indemnity or bond (Sec. 67). If an employer required to secure the payment of compensation refuses or neglects to do so, he is subject to a fine of not more than $50 for each day of such refusal or neglect; in addition, he is liable to any injured employee during the continuance of the refusal or neglect either for compensation under the Act or to an action at law with the three common law defenses abrogated (Sec. 68 (b)).

When injury or death is caused by the employer's wilful failure to comply with any statutory requirement or lawful order of the Commission, compensation will be increased ten per cent. When caused by the employee's wilful failure to use a safety appliance or to perform a statutory duty or is caused by the wilful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury, compensation will be reduced ten per cent (Sec. 13).

### B. Occupational Disease.

A comprehensive amendment to the Act was passed by the General Assembly in March, 1935, and it became effective on March 26, 1935. It inserts Section 50½ which comprises 23 sub-sections lettered "a" to "w". This amendment deals exclusively with occupational disease and should be consulted for specific and detailed provisions inasmuch as its length prohibits verbatim reproduction in this survey.

Death or disability from any one of the enumerated occupational diseases "shall be treated as the happening of an injury by accident" within the meaning of the Act, and procedure, practice, compensation, and other benefits are made to apply to such occupational diseases except as specifically otherwise provided.

> "* * * The word 'accident,' as used in the Workmen's Compensation Act, shall not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously or at frequent intervals in the course of such employment, over extended periods of time, whether such events may or may not be attributable to fault of the employer, and disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this Act: * * *"

No compensation for asbestosis or silicosis shall be paid if at the time of entering the employment the workman falsely represented himself in writing as not having been previously disabled or laid off because of asbestosis or silicosis (Sec. 50½ (a)).



The following occupational diseases are made compensable: anthrax; poisoning from arsenic, brass, zinc, manganese, lead, mercury, phosphorus, carbon bisulphide, methanol, naphtha, volatile halogenated hydrocarbons, benzol, radium, carbon monoxide, sulphuric, hydrochloric or hydrofluoric acid; chrome ulceration; compressed air, infection of skin, eyes, or nose by enumerated dust fumes or gases, cancer or ulceration of skin or eye due to coal tar products; x-ray injuries; blisters from use of tools; bursitis; miner's nystagmus; bone felon, synovitis; tenosynovitis; **asbestosis and silicosis** (50½(b)).

"Disablement" as applied to silicosis and asbestosis means the event of becoming actually incapacitated from performing normal labor in the last occupation in which remuneratively employed (Sec. 50½ (c)).

The provisions of this amendment apply only where the last exposure to the hazards of the disease occurred on or after March 26, 1935 (Sec. 50½ (e)).

The employer in whose employment the employee was last injuriously exposed to the hazards of the disease, is liable for the compensation payable (Sec. 50½ (f)).

An employer shall not be liable for any compensation for asbestosis, silicosis, or lead poisoning unless disablement or death results within three years after the last exposure, or, in case of death, unless death follows continuous disability from such disease, commencing within the period of three years limited herein, and for which compensation has been paid or awarded or timely claim made as provided and results within seven years after such last exposure. Claims for all other occupational diseases will be barred unless filed within one year from the disablement or death (Sec. 50½ (g)).

An employer must provide reasonable medical care to injured employees; for asbestosis and silicosis the maximum amount allowable for medical care is $334 annually for three years (Sec. 50½ (h)).

Compulsory physical examination is provided for with respect to persons engaged or about to be engaged in an occupation which has been found by the Industrial Commission to expose the workmen to hazards of asbestosis or silicosis. Upon receiving notice of such finding by the Industrial Commission, it is made the duty of the employer to provide examinations of new employees prior to their employment for the purpose of ascertaining whether they are in any degree affected by asbestosis or silicosis or are peculiarly susceptible thereto. Similar

physical examinations must be made from time to time, as ordered by the Commission, of all employees exposed to the hazards of asbestosis or silicosis. Physical examinations shall be made by one member of the Advisory Medical Committee or by another physician designated by the Commission. Refusal of an employee to submit to such examination bars him from compensation for asbestosis or silicosis. The employer's failure to provide such examination constitutes a misdemeanor (Sec. 50½ (i)).

Where an employee is not disabled from silicosis or asbestosis but it is found that he would be benefited by being taken out of such employment, and that the disease has progressed to such a degree as to make it hazardous to continue, and he is in consequence removed therefrom by order of the Industrial Commission, he will be paid compensation as for temporary total or partial disability, as the case may be, until employed in some other occupation. The maximum period of payment is forty weeks unless actual disability results within the prescribed time. If special training is required, the maximum amount for the training is $500. After being compensated under this section, if an employee afterwards engages in any occupation which exposes him to hazards of silicosis or asbestosis without the approval of the Industrial Commission, recovery is barred. Instead of changing his occupation at the order of the Commission, the employee may waive his right to compensation for any aggravation of his condition that may result in continuing in the hazardous employment; but in the case of total disablement or death, compensation will nevertheless be payable but not for longer than 100 weeks (Sec. 50½ (j)).

We quote the following definitions:

> "The word 'silicosis' shall mean the characteristic fibrotic condition of the lungs caused by the inhalation of dust of silica or silicates. 'Asbestosis' shall mean a characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust." (Sec. 50½ (k)).

In order for disability or death from silicosis or asbestosis to be compensable, the employee must have been exposed in the state to the inhalation of dust for a period of not less than two years, provided that no part of such two years was more than ten years prior to the last exposure (Sec. 50½ (l)).

Disability or death from silicosis or asbestosis, except as otherwise provided, is compensable in accordance with the amounts provided under the Workmen's Compensation Act (Sec. 50½ (m)).



Where such disability or death is complicated with tuberculosis, payment will be reduced one-sixth (Sec. 50½ (n)). It is expressly provided in the Act that the total compensation payable thereunder shall in no case exceed $6,000 (Sec. 41).

Compensation for disability or death from an occupational disease will be barred unless written notice of the first distinct manifestation of the disease be given to the employer in whose employment the employee was last exposed to the hazard, or to the Industrial Commission, within thirty days after such manifestation, and, in case of death, "unless also" written notice of such death be given to the employer or Industrial Commission within ninety days after occurrence, and unless claim for disability and/or death be made within one year after the disablement or death, respectively. Notice and/or claim are waived where the employer (or insurance carrier) voluntarily makes compensation payments, or has actual knowledge of the incurrence of the disease or of the death within the prescribed time, or by his or its conduct misleads the claimant reasonably to believe that notice and/or claim has been waived. Where compensation payments have been made and discontinued and further compensation is claimed, such claim for asbestosis, silicosis, or lead poisoning must be made within two years after the last payment; in all other cases of occupational disease, such claim must be made within one year after the last payment (Sec. 50½ (o)).

Where the Industrial Commission is of the opinion that a post mortem examination is necessary to ascertain the cause of death, it can order that such an examination be made. Proper notice and an opportunity to witness the examination must be given to the interested parties. If consent is not given by the surviving spouse or next of kin, recovery is barred (Sec. 50½ (p)).

An Advisory Medical Committee is created by this amendment which functions with respect to occupational disease. It acts only in an advisory capacity and reports its findings to the Industrial Commission.

It is specifically provided that with respect to asbestosis or silicosis, the Commission shall reserve its decision and award until it shall have received a report from the Advisory Medical Committee on any controverted medical question. With respect to other occupational diseases, reference to the Advisory Medical Committee appears to be optional with the Commission (Sec. 50½ (q)).

The Advisory Medical Committee is composed of three "licensed physicians in good professional standing and pe

culiarly qualified in the diagnosis and/or treatment of occupational diseases." They are appointed for terms of six years each by the Industrial Commission with the approval of the Governor (Sec. 50½ (r), (s), (t), and (u)).

The Industrial Commission is required to inspect "employments" for the purpose of determining whether they are subject to the hazards of asbestosis or silicosis and for the purpose of making studies and recommendations with a view to reducing or eliminating such hazards. An employer who unreasonably prevents or obstructs such inspection is guilty of a misdemeanor (Sec. 50½ (v)).

### 4. Court Construction.

#### A. Disease as Accidental.

The North Carolina courts had adopted a liberal construction of the Workmen's Compensation Act, so as to award compensation for disease as **accidental**, when caused by negligence, even before the adoption of the Occupational Disease Amendment of 1935. We, therefore, include a discussion of several illustrative cases.

**In McNeely v. Carolina Asbestos Co., 206 N. C. 568, 174 S. E. 509 (1934)**, the plaintiff brought his action at law to recover for damages resulting from pulmonary asbestosis, alleged to have been caused by the inhalation of fine asbestos dust over a period of approximately fifteen months' time. The plaintiff alleged that the defendant was negligent in failing to provide an exhaust system, to furnish a safe place in which to work, and to warn him of the danger. The defendant contended that since both parties were operating under the Workmen's Compensation Act, the rights and remedies conferred by the Act were exclusive of all other rights and remedies. It was the plaintiff's position that his disability resulted from an occupational disease, that such disability could not be deemed to have resulted from an injury by accident as used in the Act, and that, consequently, his sole remedy was by a common law action for damages.

The court held that the plaintiff's disability could not be deemed an occupational disease because it was caused by the negligence of the employer and hence was not the usual incident or result of the particular employment in which the workman was engaged. Or in other words, "the injury was not produced by the inherent nature of the work itself and classifiable as an occupational disease, but was produced by the active negligence of the employer and his failure to exercise reasonable care."



The court also held that the plaintiff's injury was accidental within the meaning of the Act because, as declared by the court, "* *, it would seem manifest that our act did not undertake to limit compensation to cases where the injury was begun and completed within narrow limits of time, but that it used the expression 'injury by accident' in its common-sense everyday conception as referring to an injury produced without the design or expectation of the workman * *."

The court accordingly affirmed a ruling of the trial court sustaining defendant's motion of non-suit, on the ground that plaintiff's injury was compensable under the Act as an injury by accident.

In an earlier case, **Cabe v. Parker-Graham-Sexton, Inc., 202 N. C. 176, 162 S. E. 223 (1932)**, compensation was granted for death resulting from carbon monoxide poisoning caused by the involuntary inhalation of gas in a tunnel over a period of a day.

**In Johnson v. Hughes, 207 N. C. 544, 177 S. E. 632 (1935)**, the plaintiff brought a common law action for damages, alleging that his health had been impaired, shattered, and destroyed as a result of defendant's negligence in ordering him to lift heavy equipment with insufficient help over a period of time. The defendant demurred to the plaintiff's petition on the ground that the plaintiff's sole remedy was under the Workmen's Compensation Act. The court, in sustaining the demurrer, stated that it was controlled by the decision in **McNeely v. Carolina Asbestos Co.**, supra, wherein it was held that "sickness or physical breakdown, produced solely by negligence, was not per se an 'occupational disease,' but an injury by accident within the meaning of the Compensation Act."

**Slade v. Willis Hosiery Mills, 184 S. E. 844, (Supreme Court April 1936)** involved a claim under the Workmen's Compensation Act for the death of an employee from pneumonia contracted when he was engaged in removing ashes from under a boiler on a hot day. The wetting resulting from the use of cold water in cleaning the machine, his being in the hot sun part of the day, and the exertion from the labor, all contributed to the contraction of the disease. Compensation was denied because the deceased was doing his work in the usual and customary way, and because it was not unusual or unexpected that he should get wet in cleaning the machinery or that he should go into the sunshine in carrying out the ashes. The weather had been hot but not excessively so. The Court concluded that no injury by accident was involved.

B. **Exclusiveness of the Act.**

Sec. 11 of the Act provides in part:

> "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death."

It would seem that this section should bar an employee from bringing an action at law only with respect to injury or death for which compensation is provided, and that all other actions for injury or death would be unaffected thereby. The decisions, however, do not support such conclusion.

In **Pilley v. Greenville Cotton Mills, 201 N. C. 426, 160 S. E. 479 (1931)**, the plaintiff brought an action at law to recover damages caused by the alleged negligence of defendant. The plaintiff had previously sought compensation under the Workmen's Compensation Act, but his application had been dismissed on the ground that he had suffered an accident not arising out of and in the course of his employment; no appeal was taken from that judgment. Both parties were bound by the Act. The court sustained defendant's demurrer to the plaintiff's petition on the ground that Sec. 11 excluded all other rights and remedies of the plaintiff against defendant, at common law or otherwise, on account of injury, loss of service or death.

Since the injury did not arise out of or in the course of employment, and since Sec. 11 expressly applies only to injuries or death by accident arising out of and in the course of employment, it would seem that Sec. 11 should be inapplicable. Counsel for the employer apparently did not present such an argument to the court but attempted to distinguish between an injury by accident and an injury from negligence. The court found no merit in such contention.

**Francis v. Carolina Wood Turning Co., 208 N. C. 517, 181 S. E. 628 (1935)**, is a case involving similar facts which arose in 1931.

In this case the workman, not having any duties to perform on a certain day, requested and was granted permission to use a rip saw for the purpose of making a table for his own use. While so using the saw, his hand was injured. Compensation was denied on the ground that the injury was not the result of an accident which arose out of and in the course of his employment.



The court followed **Pilley v. Greenville Cotton Mills**, supra, and held that the sole rights of the parties were those given by the Workmen's Compensation Act and that this action at law could not be maintained.

It will be observed that the cause of action in this case arose in 1931, and was governed by the Act as it then existed.

In 1933, the Act was amended by adding Sec. 24 (b) which reads as follows:

> "If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this act, and if the Commission, or the Supreme Court on appeal, shall adjudge that such claim is not within the act, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law."

That amendment appears to recognize the right to sue at law for an injury not covered by this Act.

II. **Other Statutes.**

1. **Child Labor Regulations, Chapter 90, Secs. 5031-5038.**

**Sec. 5032**

> "No child under the age of 14 years shall be permitted to work in or about or in connection with any mill, factory, cannery, workshop, or manufacturing establishment * * *"

**Sec. 5033**

> "No person under 16 years of age shall be employed or permitted to work in any of the places of occupations referred to in the preceding section for more than 8 hours in any one day or 48 hours in 6 days in any one week, or after the hours of 7 P. M. or before the hours of 6 A. M., and no person under 16 years of age shall be employed or permitted to work in or about or in connection with any quarry or mine * * or in the manufacture, preparation, or use of any poisonous substance or gas, or explosive * * *."

**Sec. 5033 (a)**

> "No female person between 16 and 18 years of age shall be employed, permitted, or suffered to work in any mill, factory, cannery, or manufacturing establishment after nine (9) o'clock in the evening or before six (6) o'clock in the morning * * *"

2. Mines, Chapter 112, Secs. 6896-6913.

Sec. 6897

"No minor under 16 years of age shall be allowed to work in any mine, * * *."

Sec. 6902

"The owner or agent of any coal mine, whether shaft, slope, or drift, shall provide and maintain for every such mine an amount of ventilation of not less than one hundred cubic feet per minute per person employed in such mine, which shall be circulated and distributed throughout the mine in such a manner as to dilute, render harmless and expel the poisonous and noxious gases from every working place in the mine. No working place shall be given more than sixty feet in advance of a break-through or airway, and all break-throughs or airways, except those last made near the working places of the mine, shall be closed up by brattice trap-doors, or otherwise, so that the currents of air in circulation in the mine may spread to the interior of the mine when the persons employed in such mine are at work. All mines governed by this chapter shall be provided with artificial means of producing ventilation, such as forcing or suction fans, exhaust steam furnaces, or other contrivances of such capacity and power as to produce and maintain an abundant supply of air, and all mines generating fire damp shall be kept free from standing gas."

Sec. 6904

"The mine foreman shall measure the ventilation at least once a week, at the inlet and outlet, and also at or near the face of all the entries, and the measurement of air so made shall be noted on blanks furnished by the inspector, and on the first day of each month the mine boss of each mine shall sign one of such blanks, properly filled with the actual measurement, and present the same to the inspector."

Sec. 6908

"For any injury to person or property occasioned by any willful violation of this chapter, or any willful failure to comply with its provisions, by any owner, agent, or manager of the mine, a right of action shall accrue to the party injured for any damage he may sustain thereby; and in any case of loss of life by reason of such willful neglect or failure a right of action shall accrue to the personal representatives of the deceased, as in other actions for wrongful death."

Sec. 6909 provides penalty for violation of the provisions of the law relating to mines or for the doing of anything whereby the life or health of persons or the security of any mine and machinery is endangered.



3. Rules and Regulations for Employees.

A. Regulations re Dust Hazards.

By Chapter 131 of the 1935 Laws, the Division of Standards and Inspection is directed to make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease.

Rules and regulations with regard to control of dust hazards have not as yet been adopted pursuant to this Act. The Division is however actively engaged along such lines and it is expected that rules and regulations will be adopted at an early date.

B. Working Places and Working Conditions.

Pursuant to the authority of Section (f) of Section 7310 (h), Consolidated Statutes of North Carolina, the Department of Labor published, in November, 1934, an 18 page pamphlet entitled "Rules and Regulations Governing Working Places and Working Conditions." It may be procured upon request addressed to the Commissioner of Labor at Raleigh.

The following rules are cited as of interest:

**Rule 11. Dust.** "In establishments making considerable dust, adequate exhaust fans for the removal of same shall be provided, and in case where complete elimination of dust by exhaust fans is impracticable, employees shall be provided with and required to wear, suitable respirators to strain the dust from air taken into lungs."

**Rule 25. Sanitation, Safety, Repair.** "Every part of a factory building, or building in which a restaurant, mercantile establishment, or other work place is located, and the premises thereof and plumbing therein, shall at all times be kept in a safe and sanitary condition and in proper repair. It shall be the duty of the employer to maintain the required sanitary facilities and conditions. Plumbing fixtures, safeguards against fire, electrical and other hazards, shall be in strict accordance with the State laws and the local ordinances, and the employer shall see that they are so provided and maintained."

**Rule 29. Air Conditioning, Humidity, Air Space. (1) Control of fumes and dust.** "In all establishments where large volumes of dust and/or dangerous fumes are created in the processes of handling or manufacturing products, such as in tobacco factories and tobacco re-drying plants, bone button factories, dyeing plants, asbestos products factories, granite-cutting plants, spray-painting shops, etc., the Commissioner shall make and enforce such special rules and regulations as he may consider necessary to protect the health of the workers. (Also see Rule

11, Dust.) Improved methods for air-conditioning shall be given due weight in departmental rating of all establishments."

**Rule 29. (2) Dye-Houses.** "(a) Dye-houses of textile and other establishments shall be equipped with ventilating systems, such as ventilating fans, heating coils, hoods with flues attached over kettles, etc., so that conditions not dangerous to health shall be maintained at all times."

**Rule 29 (3)** requires control of humidity and precautions against the ill effects of stagnant and vitiated air, too rapid variations of temperatures, excessive humidity or dryness, and harmful drafts.

**Rule 32. Compliance of Employees.** "Every employee shall use all safeguards, and safety appliances or devices furnished for his protection and shall be responsible for carrying out all rules and regulations which may concern or affect his conduct."

**C. Other Special Regulations.**

In addition to the above, the Department of Labor has issued, for distribution upon request, the following:

"Safety Rules for Spray Painting," issued August 10, 1933.
"Safety Rules for Woodworking Shops," January 1, 1933.
"Safety Rules for Handling Explosives on the Surface," July 1, 1933.
"Safety Rules for Mines," October 15, 1933.
"Safety Rules for Quarries," March 1, 1934.
"Rules for General Safety in Industry."

**III. Common Law.**

No cases of interest can be reported other than those hereinbefore discussed.

**IV. Miscellaneous Matters of Interest.**

**1. Statute of Limitations.**

By Sec. 441 (5) an action for injury to the person must be commenced within 3 years after the cause of action has accrued; by Sec. 160, where death occurs, the action must be brought within one year after the death.



# CHAPTER XXXVI
# NORTH DAKOTA

**I. Workmen's Compensation Act.**

**1. Statutes. Compiled Laws of North Dakota, 1913, Supplement 1925, Sec. 396a 1-396a 33.**

**2. Administration.** The Act is administered by the Workmen's Compensation Bureau composed of three commissioners who are appointed by the Governor for a term of six years each. One of the commissioners must be a representative of labor, one of employers, and one of the public at large. Communications may be addressed to the Bureau at Bismarck, North Dakota.

**3. Scope of the Act.** Section 1 of the Act provides:

"The State of North Dakota, exercising herein its police and sovereign powers, hereby declares that the prosperity of the state depends in a large measure upon the well-being of its wage workers, and, therefore, for workmen injured in hazardous employments, and their families and dependents, sure and certain relief is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

**Section 2** contains, among others, the following definitions:

"'Hazardous employment' means any employment in which one or more employees are regularly employed in the same business or in or about the same establishment, except agriculture and domestic service, and except also any employment of a common carrier by steam railroad."

"'Injury' means only an injury arising in the course of employment, including an injury caused by the willful act of a third person directed against an employee because of his employment, but shall not include injuries caused by the employee's willful intention to injure himself or to injure another, or by his voluntary intoxication. **The term 'injury' includes in addition to any injury by accident, any disease proximately caused by the employment.** If the employer claims an exemption or forfeiture under this section, the burden of proof shall be upon him." (Bold face type not in text.)

From the foregoing, it is to be observed that disease proximately caused by the employment is compensable.

No special provisions are made in the Act with respect to claims based upon disease and such claims are therefore governed by the general provisions of the Act in the same manner as traumatic injuries are covered.

**Section 3** sets forth the schedule of compensation which reaches the maximum of $15,000 for permanent total disability.

**Section 6** provides:

> "Every employer subject to this act shall contribute to the North Dakota Workmen's Compensation Fund in proportion to the annual expenditure of money by such employer for the service of persons subject to the act, the amount of such payments and the method of making the same to be determined as hereinafter provided.
>
> "An employer securing the payment of compensation by contributing premiums to the Workmen's Compensation Fund shall thereby be relieved from all liability for personal injuries or death sustained by his employees and the persons entitled to compensation under this act shall have recourse therefor only to the North Dakota Workmen's Compensation Fund and not to the employer."

**Section 7** authorizes the Bureau to classify employments and fix the rates to be paid into the state fund.

By **Section 9** employers are relieved of the obligation to respond in damages at common law for injury or death of an employee which occurs during the period covered by the premiums paid into the state fund.

**Section 11** has been so frequently discussed in court decisions that it is quoted in full as follows:

> "Employers subject to this act who shall fail to comply with the provisions of sections six (6) and seven (7) hereof shall not be entitled to the benefits of this act during the period of such noncompliance, but shall be liable to their employees for damages suffered by reason of injuries sustained in the course of employment, and also to the personal representatives of such employees where death results from such injuries, and in such action the employer shall not avail himself or itself of the following common law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, and the defense of contributory negligence.
>
> "Such employer shall also be subject to the provisions of Section eight (8).



> "Any employee, whose employer has failed to comply with the provisions of sections six (6) and seven (7) hereof, who has been injured in the course of his employment, wheresoever such injury has occurred, or his dependents, in case death has ensued, may, in lieu of proceeding against his employer by civil action in court, file his application with the Workmen's Compensation Bureau for an award of compensation in accordance with the terms of this act, and the Bureau shall hear and determine such application for compensation in like manner as in other claims before the Bureau; but the amount of the compensation which said Bureau may ascertain and determine to be due to such injured employee, or to his dependents in case death has ensued, together with reasonable costs and attorney fees allowed by the Bureau, shall be paid by such employer to the person or persons entitled thereto within thirty days after receiving notice of the amount thereof as fixed and determined by the Bureau. In the event of the neglect, failure or refusal of the employer to pay such award within said thirty days, the same shall constitute a liquidated claim for damages against such employer in the amount so ascertained and fixed, which, together with such further costs and attorney fees as may be allowed by the court, may be recovered in an action in the name of the State for the benefit of the person or persons entitled thereto; and no exemptions except absolute exemptions shall be allowed against any levy under execution pursuant to judgment recovered in such action."

There is no provision for a medical board in this Act but medical examination is furnished by the Bureau and the employee is entitled to examination by a physician of his own choosing as provided in Section 16.

All employees are required to pay into the state fund from which disbursement is made to injured employees. No provision is made for an employer carrying his own risk.

**4. Court Construction.**

**A. Application to Occupational Disease.**

We cannot cite cases which throw much light upon the application of the Act to occupational disease. The paucity of such cases is probably due to the admitted application of the Act to such disease.

In **Dahn v. Kitchen, 209 N. W. 364 (1926)**, the Supreme Court of North Dakota considered the right of a workman to compensation for disability which was diagnosed as being caused by sleeping sickness. That such disability would be covered by the Act was not questioned. The only question discussed and decided was whether or not the disease was

contracted in the course of the employment. For the reason that there was found to be no competent evidence that the disease was so contracted, compensation was denied.

**In Pfeiffer v. North Dakota Workmen's Compensation Bureau, 221 N. W. 894 (1928),** compensation was allowed where the claimant was suffering from an existing glioma (tumor) which was aggravated by a slight blow received during the course of his employment. Had it not been for the existing condition, the blow would have had no appreciable effect.

B. **Exclusive Remedy and Penalty for Non-compliance with Act.**

The rights and remedies described by the Workmen's Compensation Act have been held to be exclusive. Furthermore, the employer cannot escape the obligations of the Act by failure to pay into the state fund as required by the Act. Any employer who does not pay into the fund is, in fact, severely penalized as will be noted from the following decisions.

**Fahler v. City of Minot, 194 N. W. 695 (1923).**

Fahler, who was a policeman in the City of Minot, was killed while undertaking to make an arrest. His administrator brought an action at law for damages against the City alleging that the City was an employer subject to the terms of the Workmen's Compensation Act and that it had failed to comply with its provisions, especially Sections 6 and 7 respecting the payment of premiums. The defendant demurred to the petition on two grounds, first, that the policeman was not an employee within the terms of the Act, and second, that even though the City had not complied with the Act, it is not liable in damages to the legal representatives of a deceased employee who was killed in the course of his employment but through no fault of the City or any one acting in its behalf.

The Supreme Court of the State held, first, that the City and the policeman were covered by the Workmen's Compensation Act, and second, that failure of the City as an employer to comply with Sections 6 and 7 of the Act, which provided for payment of premiums, made the City liable under Section 11 of the Act. The Court held that because of the provisions of Section 11, the City would be liable in damages even though there existed no common law liability to respond in damages. The Court said that Section 11 makes the occurrence of the injury in the course of the employment, the sole criterion of liability of a noncomplying employer.

It was argued by the defendant that Section 11 recognized the necessity of negligence as the basis of an action at law inasmuch as the section specifically denies to the employer the common law defenses in an action based upon the employer's



failure to comply with Sections 6 and 7. In answer to this argument the Supreme Court said:

> "In answer to this argument it is sufficient, in our opinion, to say that it is unnecessary to account for the reason why the legislature chose one method rather than another; but it is certain that by enumerating these defenses and rendering them unavailable the intention was definitely expressed to make them unavailable as against whatever liability was imposed. In other words, it would not any longer be competent to defend upon the usual grounds upon which personal injury claims are contested."

A similar conclusion was reached in **Lilly v. Haynes Co-Op. Coal Mining Co., 196 N. W. 556 (1923).** There the defendant-employer had failed to pay premiums under Sections 6 and 7 and the miner, who claims to have been injured while mining, brought an action for damages based upon alleged negligence of the defendant with respect to the conditions of employment, tools, etc. There was irreconcilable conflict in the evidence. The Supreme Court reversed a judgment for the defendant which was granted notwithstanding the verdict and ordered a new trial. The significant statement in the Supreme Court's opinion is:

> "In any event, the plaintiff, having offered evidence sufficient to support a finding that he was employed by the defendant and injured in the course of the employment, was entitled to recover a verdict because of such injury **and without regard to questions of fault."** (Bold face type ours.)

The provisions of Section 11 are invoked in a somewhat different way in the case of **State ex rel. Dushek v. Watland, 51 N. D. 710, 201 N. W. 680 (1924).** Here the Workmen's Compensation Bureau made an award of compensation to the injured workman against the employer who had failed to comply with the Act. The State then brought this action against the employer to enforce the award. The amount of the award was computed upon the basis of the schedule of compensation and a 50% penalty added for noncompliance with the Act. Judgment for the full amount was rendered in the trial court and was affirmed by the Supreme Court with respect to the compensation proper but modified by eliminating the 50% penalty. The Court referred to the compensation as being in the nature of a liquidated claim and held that there were no questions for review except those of a jurisdictional character. The court commented:

"It (the Workmen's Compensation Act) substitutes the principle of compensation for that of liability for fault. * *

"It will be observed that an employee of an employer who has not complied with the law has two remedies and he may elect which one he will pursue: (1) he may maintain a civil action against his employer, and in such action he is entitled to recover whatever damages he is able to show he has sustained; or (2) he may in lieu of such action apply to the Compensation Bureau for compensation under the Act."

Again the Court remarks:

" * * where an employer, subject to the act, has failed to comply therewith, he is liable to his employees for **all damages** they may suffer by reason of injuries sustained in the course of employment * *" (Bold face type not in text.)

The 50% penalty was remitted for the reason that there appeared to have been reasonable doubt with respect to the jurisdictional questions.

It is settled in **Nyland v. Northern Packing Co., 218 N. W. 69 (1928)**, that the employee must elect between the two remedies given him under Section 11 and that unless he has elected to submit his claim against the noncomplying employer to the Bureau, he cannot thereafter bring an action for damages.

The drastic effect of the right under Section 11, to bring an action at law against the employer who has not complied with the Act, is demonstrated in the case of **Moen v. Melin, 231 N. W. 283 (1930)**. Here an employee in a beauty shop was badly burned when she upset a can of wood alcohol which she was using as a fuel. Her employer had not complied with the Workmen's Compensation Act. The injured employee sued and the defense was urged that there was no negligence on the part of the defendant. A verdict was procured for $14,700 and it was affirmed by the Supreme Court. The courts specifically held that it was unnecessary to prove negligence. Having established that the employer had failed to comply with the Act and that the employee was injured in the course of her employment, the jury determined the amount of her damages exactly as they would in any other action for damages. It is manifest that the jury's verdict greatly exceeded the amount of compensation which would have been obtainable had the plaintiff applied to the Bureau for a determination of her rights.

In view of the foregoing decisions, it is extremely important that an employer subject to the Workmen's Compensation Act in this State, comply with it and make the necessary payments



under Sections 6 and 7. If he does not do so, he has no defense whatever to an action brought by an employee injured in the course of his employment and the amount of recovery is not limited by the schedule of compensation.

Although no cases can be cited so holding, the principles announced in the above cases would undoubtedly apply to actions based upon disability due to compensable occupational disease as well as traumatic injury.

## II. Other Statutes.

### 1. Child Labor. Chapter 12, Secs. 1404-1414a.

**Section 1404** forbids the employment in industry of children under fourteen years of age.

**Section 1405** prohibits the employment of children between the age of fourteen and sixteen in any factory, workshop, or mercantile establishment unless the employer procures and keeps on file an employment certificate.

**Section 1406.** No child under sixteen is permitted to be employed in operating circular or band saws, wood-shapers, wood-joiners, planers, sandpaper, or wood polishing machinery, emery or polishing wheels used for polishing metal; nor shall they operate or assist in operating rolling mill machinery, punches or shears, washing, grinding, or mixing mills or calendar rolls in rubber manufacturing; nor shall children be employed in any manner in preparing any composition in which dangerous or poisonous acids are used, and they shall not be employed in any capacity in the manufacture of paints, colors, or white lead; or any other employment that may be considered dangerous to their lives or limbs, etc.

**Section 1413** provides penalties for violations of any of the provisions of the Act.

### 2. Inspection of Coal Mines, Chap. 38, Secs. 3084a 1-3084a 91.

**Section 3084a 48** provides:

"The owner, operator or superintendent of every coal mine, whether operated by shaft, slope, or drift, shall provide and hereafter maintain ample means of ventilation for the circulation of air through the main entries, cross entries and all other working places, to an extent that will dilute, carry off and render harmless the noxious or dangerous gases generated in the mine, affording not less than 100 cubic feet per minute per person employed therein, and not less than 600 cubic feet per minute for each and every animal in the mine, but in any mine, or section of a mine where blackdamp is generated not less than 150 cubic feet of air per minute shall be provided for each person or as much more as may

be necessary to keep such section free from blackdamp. The quantities of air in circulation shall be ascertained with an anemometer or other efficient instrument; such measurement shall be made by the foreman or his assistants once a week at the inlet and outlet airways, and also at or near the face of each entry, and shall be recorded in a book kept for that purpose at the mine office. The quantity of air as provided for by this act for each person shall be conducted to each working place.

"In rooms generating blackdamp the volume of air required by this act shall be conducted to the face thereof by the use of brattice cloth or other suitable means."

Section 3084a 49 provides:

"The current of air in mines must be split or subdivided so as to give a separate current to a number not exceeding 75 men at work, and the inspector has the discretion to order a separate current for a smaller number of men if special conditions render it necessary."

III. *Common Law Liability.*

The Court decisions dealing with the right to bring an action at law are sufficiently covered in Section 14 of this Chapter. Attention is called to the fact that occupational disease is compensable; that the Act provides the exclusive remedies; and that the full amount of damages suffered may be assessed by a jury against an employer who has not complied with the Act, if the employee elects to submit his case to the court instead of claiming compensation before the Bureau and being limited by the schedule of compensation.

IV. **Miscellaneous Matters of Interest.**

1. **Limitations of Actions.**

An action for injury to the person must be commenced within six years after the cause of action accrues (Sec. 7375); an action for wrongful death must be commenced within one year from the death (Sec. 7386).

2. **Pending Legislation and Surveys.**

No legislation is now pending with reference to dust hazards.

There has been no official survey in this state of dust hazards or silicosis.

The hazard of carbon monoxide poisoning is receiving considerable attention in this state at present.



# CHAPTER XXXVII

# OHIO

I. **Workmen's Compensation Act.**

1. **Statutes. Throckmorton's Annotated Code 1934, Sec. 1465-37 through Sec. 1465-112.**

2. **Administration.** The Act is administered by the Industrial Commission, composed of three persons appointed by the Governor with the advice and consent of the Senate for terms of six years each. Not more than one of the members of the Commission may be classed as a representative of employers, not more than one as a representative of employees, and not more than two may belong to the same political party. Communications may be addressed to the Commission at Columbus, Ohio.

3. **Scope of the Act.** The Ohio Workmen's Compensation Act is compulsory as to private employers who have regularly in their service three or more employees (Sec. 1465-60, subdiv. 2). By court construction, only injuries or death by accident (see Sec. 14 of this Chapter) and injury or death from twenty-one enumerated occupational diseases (Sec. 1465-68a) are compensable thereunder. **The schedule does not include silicosis or other diseases resulting from breathing dust polluted air.** This section became effective July 8, 1931.

The schedule of compensable diseases includes anthrax; glanders; poisoning from lead, mercury, phosphorus, arsenic, benzol, volatile petroleum products, carbon bisulphide, wood alcohol, carbon dioxide, brass or zinc; manganese dioxide, radium, potassium cyanide, or sulphur dioxide; infection or inflammation of the skin on contact surfaces due to oils, cutting compounds or lubricants, dusts, liquids, fumes, gases or vapors; epithelioma cancer; compressed air illness; tenosynovitis; and chrome ulceration of the skin or nasal passages.

Each employer within the terms of the Act must either pay into a state insurance fund (Sec. 1465-69) and into an occupational disease fund (Sec. 1465-69b) certain premiums fixed by the Industrial Commission, or, upon satisfying the Commission of financial ability to pay the compensation and upon depositing the required security or bond, elect to pay the compensation individually. It becomes the duty of each member of a firm and of the officers of each private corporation to

cause the firm or corporation to so secure the payment of compensation, and, where there is a failure to comply, each of the above mentioned persons shall be guilty of a misdemeanor punishable by a fine of not more than $500, and where the failure is willful, imprisonment for not more than 90 days (Sec. 1465-69a).

Where compensation is secured as required, employers " * * shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of an employee, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay direct * *". But, where there is a failure to so comply, the employer is liable at common law for personal injuries or death caused by his negligence with the defenses of contributory negligence, negligence of fellow-servant and assumed risk abrogated (Sec. 1465-73). Under such circumstances an employee who has been injured or suffered an occupational disease, or his dependents in case of death, may, in lieu of so proceeding at common law, claim compensation under the Act as if the employer had fully complied therewith. Proper action will then be taken by the Commission for the collection of the award (Sec. 1465-74).

A scheduled occupational disease, will be compensable if it has been contracted in the employment in which the employee was engaged at any time within twelve months prior to the date of the disablement and is due to the nature of one of the processes described in the schedule, provided that the employee has been a resident of Ohio for ninety days next preceding the contraction of the disease or has been employed by an employer required by the Ohio Workmen's Compensation Act to contribute to the state occupational disease fund (Sec. 1465-68a). A willful and false representation by an employee that he has not previously suffered from such disease will bar his recovery (Sec. 1465-68c). A claim must be filed within four months after the disability, due to the disease, begins (Sec. 1465-72b); claims for accidental injuries or death are barred unless application is made within two years after the injury or death (Sec. 1465-72a).

The amount of compensation payable for injury or death resulting from the contraction of occupational disease is the same as for injury or death by accident (Sec. 1465-68a). The maximum amounts payable are as follows: for permanent total disability $18.75 weekly during the life of the employee; for temporary total disability, $3750; for partial disability, $4000



plus any compensation allowed for temporary total disability; for death, funeral expenses of $200 plus a death award of $6500 (Sec. 1468-78 through Sec. 1465-82). In addition, compensation is payable for medical, nurse and hospital service not to exceed $200 except upon the unanimous approval of the Commission (Sec 1465-89).

Where an injury, disease or death is caused by the employer's failure to comply with any specific requirement for the protection of the lives, health or safety of employees enacted by the Legislature or in the form of an order adopted by the Commission, the compensation otherwise payable will be increased by not more than 50 nor less than 15 per cent of the maximum amount established by law (Ohio Constitution, Art. II, Sec. 35).

**4. Court Construction.**

**A. Injuries by Accident.**

It seems firmly established that an injury or death sustained as the result of inhaling dust, or other disability due to a disease not scheduled, would be compensable under the Ohio Workmen's Compensation Act **only** if it results from an **accidental injury** within the meaning of the Act.

There are numerous Ohio decisions and the following are cited as illustrative only.

In the early case of **Industrial Commission v. Brown, 92 O. S. 309, 110 N. E. 744 (1915)**, decided before the occupational disease section was added to the Act, the question arose whether lead poisoning contracted in the course of employment was compensable under the Act. The Court denied compensation on the ground that occupational diseases were designedly omitted by the drafters of the Act. Reference was made, with apparent approval, to a statement of the Court in **Adams v. Acme White Lead & Color Works, 182 Mich. 157, 148 N. W. 485, (1914)**, declaring:

> "We are not able to find a single case where an employee has recovered compensation for an occupational disease at common law." (See Sec. III of Chapter 24, covering Michigan, for a discussion of this case.)

The Court also pointed out that the Act covered only injuries resulting from accident.

**Industrial Commission v. Roth, 98 O. S. 34, 120 N. E. 172 (1918)**, also involved a claim under the Act for death resulting from lead poisoning contracted in the course of employment, which claim arose before the occupational disease section was added to the Act. The employee, a painter, had been directed by a foreman to heat the paint in a small building in order

that it might be applied in the cold weather. The process of heating in a small unventilated room was done at numerous times over a period of two days. The Court, however, granted compensation on the ground that the injury was one occasioned by accident. The Court declared that an occupational disease is not only a disease incident to a particular occupation, but it is also a disease developed in the usual and ordinary manner in the occupation in which the person was engaged. Such was held not to be true under the facts as presented since the injury occurred by chance, unexpectedly, and not in the usual course of events.

In **Industrial Commission v. Cross, 104 O. S. 561, 136 N. E. 283 (1922)**, compensation was denied where an employee's death resulted from typhoid fever contracted as a result of drinking impure water furnished him by his employer. It was held that diseases which are contracted as here, as distinguished from diseases which are occasioned by or follow as a result of some physical injury, are not included within the term "injury" as used in the Act. There was a vigorous dissenting opinion.

In **Renkel v. Industrial Commission, 109 O. S. 152, 141 N. E. 834 (1923)**, the plaintiff filed his claim under the Act for disability resulting from tuberculosis caused by the inhalation of iron dust during a year's employment in defendant's plant. The Court in refusing to grant an award in plaintiff's favor declared that:

> "* * * compensation may be awarded for incapacity by reason of disease only where it is shown that the disease was caused by or is the result or consequence of a compensable injury, such as, for instance, the development of blood poison from a wound upon the body of the employe inflicted in the course of employment. Such a disease is generally referred to by the authorities as a traumatic disease; that is, a disease which is caused by physical injury."

The Court then pointed out that tuberculosis, like typhoid fever, in **Industrial Commission v. Cross**, supra, was a disease contracted by reason of the employee's lowered resistance resulting from long continued work under conditions tending to develop the disease, and so does not fall within the term "injury" as used in the Constitution and in the Act.

In **Industrial Commission v. Russell, 111 O. S. 692, 146 N. E. 305 (1924)**, compensation was denied where plaintiff, an operator of a moving picture machine, suffered the loss of sight of both eyes as the result of the prolonged action of ultra-



violet rays coming from a silver-tipped carbon point used in a moving picture machine, which he was required to look at almost continuously. The Court declared that there was no accidental occupational disease and no traumatic injury nor any accident which caused the unfortunate condition.

In **Industrial Commission v. Burckard, 112 O. S. 372, 147 N. E. 81 (1924)**, compensation was granted where the death of an employee, a chemist, resulted from tuberculosis caused by the inhalation, on a certain day, of poisonous fumes due to minor faults in equipment or accidental mishandling of materials. The Court said:

> "* * there is sufficient, in this record to show that the deceased's death was occasioned by or followed as a result of physical injury; that it was not occasioned in the natural and ordinary course of his employment, but by an unusual and extraordinary happening in the course of such employment, which was both accidental and unforeseen. * *."

In **Industrial Commission v. Polcen, 121 O. S. 377, 169 N. E. 305 (1929)**, compensation was granted where the employee who had been engaged for some ten years in the sulphuric department of the defendant chemical company, claimed to have been ruptured by a violent coughing spell caused by the emission of sulphuric fumes into the plant. The evidence disclosed that a particular coughing spell upon a particular day caused a specific injury and that there was not a continuous condition but a single particular condition which caused the injury. The Court concluded that the injury was not a usual and customary incident to the occupation in which the claimant was engaged and therefore accidental.

In **Industrial Commission v. Middleton, 126 O. S. 212, 184 N. E. 835 (1933)**, compensation was denied for facial paralysis sustained as a result of heavy lifting after exposure to cold weather during three weeks employment. There was no trauma nor any sudden happening, only prolonged heavy lifting and exposure.

In **Industrial Commission v. Palmer, 126 O. S. 251, 185 N. E. 66 (1933)**, compensation was granted for death resulting from the inhalation of carbon monoxide gas, not on the ground that a scheduled occupational disease was involved, for such was not true, but on the ground that the plaintiff's death was the result of an accident. Although plaintiff had been exposed to the poisonous gas for some time, the cause of the death was an unusual gassing on two specific occasions.

In **Industrial Commission v. Helriggle, 126 O. S. 645, 186 N. E. 711 (1933)**, compensation was also granted where death re-

sulted from the inhalation of carbon monoxide gas. A new explosive was being tried in a mine, and the fumes given off were inhaled by decedent. This experimentation produced a sudden and unusual hazard to which decedent was exposed.

In **Industrial Commission v. Bartholome, 128 O. S. 13, 190 N. E. 193 (1934)**, claimant, as assistant custodian, was obliged to remove soot, ashes, and fine dust from the combustion chamber of a boiler twice annually. While cleaning the chamber of the soot, etc., which had accumulated until it was waist deep in parts, he was overcome and fell down. He finally managed to get out of the chamber but the soot, etc., which he had inhaled, caused an infection of the lungs which aggravated a latent tubercular condition or caused him to contract tuberculosis in the first instance. The Court granted compensation for death by accident stating that the decedent was doing an extraordinary duty at the time he inhaled the soot and dust.

In **Industrial Commission v. Armacost, 129 O. S. 176, 194 N. E. 23 (1935)**, plaintiff sought compensation for injury to her eyes, known as chemical conjunctivites, resulting from minute particles of dye getting in her eyes while handling dress goods over a period of time. The Court held this was not an accidental injury and therefore not compensable under the Act. It was also stated that although there may have been medical trauma involved, there was no legal trauma, because, to so declare, would be to hold that when any microbe entered the body from the outside and lodged upon an uninjured mucous membrane, trauma results.

B. **Exclusiveness of the Act.**

The amendment to the Constitution of Ohio effective January 1, 1913, authorized, in Article II, Section 35, the enactment of laws providing for workmen's compensation for death, injuries or occupational disease. That section provided in part that such laws might provide for "taking away any or all rights of action or defense from employees and employers."

Article II, Section 35 of the Constitution was further amended in 1923, effective January 1, 1924, so as to provide:

> "Section 35. **Workmen's compensation.** For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. **Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease,** and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. * * *" (Bold face type not in text.)



Pursuant to the above quoted constitutional provision which became effective January 1, 1913, the State Legislature enacted the first workmen's law which included Section 1465-70 of the Code. That section has remained unaltered. It provides that where an employer has secured the payment of compensation as required therein, he, "shall not be liable to respond in damages at common law or by statute, save as hereinafter provided, for injury or death of an employee, wherever occurring, during the period covered by such premium so paid into the state insurance fund, or during the interval of time in which such employer is permitted to pay compensation direct to his injured or the dependents of his killed employees as herein provided." Section 1465-71 makes similar provision for those employers not bound by the Act who voluntarily elect to come within its terms by paying into the state insurance fund the premiums provided by the Act.

As disclosed in the following decisions which are cited as typical only, the courts have construed the constitutional provisions as barring all rights of action for injury or death at common law or otherwise even though compensation may not be provided under the Act for the injury in question.

In **Zajachuck v. Willard Storage Battery Co., 106 O. S. 538, 140 N. E. 405 (1922)**, the plaintiff brought his action at common law to recover damages for disability from lead poisoning caused by the inhalation of dust and fumes over a period of a year and a half. At that time no compensation was provided in the Workmen's Compensation Act for disability from occupational diseases. The plaintiff alleged negligence in failing to warn of the danger and in failing to observe statutory requirements. The Court without deciding whether a common law right of action existed for such disablement, held that, since both employer and employee were under the Workmen's Compensation Act, the remedy thereunder was exclusive and barred any right of action which the plaintiff may have had at common law or otherwise.

In **Mabley & Carew Co. v. Lee, 129 O. S. 69, 193 N. E. 745 (1934)**, the claimant, a sixteen year old girl, suffered a nervous breakdown as a result of working long hours in violation of the minimum wage law. In her action at law for the resulting

damage, the Court, without discussing whether or not the plaintiff would be entitled to compensation under the Workmen's Compensation Act, sustained the defendant's demurrer to the plaintiff's petition on the ground that since the employer was one contributing to the state fund, the employee's right to claim under the Act was exclusive of any common law right of action for her injury. A strong dissent was written which contended that the Act is exclusive only as to those injuries for which compensation is provided therein.

II. Other Statutes.

1. Occupational Diseases. Ohio Code Ch. 23a, Sec. 6330-1 to Sec. 6330-12.

This Act was passed in 1913, shortly after the passage of the first Workmens' Compensation Act, but it is entirely distinct from the Workmens' Compensation Act. The first section of the Act, now known as "General Code 6330-1" was amended to its present form in 1921. It is the only section of the Act which applies generally to all employments. It provides:

> "Every employer shall, without cost to the employees, provide such reasonably effective devices, means and methods as shall be prescribed by the Industrial Commission of Ohio, to prevent the contraction by his employees of illness or disease incident to the work or process in which such employees are engaged."

This section has been construed by the Courts as not having the effect of imposing upon employer liability for occupational disease contracted by an employee. It does, however, authorize the Commission to adopt rules and approve safety devices; and the failure of the industry to conform to such rules incurs a penalty of fifteen to fifty percent of the award of compensation allowable under the Workmens' Compensation Act. This penalty is mandatory under Article II, Section 35 of the Ohio Constitution.

The remaining sections of this Act apply only to work or process in the manufacture of lead, including white lead, red lead, litharge, sugar of lead, arsenate of lead, lead chromate, lead sulphate, lead nitrate or fluo-silicate. Elaborate safety provisions are specified with respect to working rooms, washing facilities, dressing rooms, eating rooms, drinking fountains and clothing of those engaged in such work. It is specifically provided:

> "The employer shall provide and renew when necessary, at least two reasonably effective respirators for each employee who is engaged in any work or process which produces lead dust."



Employees are required to use all the facilities so furnished; the employer is required to post notices in conspicuous places calling attention to the dangers involved in the work; medical examination of the employees is required once a month; medical reports of these examinations are required; and severe penalties are provided for the violation of this Act.

2. Mining Laws. Ohio Code Ch. II, Sec. 898-1 to Sec. 898-305.

This chapter must be consulted for detailed information. We can only quote here the sections which are most directly designed to prevent air pollution.

Sec. 898-42. Ventilation of mines.

> "The owner, lessee or agent of a mine, shall provide and maintain the necessary artificial means of capacity and power capable of supplying the required ventilation, and shall maintain a sufficient volume of air, not less per minute than one hundred and fifty cubic feet for each person, and five hundred cubic feet for each animal working therein, measured at the intake, and distributed so as to expel or dilute and render harmless, explosive, poisonous and noxious gases."

Sec. 898-43. Additional requirements for mine generating fire damp.

> "The owner, lessee or agent of a mine generating fire damp, so as to be detected by a flame safety lamp, shall provide and maintain not less than two hundred cubic feet of air per minute for each working person therein."

Sec. 898-46. Ventilation of mines, when started.

> "At each mine where the ventilation is not continuous, it shall be started a sufficient length of time prior to the appointed time for any person, or persons, working therein to enter, to clear the mine of explosive, poisonous and noxious gases, and shall be kept in operation a sufficient length of time after the appointed time for such employes to leave their working places, for all persons to be out of the mine."

Section 898-49 requires sprinkling or otherwise treating when the mine contains accumulation of coal dust, of a fineness capable of being thrown into the air by concussion or other means, in sufficient quantities to form an explosive dust mixture.

Section 898-137 requires the withdrawal of the men from the mine whenever ventilating fans or machinery get out of order.

Section 898-144 places the responsibility for inspection of the

mines upon the mine foremen, particularly with respect to ventilation.

3. **Workshops and Factories. Ohio Code Ch. 12, Secs. 979 to 1038-24.**

This chapter should be consulted for detailed provisions.

Under Section 989, each district inspector of workshops and factories is required to inspect with respect to ventilation and other conditions.

Under Section 996, the inspector is authorized to notify the owner of unsatisfactory conditions as to ventilation and to order alterations and additions as needed.

The owner is required to comply with such orders under penalty of fine for failure to do so. (Secs. 997 and 998.)

Section 1027 requires the owners and operators of shops and factories to take many specified precautions to prevent injury. Included therein, is the requirement to use blowers to protect operators from particles of dust in the operation of emery wheels and buffing wheels. This is a long paragraph and should be studied by any operator who may be affected thereby.

4. **Employment of Minors. Ohio Code Chapter 11, Sec. 12960 to Sec. 13021.**

The length of these sections forbids copying herein; attention however is directed to them, and particularly to the following sections:

Sec. 12972 forbidding employment of a child under 16 years of age in such manner as to endanger the health or morals of such minor.

Sec. 12993 forbids the employment of a child under 16 years of age in 26 specified employments which include practically all industrial work.

Secs. 13001 and 13002 contain further and elaborate prohibitions upon the employment in certain lines of work of children under the age of sixteen.

Sec. 13007-3 contains similar prohibitions with respect to the employment of children under the age of eighteen.

5. **Industrial Codes.**

Pursuant to statutory authority, the Industrial Commission of Ohio has from time to time issued "Specific Safety Requirements" applicable to certain industries. These are published in bulletin form and may be procured upon request, addressed to the Industrial Commission of Ohio. We call attention to the following, which are of interest in this survey:



A. **Foundries. Industrial Bulletin No. 205.** There are 98 sections of this bulletin. A few only can be noted.

Sec. 53 requires the wearing of respirators, hoods or helmets by employees engaged in cleaning castings, with air or sand blasts.

Sec. 55 requires the wearing of suitable safety goggles when the eyes of the employees are liable to be injured, by dust, flying chips or molten metal.

Sec. 56 provides that when dust arising from cleaning operations is liable to cause injury to the health of the employees, they shall wear suitable respirators.

Secs. 60 to 66 inclusive relate to ventilation and require the removal of smoke, steam, gases and dust by ventilators, fans and blowers. Other sections regulate the manner of heating and lighting, and the cleaning and ventilating of washrooms, lockers, and rooms where females are employed.

By Secs. 86 et seq., the same rules are made applicable to brass foundries.

B. **Woodworking Machinery. Industrial Bulletin No. 206.** This bulletin contains 81 sections, several of which deal with the problem of disposing of dust created in using woodworking machinery. We call particular attention to Secs. 38, 39, 40, 42, 45 and 51, all of which deal with the installation of exhaust hoods and exhaust systems.

C. **Blowers and Exhaustures. Industrial Bulletin No. 209** This bulletin contains numerous rules and regulations to be observed by employers conducting a manufacturing business where emery wheels are used. There are provisions in regard to hoods and hoppers, exhaust systems, form reports to be made, piping, plans to be submitted for blower installation, improvements, inspections, and so forth. Employers affected by this bulletin should acquaint themselves with the rules contained therein.

D. **Potteries. Industrial Bulletin No. 211.** This is a six page bulletin and should be consulted. Certain paragraphs, pertinent to this survey, require thorough ventilation of all places where workers are employed; that all blowers in workshops be kept clean; that watering cans be provided each kiln crew for sprinkling the floor when necessary, to keep down dust; that the floors be sprinkled before sweeping; and that respirators be furnished men for use while sweeping floors. The last section of this bulletin provides as follows:

"Suppression of Dust.

"The following processes shall not be carried on without the use of an efficient exhaust draught:

"1. The bedding of any articles in flint.

"2. The removal of any article bedded in flint from the sagger after being fired.

"3. The sifting of flint.

"4. The cleaning of earthenware bisque by machine.

"5. Ware cleaning after the application of glaze by dipping or other process, except when cleaned by a moist process.

"6. The lawning of dry colors.

"7. Ground laying.

"8. Color dusting and color blowing.

"9. The grinding of grog in sagger shops shall be discontinued unless some effective means is used to overcome the dust therefrom.

"10. The dusting of cores for casting.

"11. In the process of mould-making, every bin or other receptacle used by the mould maker in mixing his plaster, shall have an efficient exhaust draught to prevent the escape of dust into the workroom.

"12. In all processes, employer and employee shall as far as practicable, adopt efficient measures for the prevention and removal of dust."

III. Common Law.

The Supreme Court of Ohio has not decided any case in which there was a clear-cut issue as to the existence in Ohio of a common law right of recovery for occupational disease caused by the negligence of the employer. Many cases, however, have discussed the question even though not specifically at issue and many statements appear in court opinions of the state from which a definite understanding has arisen that no such common law right exists in this state. It is to be noted that the Ohio court shows no evidence of recognizing the distinction between the two definitions of "occupational disease"—the one which refers to a disease characteristic to an industry acquired over a long period of time and which cannot be prevented by reasonable care, and the other which refers to disease characteristic to an industry, but due to negligence of the employer and which reasonable care would prevent.

The first recognition of the question as to whether a common law right of action existed in Ohio for occupational disease, appears in **Industrial Commission v. Brown, 92 O. S. 309, 110 N. E. 744 (1915).** The only issue was whether the words "personal injuries sustained in the course of employment" as used in the Workmen's Compensation Law of 1911, included lead poisoning contracted in the course of employment.



At that time workmen's compensation laws were relatively new and the Ohio court was pioneering in the construction of such laws. There were not many helpful precedents. It is not surprising that the Court was impressed by the now well known Michigan decision in **Adams v. Acme White Lead & Color Works,** which had been decided a few months previously. The Ohio court cited the Michigan case for a definition of "personal injury" and quoted with approval as follows:

> "Manifestly the terms 'personal injury' and 'personal injuries', above mentioned referred to common law conditions and liabilities and do not refer to and include occupational diseases, because an employe had no right of action for injury or death due to occupational diseases at common law, but, generally speaking, only accidents, or, rather, accidental injuries, gave a right of action. We are not able to find a single case where an employe has recovered compensation for an occupational disease at common law. Certainly it can be said that in this state no employer has ever been held liable to the employe for injury from an occupational disease, but only for injuries caused by negligence. It seems to us that the whole scheme of this act negatives any liability of the employer for injury resulting from an occupational disease."

The soundness of the Michigan decision has frequently been called in question, as we have pointed out in Chapter XXIV of this survey which covers the Michigan law. Nevertheless, its citation by the Ohio court, as above set forth, is the foundation for a long line of Ohio decisions which apparently assume that the Brown case was a final pronouncement and which determines that no such common law right exists in Ohio.

The United States Circuit Court of Appeals for the Sixth Circuit in a decision rendered in 1918 in the case of **Zajkowski v. American Steel & Wire Co., 258 F. 9,** ignores that portion of the decision of the Ohio Supreme Court in the Brown case above cited, which held that there is no common law right of recovery for occupational disease, and reached the opposite conclusion. Plaintiff had sued to recover at common law for blindness brought about gradually during a period of two years by exposure to heat and intense light in the course of his employment. The Circuit Court of Appeals said:

> "The case set out in the petition falls well within principles of the common law."

Holding further that the Workmen's Compensation Law bars a common law action only as to those injuries for which com-

pensation is obtainable, the Court reversed the decision of the trial court which was in favor of the defendant and granted the plaintiff a new trial.

No later federal decisions in this Circuit are reported and the Ohio courts have not followed the decision of the federal court above cited.

In **Zajachuck v. Willard Storage Battery, 106 O. S. 538, 140 N. E. 405 (1922)**, supra, the plaintiff's action was at law to recover for an occupational disease not compensable under the Act. The Court held for the defendant on the ground that, since both parties were under the Act, the employee's right to recover thereunder was exclusive of any right to recover at common law. In its opinion the Court said:

> "Whether a course of action existed under the common law for disease resulting from occupation disease, it is not necessary to decide, although the approved quotation on page 316 of Industrial Commission v. Brown, supra, would seem to deny a recovery at common law for diseases of that character."

Later the opinion stated:

> "That the employer was not liable for occupational disease generally, or for all occupational diseases, undoubtedly was recognized by the general assembly, for in its scheme of legislation, in 1921, it included only 15 specific occupational diseases (109 O. L. 183) which it considered compensable, * *."

The opinion is doubtless justified that the statements made in this case in regard to the right to recover at common law for an occupational disease are but dicta.

In **Industrial Commission v. Monroe, 111 O. S. 812, 146 N. E. 213 (1924)**, the question before the Court was whether or not in occupational disease cases, the Legislature intended to allow an appeal from decisions of the Commission denying claims therefor. The claimant had previously been refused an award by the Commission for the death of an employee from lead poisoning. The Court, in denying a right of appeal, said:

> "It is not for this court to pass upon the wisdom or reasons for denying such privileges. **At common law there was no liability for damages for occupational disease,** but by statute (109 O. L. 183), the Legislature has classified 15 different diseases occupational in character that are compensable, and in granting this right by the same act denies the privilege of appeal."

In **Maxwell Motor Co. v. Winter, 118 O. S. 622, 163 N. E.**



**198 (1928)**, the plaintiff brought his action at law for damages resulting from a scheduled occupational disease, claiming that the defendant had failed to comply with a lawful requirement. His action was based upon Section 1465-76, **since repealed**, which provided that:

> "In case * * * injury has arisen * * from the failure of such employer * * to comply with any lawful requirement, for the protection of the lives and safety of employees, then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee * * * may at his option, either claim compensation under this Act or institute proceedings in the courts for his damage on account of such injury; * * *"

The defendant contended that since there was no action at common law for an occupational disease, the provision of the Act relied upon by the plaintiff had no application. The Court in holding that the plaintiff's petition stated a good cause of action said:

> "The Legislature, by the Occupational Disease Act, intended to create and to give to an employee suffering from an occupational disease certain rights not theretofore existing, to wit, all the rights that an injured employee had under the Workmen's Compensation Act, * *
>
> **"This was the creation of a right not theretofore existing,** and the intent of the legislature to create the same is clear and manifest, in this, that it is not to be presumed that one individual suffering a disability from an occupational disease, due to the violation of a lawful requirement, should receive compensation under the Workmen's Compensation Act, if he so elects, and another employee in the same situation be denied the right to recover, because he had exercised his lawful right, under Sec. 1465-76, General Code, to institute a proceeding in court for his damages on account of his disability due to occupational disease, occasioned by the violation of a lawful requirement. We think the Legislature never intended such discrimination, and our conclusion is that, by the Occupational Disease Act (Sec. 1465-68a, et seq.) **a new right to recover was created.**"

In March, 1928, the Court of Appeals of Lucas County, decided **Ewers, Admx. v. The Buckeye Clay Pot Co., 20 O. A. 396.** The plaintiff's decedent, during thirteen years of employment by the defendant, contracted nontubercular fibrosis of the lungs caused by inhaling dust produced from the clay and other ingredients used in manufacturing processes. The disease was

commonly known as potter's consumption. Compensation was disallowed by the Industrial Commission on the ground that the disease was not one enumerated in the Workmen's Compensation Act. That ruling of the Industrial Commission having been approved by the Supreme Court, this action was brought at law based upon negligence of the defendant. In other words, this is a common law action. Judgment for the defendant was granted upon the pleadings. The Appellate Court affirmed the judgment holding that the decedent had suffered from an occupational disease not covered by the Act and

> "That no recovery could be had at common law for an injury to or death of an employee due to an occupational disease was decided by the Supreme Court of Ohio in Zajachuck v. Willard Storage Battery Co., 106 Ohio St., 538, 140 N. E., 405, and in Industrial Commission v. Monroe, 111 Ohio St., 812, 146 N. E., 213.
>
> "Since Section 35, Article II, of the Constitution, and the legislation enacted conformably thereto, provide, with certain exceptions not here involved, that employers complying therewith shall not be held to respond in damages at common law, or be sued for injury or death of any employee, and since the death of Ewers resulted from an occupational disease, which although not one compensable under the Workmen's Compensation Law, is nevertheless not an injury for which an action at law can be maintained, it is obvious that the judgment of the court of common pleas must be and accordingly is affirmed."

Effort was made to carry the above case to the Supreme Court, but a motion to certify the record was overruled by the Supreme Court on June 14, 1928. The case received further recognition, however, in connection with the case of **Mabley & Carew Co. v. Lee,** the latter case having been certified to the Supreme Court from the Court of Appeals because of conflict with the Ewers case.

In the case of **Mabley & Carew Co. v. Lee, 129 O. S. 69, 193 N. E. 745** (above referred to), the plaintiff, who was a girl sixteen years of age, was employed in a department store in Cincinnati during the month of December, 1931, for consecutive periods much in excess of the statutory time permitted for employment of females and minors. She brought an action at law for damages complaining of a nervous breakdown by reason of said employment. The disease complained of was admittedly not covered by the Workmen's Compensation Act. A demurrer to the petition was overruled and the petition held good by the Court of Appeals. That Court stated that the



petition did not show a right to any claim under the Workmen's Compensation Law, and that the right of the employee to recover exists at common law. This decision being in conflict with the Ewers case, decided by another Court of Appeals of the State, the Lee case was admitted and heard by the Supreme Court. That Court, however, reversed the Court of Appeals and held that the action could not be maintained. This decision had the effect of affirming the Court of Appeals in the Ewers case.

While this case does not specifically discuss the existence of a common law right of action for occupational disease apart from and unaffected by the Workmen's Compensation Act, it does hold that since the adoption of the amendment to the Ohio Constitution effective January 1, 1924, and the adoption of the occupational disease sections of the Workmen's Compensation Act, there is no right of recovery for occupational disease against an employer who is a contributor to the state fund except such right as is given under that Act. This bars a common law right of action under those circumstances even though the disability complained of may have been caused by the employer's negligence and is not one for which compensation was obtainable.

A strong dissenting opinion was written by Judge Zimmerman.

In the two very recent cases next discussed, the Ohio Supreme Court has dismissed without opinion petitions in error filed by counsel for employees for the reason that no debatable constitutional question was involved. **Fritz v. Westinghouse Electric & Mfg. Co., 130 O. S. 155, 197 N. E. 920 (1935).** In this case plaintiff's action was at law to recover for disability from silicosis, alleging the negligence of the employer as the cause thereof. The plaintiff contended that a common law right of action existed in favor of the plaintiff and that Article II, Section 35 of the Ohio Constitution (set out in Section 1 4B of this Chapter) as interpreted by the Court in **Mabley & Carew Co. v. Lee, 129 O. S. 69, 193 N. E. 745 (1934),** supra, was unconstitutional in that it violated the Fourteenth Amendment to the Constitution of the United States. The defendant contended that Mabley, et al v. Lee, supra, applied, thereby precluding plaintiff from bringing his action, and that no common law right of action ever existed in Ohio for an occupational disease.

In **Mozingo v. Marion Steam Shovel Co., 130 O. S. 591, 200 N. E. 756 (1936),** the plaintiff's action was at law to recover damages for disability from pneumoconiosis based upon the negligence of the defendant. Here again it was contended that

the plaintiff had a common law right of action for his disability and that to construe Article II, Section 35 of the Ohio Constitution and Section 1465-70 of the Workmen's Compensation Act as denying him such right of action, was to violate the "privileges and immunities", "due process", and "equal protection" clauses of the Fourteenth Amendment of the United States Constitution. The defendant contended the plaintiff had not been deprived of anything since no common law right of action existed in plaintiff's favor for an occupational disease and also that, assuming that he did have such a cause of action at common law, there is no vested right therein which cannot be changed at will by the Legislature. Again the Ohio Supreme Court dismissed the petition-in-error on the ground that no debatable constitutional question was involved. Upon appeal to the United States Supreme Court, there was a dismissal for want of a substantial federal question, 56 S. Ct. 957, (June 1, 1936); subsequent thereto a petition for rehearing was filed which is now pending in the United States Supreme Court.

Difficult as it may be to analyze and harmonize all of the decisions of the Ohio courts for the past twenty-five years, it seems to be the settled law of Ohio that there can be no recovery for silicosis or other dust diseases at common law and there is no right of recovery therefore under the Workmen's Compensation Act inasmuch as they are not included in the schedule of compensable diseases unless, in rare instances, such disability might be so incurred as to be held accidental.

IV. **Other Miscellaneous Matters of Interest.**

1. **Statute of Limitations.**

By Section 1124-1, an action for bodily injury must be brought within two years after the cause thereof arose. Where death occurs, Section 10509-167 provides that the action must be commenced within two years after the death.

2. There are at present no bills pending in the Legislature dealing with dust hazards or with the bringing of silicosis and other dust diseases within the Workmen's Compensation Act. During the last session of the Legislature, silicosis received consideration as part of a bill containing numerous other provisions; the bill, however, did not get out of committee during the regular session.



# AIR HYGIENE FOUNDATION OF AMERICA, Inc.

*Legal Series, Bulletin No. 1, Part vi*



## A Survey of the Statutes and Court Decisions Respecting Occupational Disease from Air Pollution

(For the Confidential Information of members. Not for reproduction, wholly or in part.)

PITTSBURGH, PENNSYLVANIA

SEPTEMBER 10, 1936

# LEGAL SURVEY

PART vi

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of States of the United States.

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

by

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## FOREWORD

This part (vi) of Bulletin No. 1, Legal Series, Air Hygiene Foundation of America, contains an analysis of the statutes and court decisions, affecting occupational disease, of nine States.

Part i was a resume of workmen's compensation laws as they affect occupational disease, and common laws and liabilities; part ii included detailed reports on Alabama to California; part iii covered Colorado to Kansas, part iv Kentucky to Montana, and part v Nebraska to Ohio. Part vii will complete the detailed reports and will include an index.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
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September 10, 1936

# CHAPTER XXXVIII

# OKLAHOMA

## I. Workmen's Compensation Act.

### 1. Statutes: Oklahoma Statutes 1931, Secs. 13348-13404.

2. **Administration.** The Act is administered by the State Industrial Commission, consisting of three members appointed by the Governor with the approval of the Senate. Each member must be a citizen of the state for two years, a qualified voter, and not less than 30 years of age. (Sec. 13378).

Communications may be addressed to the Commission, State Capitol Building, Oklahoma City, Oklahoma.

3. **Scope of the Act.**

Section 7, Article 23 of the Oklahoma Constitution provides:

> "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

By virtue of this constitutional provision, the Workmen's Compensation Act does not provide any compensation for death, and the following sections were enacted to conform to the constitutional provisions.

**Sec. 13402**

> "This Act shall not affect any action pending or cause of action existing or which has or may hereafter accrue to the dependents or other legal representatives of an injured employee in case death results from the injury after he has been awarded compensation under the provisions of this Act; provided, that for any injury for which compensation is not provided under the provisions of this Act the injured party shall have the right of action in the courts for his damage on account of such injury."

**Sec. 13403**

> "It is not intended that any of the provisions of this Act shall apply in cases of accidents resulting in death and no right of action for recovery of damages for injuries resulting in death is intended to be denied or affected."

By Section 13349 compensation is made payable "for injuries sustained by employees engaged in the following hazardous employments." Many employments are then enumerated as

hazardous, including among others, factories, foundries, glass factories, quarries and mines.

Section 13349 (7) contains the following pertinent definitions:

> "'Injury or personal injury' means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom." (Bold face type not in text.)

Section 13351 provides that every employer subject to the Act shall pay, or provide as required by the Act, compensation according to the schedule "for the disability of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury * * *." (Bold face type not in text.)

As to the exclusive character of the remedies granted under the Act, it is provided as follows:

> "The liability prescribed in the last preceding section shall be exclusive, except that if an employer has failed to secure the payment of compensation for his injured employee, as provided in this Act, then an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury * * *." (Sec. 13352).

In such action the employer is denied the common law defenses.

Sec. 13404

> "The right of action to recover damages for personal injuries not resulting in death arising and occurring in hazardous employments as herein defined, * * is hereby abrogated, and all jurisdiction of the courts of this state over such causes * * is hereby abolished."

By specific exception this section does not abolish the right to sue an employer who has not complied with the Act, or the right to sue for wrongful death.

The maximum compensation for permanent total disability is $9,000, and for either temporary total or temporary partial disability, $5400. (Sec. 13356).

The injured employee is required to submit to medical examination, but no medical board is created. (Sec. 13359).

"Notice of an injury for which compensation is payable" must be given to the commission and to the employer within 30 days "after injury." (Sec. 13358). The right to claim compensation is forever barred unless claim for compensation shall be filed



with the commission "within one year after the injury." (Sec. 13367).

From the foregoing it will be observed, that there is no specific provision for compensation for occupational disease. Disease is compensable only when it is the natural result of an accidental injury. It is necessary to carefully study the decisions of the Oklahoma courts for a full understanding of the meaning of accidental injury, and of the circumstances under which disease may be considered the result of accident, so as to be compensable.

**4. Court Construction.**

**A. Disease as Accidental.**

The Workmen's Compensation Act has been construed a great many times by the Oklahoma courts, and the cases are in harmony in holding that compensation is not payable unless there has been an accidental injury. The courts have had considerable difficulty with cases where injury has been suffered, but where the injury is not traumatic in character. The decisions are not altogether consistent, but there is a definite attitude of liberality of construction which includes as compensable many disabilities due to disease, which are not included under the strict construction of similar acts applied by courts of other states.

Not being able to discuss the many cases dealing with this subject, we cite the following as illustrative:

The early case of **Associated Employees' Reciprocal et al. v. State Industrial Commission, et al., 88 Okl. 249; 212 P. 604 (1923),** allowed compensation for an abscess in the palm of the hand resulting from a bruise received through continuous use of the hand in using a pick in ditching. The contention was made that there was no sudden or violent accident which resulted in the injury. The Court said, however:

> "Under the law it is not necessary that the claimant receive a sudden or violent injury in order to receive compensation. The term 'accident' is not used in a narrow sense. * *
>
> "It is clear that the development of an abscess * * resulting from continuous use of the hand in using a pick in ditching, is such injury as is compensable under the law."

In **Quality Milk Products v. Linde, 15 P. (2d) 58 (1932),** the Court virtually adopts the theory that any disease is accidental in character if it is unexpected and does not happen by design. That case practically eliminates the necessity for the happening of some specific event on a day certain. In that

case, the claimant worked from March, 1930, to July 6, 1930, and again from November, 1930, until April 4, 1931. He was a painter, and his duties were to clean and paint automobiles, at times using wood alcohol in a spray gun. It made him sick at various times during the first period of employment, and his real sickness began about March 1, 1931. He was then sick for three days, having vomiting spells, and it culminated in disability on April 4, 1931. The Commission found that he had sustained accidental personal injury on April 4, 1931. Nothing unusual occurred on April 4.

The Court discussed at length the meaning of "accidental" and the meaning of "injury", quoting with approval from **Victory Sparkler & Specialty Co. v. Francks, 147 Md. 368,** and reached the conclusion:

> "The effect from this work in an enclosed room was not apparent to either employer or employee. The injury happened without design on the part of either, and the effect was unforeseen and without the concurrence of either. It was an unintended and unexpected occurrence which produced the injury. * * * It was an untoward event resulting in impairment to the disability of respondent on account of his being in contact with the alcoholic fumes in a room provided with insufficient ventilation, and in our opinion it does not fall within the occupational class for which our law affords no compensation *."

It is manifest that the rule laid down in the foregoing case is broad enough to include disabilities due to exposure to most dust hazards.

In **Johnson Oil Refining Co. et al. v. Guthries et al., 27 P. (2d) 814 (1933),** compensation was allowed for disability as resulting from accidental injury, suffered by an employee who was engaged over a long period of time in cleaning petroleum coke out of stills, and who during the entire time was exposed to coke dust and gas fumes. This employment had continued "for a number of years." After again discussing the various definitions of accidental injuries, the Court said:

> "Under the evidence, the condition of claimant was probably progressively brought about by the inhaling of gas fumes and dust for a period of time, but on a definite and specified date, he went to work as usual, and after working a short time became suddenly ill and was unable to work further. The evidence is that on this certain date he had reached his limit, and that the breathing of the gas fumes and coke dust on this particular occasion was



> the exciting cause of his present condition. Such was the finding of the Commission, which is sustained by the evidence."

Following the two cases last above cited, the Court again allowed compensation in the case of **Tri-State Contractors, Inc., et al. v. Althouse et al., 27 P (2d) 1041 (1933).** There the claimant inhaled cement dust continuously during a period of three weeks employment. He began to experience difficulties shortly after starting to work, and it culminated in disability in the nature of "cement burns." Upon this record it was held that the injury suffered was sufficiently definite in point of time to be accidental in character.

It is extremely difficult to reconcile the foregoing cases with the decision in **United States Gypsum Co. v. McMichael, 293 P. 773 (1930).** In that case the Court reversed the Industrial Commission and disallowed compensation, holding that the disability was in the nature of an occupational disease, as distinguished from accidental injury, and was not compensable. The claimant had been employed intermittently for 10 years about the plant of the defendant company. He had long been exposed to gypsum dust, and had complained about the dust affecting his lungs. On June 27, 1929, he loaded a box car which "was the worst he had ever loaded as to being dusty, the dust arising from the gypsum rock therein loaded." Immediately following that day's work "his lungs hurt him and he was sick all night with his chest, lungs and bronchial tubes." He was not able to work thereafter.

As early as March, 1928, examination had shown that he was suffering from chronic bronchitis, and his trouble was diagnosed as pneumoconiosis. On April 1, 1928, he requested that he be transferred to another department, to escape the dust. The testimony showed that inhaling of gypsum dust was the sole cause of his inability to perform labor after June 28, 1929. The Court quotes with approval from **Meade-Fiber Co. v. Starnes, 147 Tenn. 362, 247 S. W. 980,** and held that the breathing of dust necessarily caused by the very work in which the employee was engaged did not constitute an accidental injury. The Court held

> (the evidence) "in its effect is, that the man's condition is the result of inhaling irritating dust by a slow, insidious condition, little by little, not ascribable to any particular day, but clearly a condition brought about by his occupation, amounting to an occupational disease."

There was a vigorous dissenting opinion, by two judges who

analyzed the record and maintained that the character of work performed on June 22 was sufficiently unusual to constitute the collapse of the claimant an accidental injury, even though he suffered heretofore from inhalation of dust in the usual course of his employment.

Shortly after the decision in the **United States Gypsum Co.** case above cited, the same court decided **Bryant et al. v. Beason et al., 4 P. (2d) 1061 (1931)**, and allowed compensation to a man who had been employed from June 1st until October 1st in handling cement, and who on October 1st inhaled an unusually large amount of cement dust. The Commission apparently adopted the testimony of certain doctors that pneumoconiosis was contracted from the inhalation of dust on this single day, thus constituting the injury accidental. The Court said that it could not disturb the Commission's finding, which was based upon competent evidence.

There are numerous other cases in which compensation was denied on the ground that the disability was in the nature of occupational disease, rather than accidental injury. Among those cases are, **Imperial Refining Co. et al. v. Buck, 7 P. (2d) 908 (1932)**, where the claimant suffered sore and swollen feet caused by constantly standing in oil; **Campbell Bakeries, et al. v. Baumeister, et al., 15 P. (2d) 989 (1932)**, where the claimant constantly handled heavy objects and suffered incapacitating pains in his back, hips and right leg, all of which "just came on gradually"; **Wilson & Co., Inc. v. McGee, et al., 21 P. (2d) 25 (1933)**, where the claimant suffered repeated frost bites from handling meat in a freezer, where the temperature was extremely low; **The Anna Maude, et al. v. Statham, 23 P. (2d) 203 (1933)**, where the claimant suffered from a ganglion on the wrist, as a result of constant use of the wrist in washing dishes; and **Coca-Cola Bottling Co., et al. v. Mowry, et al., 31 P. (2d) 562 (1934)**, where the claimant suffered from gradual and constant inhalation of caustic soda fumes.

While it is difficult to evolve a definite rule from the many decisions of the Oklahoma courts, it appears that compensation will be allowed for a diseased condition which has gradually developed if the employee was not aware that the conditions under which he worked might produce the disease. In other words, it would be accidental because unforeseen.

B. **Exclusiveness of Remedy.**

The law is well settled in Oklahoma, that the right to compensation is the sole and exclusive remedy of the employee, if the injury suffered comes within the Workmen's Compensation Act, and if the employee's common law cause of action is not



specifically excepted by some provision of the Act.

One such exception is injury due to the wilful act of the employer.

In **Adams v. Iten Biscuit Co., 63 Okl. 52, 162 P. 938 (1917)**, the Court said:

> "The compensation afforded by the act and the procedure by which the same is determined was intended to be exclusive as to all of the injuries therein embraced, and the right of action theretofore possessed by the injured employee was abolished, leaving to him such right of action in the courts for willful injuries as he may have had prior to its passage, and the act, as thus construed, does not deprive plaintiff of the equal protection of the laws."

In the same case the Court said:

> "A willful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the Act."

Another exception exists in favor of the employee, when the employer has not complied with the Act. In such cases, the employee may elect to pursue his common law remedy.

In all cases where the employee has a right to pursue his common law remedy, in lieu of accepting compensation, he is required to prove his case as a common law action. In other words, his action is based upon negligence, and he must prove negligence in order to recover. Such is the holding of **Eagle Creek Oil Co. v. Gregston, 99 Okl. 181, 226 P. 339 (1924)**.

C. **Effect of Death on Right to Compensation.**

The provisions of the Workmen's Compensation Act have no application to an accident for injuries resulting in death. **Consumers' Gas Co. v. O'Bannon, 94 Okl. 107, 221 P. 423 (1923)**.

There was serious question as to whether accrued and unpaid installments of compensation under an award of the Commission were payable to the estate, after death of the employee. In the case of **Western Indemnity Co. v. State Industrial Commission, 219 P. 147 (1923)**, it was settled that when the Commission makes an award, from which there is an appeal, and which award is not reversed, it is payable to the estate of the claimant. This may, in a measure, permit double recovery, for the common law right of action for the death of the employee continues to exist if the death was caused through negligence of the employer. The decisions are in accord that installments of compensation which have not matured at the time of the death of the employee, cannot be collected by the estate. Following several decisions on this question as to the right of the estate

to recover unmatured installments, the State Legislature, in 1933, amended Sections 13365 and 13372. These amendments apparently give the right to the estate to recover the full award, whether matured or not. If the courts so construe these amended sections, it results in further, possible duplication of recovery if death results from the employer's negligence.

II. Other Statutes.

1. Labor; Chapter 52, Secs. 10802-10896.

A. Employment of Women and Children; Secs. 10833-10850.

Sec. 10833 regulates the employment of children under 15 years of age, and empowers the Commissioner of Labor to determine what occupations are injurious to health or morals of children.

Sec. 10834 regulates the employment of children under 16 years of age, specifically prohibiting certain employments, including among others, employments where there are acids, dyes, lyes, gases, glass dust or other dust, or lint in such quantities as to be injurious to health.

Sec. 10837 limits the working hours of children under 16 years to 8 hours a day and 48 hours a week.

Sec. 10847 regulates the employment of females, and limits the hours of employment to 9 hours per day and 54 hours per week.

B. Factory Inspection and Regulation; Secs. 10851-10871.

Sec. 10852 authorizes the Superintendent of the State Board of Health, the Commissioner of Labor and the Factory Inspector, to formulate, publish and enforce rules for the sanitary regulations of manufacturing institutions, factories and workshops.

Inquiry develops that the Superintendent of the State Board of Health has not issued any regulations pursuant to the provisions of the above mentioned statute. The Department of Labor has issued its "Bureau of Factory Inspection Bulletin No. 7-A, 1936 Edition," and in it has set forth many safety code provisions. On page 5 of that bulletin, following the text of Sec. 10852, there appears a note which reads:

> "Owing to the fact that the legislature has, so far, restricted the personnel in the bureau of factory inspection to three persons, it has been considered inadvisable to vitalize the above section of law."

On page 9 of the bulletin, the explanation appears that the balance of the bulletin (some 200 pages) sets forth requirements adopted as the standards of the Department of Labor, which standards are taken from the various American Stand-



ards Safety Codes, developed under the procedure of and approved by the American Standards Association.

At page 140, et seq., will be found certain general safety provisions conforming to the American Standards Safety Codes, but none of which are sufficiently important to warrant their being reproduced herein.

C. Protection of Labor Generally; Secs. 10872-10896.

Sec. 10890 provides:

> "An employer shall be responsible in damages for personal injury caused to an employee, who was himself in the exercise of due care and diligence at the time he was injured, by reason of any defect in the condition of the machinery or appliances connected with, or used in, the business of the employer, which arose or had not been discovered or remedied, owing to the negligence of the employer, or of any person entrusted by him with the duty of inspection, repair, or of seeing that the machinery or appliances were in proper condition."

2. Constitutional Provisions.

A. Child Labor.

Article 23 of the constitution of Oklahoma contains the following provisions:

> "The employment of children, under the age of 15 years, in any occupation, injurious to health or morals, or especially hazardous to life or limb, is hereby prohibited.
>
> "Boys under the age of 16 years, women and girls shall not be employed underground, in the operation of mines; and, except in cases of emergency, 8 hours shall constitute a day's work underground in all mines in the state."

B. Contributory Negligence.

Article 23 of the constitution of Oklahoma contains the following provision:

> "The defense of contributory negligence or assumed risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

This provision may become of great importance in actions brought for damages due to inhalation of dust, where knowledge of the conditions is involved and necessarily raises the question of assumed risk.

3. Mines and Mining, Chapters 55, Secs. 11024 et seq.

A. Coal Mining; Secs. 11024-11130.

Sec. 11053

"The operator of every coal mine shall provide and hereafter maintain ample means of ventilation, affording not less than 150 cu. ft. of air per minute, for each and every person employed therein; and five hundred (500) cu. ft. of air per minute for every animal employed therein; more in either case as the Chief Mine Inspector or district mine inspector may deem requisite. The quantity of air serving any group of men shall be measured in the last two entry cross-cuts. The ventilation shall be conducted through all accessible entries, rooms and all working places, in such manner and with such velocity as to dilute and render harmless inflammable, noxious and poisonous gases."

Sec. 11054

"It shall be the duty of the operator of any coal mine to provide and maintain on the surface a ventilating fan capable of supplying the volume of air required by this Act * * *"

Sec. 11055

"All ventilating fans shall be kept in operation continuously night and day unless underground operations are suspended * * *"

Sec. 11057

"In case of stoppage of the fan all men shall be withdrawn from the mine."

Sec. 11058

"After the passage of this Act, a ventilating furnace shall not be used at any coal mine in the state, regardless of the number of men employed therein."

Sec. 11108

"In case any haulage-way, air courses, entry or room in any coal mine in this state becomes so dry that the air becomes dangerously charged with coal dust, the operator, lessee or agent, or whoever is operating the said mine in any capacity, shall have such haulage-way, air course, entry or room regularly and thoroughly sprinkled, sprayed and dampened with water, rock dusting until sufficient rock dust barriers as conditions may warrant may be substituted in lieu of sprinkling or spraying. In the event that either sprinkling, spraying or rock dusting is found to be impracticable, then the dangerous dust shall be removed from the mine and shall not be deposited in any place in the mine where it could again be distributed in the atmosphere by the ventilating currents.



"It shall be the duty of the district mine inspector to enforce all possible preventative measures to maintain the safety of all persons employed in any mine against the gathering or accumulating of any combustible matter that is explosive in its nature, and he shall cause the operator, or whoever is operating such mine as owner, lessee, or agent, to immediately remove any such accumulated matter, or render same harmless as provided for in this Section."

Sec. 11124

"The Chief Mine Inspector is further empowered and directed to ascertain by chemical analysis, when in his judgment it becomes necessary for the preservation of the health and safety of miners, the amount of dust, noxious gases and other impurities and the oxygen content in the air circulating in any mine in this state."

B. Lead and Zinc Mining, Secs. 11131-11156.

Sec. 11136. The Mine Inspector is directed to make inspections to ascertain the condition of the mines, and if he finds therein that the health of employees is impaired by reason of insufficient ventilation or circulation of air, he is to notify the operator of the defect and direct him to make necessary alterations with all due diligence, until completed. If necessary, the inspector is empowered to order a cessation of all work.

Sec. 11137. The Inspector is also directed to make inspections to ascertain or discover the presence of dust in such quantities as to be injurious to the health of employees; and upon finding dust in the air in quantities exceeding three hundred particles per cubic centimeter, shall notify the operator of such condition. Within 15 days after receiving such notice, the operator must

"* * provide, install and equip, and thereafter at all times maintain in such mine, a water line fully equipped, and in good serviceable working order and repair, leading up to the face of any and all drifts where dust is produced, or so close to the face of said drifts so that by the use of a suitable hose extension or sprinkling attachment to be supplied by the owner or owners of the mine, the mineral or earth in and adjoining the face of the drift or drifts of such mine can be sprinkled or wet by water from said pipe line; thereupon and thereafter, every person drilling, squibbing or blasting in said mine shall keep the face, surface, and drill holes in said drifts or drift wet or moist by the use of water from said water line to such an extent in such way as shall prevent, as far as possible, any dust raising from the working of any such face, or from the drilling,

blowing or shooting of any hole or holes; and the Ground Foreman in charge of the underground workings in any such mine or mines, so equipped with a water line, shall require all ground or dirt after being shot or blasted to be thoroughly wet or sprinkled to such an extent as shall prevent, as far as is practicable any dust from arising therefrom while the employees are at work therein."

Sec. 11152

"Boys under the age of 16 years, and women and girls shall not be employed under the ground or in the operation of said mines in this State, in any capacity other than clerical, and then only on top of the ground."

C. Safety Regulations; Secs. 11176-11221.

Sec. 11182 provides that it shall be unlawful to employ more than 10 persons in any mine or to permit more than 10 persons to be employed therein at any time unless they are in communication with at least two openings to the surface from each stratum of mineral worked in such mine. Exceptions are made under certain conditions set out in this section.

Sec. 11192. The operator of every mine must provide and maintain ample means of ventilation affording not less than 150 cu. ft. of air per minute for each person employed therein, and 50 cu. ft. of air per minute for each animal; in a mine where firedamp is detected, the minimum is 200 cu. ft. of air per minute per person and as much more as the Inspector deems necessary, and the ventilation shall be conducted to dilute and render harmless and expel therefrom the noxious and poisonous gases.

Sec. 11193. No more than 45 persons are permitted in the same air current, and mines where 10 or more persons are employed must be provided with a fan or other means to produce the ventilation, but no furnace is to be used where mines generate gases in dangerous quantities.

Sec. 11194 deals specifically with the operation of ventilating fans and doors.

Sec. 11195

"All mines generating firedamp shall be kept free of standing gas in all working places and roadways. No accumulation of explosive gas should be allowed to exist in the worked out or abandoned parts of any mine * * *."

III. Common Law Liability.

Although no decision of the state court can be cited specifically holding that a common law right of action exists for disability due to occupational disease, caused by negligence of



the employer, an inference seems fairly justifiable, from decisions dealing with the Workmen's Compensation Act, that such common law right does exist. It would of course have to be grounded in negligence of the employer. Furthermore, it would be necessary that the disease be not the result of accidental injury, which would make it compensable under the Workmen's Compensation Act.

One decision of the United States Circuit Court of Appeals, of the Tenth Circuit, in a case which arose in the United States District Court for the Northern District of Oklahoma, merits consideration. It is **Grammer v. Mid-Continent Petroleum Corp., 71 F. (2d) 38 (1934).** The employee was engaged for 11 years as a tank cleaner and still cleaner in the service of the defendant company. He worked steadily until February 27, 1932, when he became ill with lung trouble, and he died July 7, 1932. His disease was diagnosed as pneumoconiosis. This action was brought by his administratrix for wrongful death based upon negligence of the employer.

The Court did not question the right to bring the action, but the plaintiff failed to recover, because of the failure of the evidence to establish negligence. The case is therefore a recognition of the common law right to recover, provided negligence can be shown.

The statement of the Court with respect to the risks of the employment which were assumed by this employee, are of interest to all who are studying the question of dust hazards. The Court said in part:

"If Grammer died of pneumoconiosis, and if his occupation had anything to do with it, it was because of the dust in which he worked. He knew the dust was present when he took the job and when he kept it year after year. He knew it was somewhat harmful to the lungs, for he was furnished with a respirator and told to wear it, and that its purpose was to keep the dust out of his mouth, nose, and lungs. The dust irritated the throat and coughing followed. He assumed the ordinary, known risks attendant upon inhaling dust-laden air. Butler v. Frazee, 211 U. S. 459, 29 S. Ct. 136, 53 L. Ed. 281. No more effective warning of danger could be given than by furnishing respirators and requiring them to be worn.

"Grammer did not however assume the risk of any concealed dangers lurking in the dust. Appellee concededly knew of no lurking danger. Should it have discovered the danger? There's the nub of this case. If coke dust, or the gases hereafter discussed, alone or in combination, are inherently dangerous

substances, as is arsenic or nitric acid, the cases above cited are to the effect that appellee should have exhausted scientific knowledge in an endeavor to run the danger to its lair and protect against it. But is carbon dust an inherently dangerous substance? Appellant's own scientist said it was less harmful than ordinary house dust. The record discloses what we all know, that men live and die amid the dust and soot of the industrial districts of the cities of Pennsylvania and Ohio; and that coal miners and stone-workers perform their tasks in clouds of dust. Certainly ordinary house dust cannot, in law or fact, be classed with poisons or explosives which must be handled with infinite care."

Judge Bratton dissented on the ground that the evidence established prima facie the existence of a danger inherent in the employment; that the evidence showed that scientists had knowledge of the dangers; that Grammer did not have knowledge of it; that the defendant was charged in law with knowledge of the hazard, since the elements constituting it were known scientific facts; and that failure to warn in such circumstances constitutes actionable negligence.

**IV. Miscellaneous Matters of Interest.**

**1. Statutes of Limitation.**

An action for personal injuries must be brought within two years after the cause of action has accrued. **(Sec. 101 (4) under Civil Procedure)**; where death occurs, the action must be commenced within two years after the death. **(Sec. 570 under Civil Procedure.)**

**2. Surveys.**

The United States Bureau of Mines has issued a bulletin known as "Technical Paper 545" and entitled "Silicosis and Tuberculosis among Miners of the Tri-State District of Oklahoma, Kansas and Missouri." It covers the year ending with June 30, 1928. This bulletin may be procured from the United States Department of Commerce or the Bureau of Mines.



# CHAPTER XXXIX

## OREGON

**I. Workmen's Compensation Act.**

**1. Statutes. Oregon Code, 1930, Section 49-1801 through Section 49-1846.**

**2. Administration.** The Act is administered by the State Industrial Accident Commission, which is composed of three persons appointed by the Governor for terms of four years each, no more than two of whom may belong to the same political party. Communications may be addressed to the Commission at Salem, Oregon.

**3. Scope of the Act.** The Act contains no reference to disease.

The Act is elective as to private employers engaged in occupations defined as hazardous, but election to operate under the Act is presumed unless notice to the contrary is given. **(Sections 1810 and 1821).**

**Section 1814** provides:

> "Every workman subject to this act while employed by an employer subject to this act who while so employed **sustains personal injury by accident** arising out of and in the course of his employment and resulting in his disability, or the beneficiaries, as hereinafter defined, of such workman, in case the injury results in death, shall be entitled to receive from the industrial accident fund thereby created the sum or sums hereinafter specified and the right to receive such sum or sums shall be in lieu of all claims against his employer on account of such injury or death, except as hereinafter specifically provided. * * *" (Bold face type not in text.)

In **Section 1814-a** the right of election of remedies is given the employees when the employer has failed to comply with the act; and the words "accidental injury" are therein consistently used. The right of this election is given to an employee who "shall receive an **accidental injury** * * *."

In **Section 1822-a**, when treating the right of the employee with respect to injuries received prior to the employer's compliance with the Act, the language again is:

> "If a workman * * * shall receive an **accidental injury** prior to the time the employer has filed * * *."

Section 1827 reads as follows:

> "If any workman while he is subject to this act and in the service of an employer who is thus bound to contribute to the industrial accident fund shall sustain a personal injury by accident arising out of and in the course of his employment caused by violent or external means, he or his beneficiaries or dependents, if the injury result in death, shall receive compensation as hereinafter provided." (Bold face type not in text.)

4. *Court Construction.*

A. Disease—When Compensable.

It is well settled by decisions of the Oregon court that injury to be compensable must have been caused through accidental means. A concise statement of the rule is contained in **Demagalski v. Industrial Commission, 47 P. 2d., 897,** as follows:

> "Where unusual or unexpected result occurs by reason of doing of intentional act by employee, but no mischance, slip, or mishap occurs in doing act itself, ensuing injury or death is not compensable as injury or death caused through accidental means, but to be compensable it must appear that means used was accidental although result may be unusual, unexpected, or unforeseen."

That occupational disease is not compensable was held in the early case of **Iwanicki v. Industrial Accident Commission, 104 Or., 650, 205 P. 990 (1922).**

The workman was employed as an upholsterer for a period of seven weeks; and continuously followed the practice of holding lead nails in his mouth. He, therefore, contracted lead poisoning. The claim was made that he had suffered an "injury" and that it was by "external means," even though the injury may not have been caused by "violent" means. The statute refers to "injury by accident * * * caused by violent or external means."

In meeting these contentions, the Court said that throughout all the precedents treating of accident, especially an accident caused by violent or external means, runs the element of suddenness or unexpected happening going to make up an accident. It does not allude to the insensible progress of a mere occupational disease. It does not mean that, where a work is pursued in the ordinary manner, and one contracts a disease which may reasonably be expected to occur to some people in the pursuit of such an occupation, the result shall be called accidental as distinguished from the mere personal injury contemplated by statutes like that of Massachusetts.



> "* * * Throughout all these precedents we find it laid down that, where the term 'accident', especially when it is to be brought about by violent or external means, is employed, it denotes some sudden, unexpected happening which produces the hurtful result, and must be referable to a certain time and place.
>
> "* * * The act manifestly applies only to sudden happenings, induced by violence or some external force. * * *"

It was found that the evidence established that the disability in question was clearly an occupational disease and therefore not compensable.

It has been held several times by the Oregon court that disease which is the natural result of a personal injury caused by violence or external means is compensable. Such is the effect of the following cases:

> ***Robertson v. State Industrial Accident Commission, 235 P. 684 (1925).***

Here the workman suffered an accidental personal injury to his neck while engaged in construction work; and pneumonia was contracted because of the weakened condition resulting from the accident. The court held that, if the Commission found upon competent evidence that the illness was caused by the accident, compensation would be allowable for the full period of the disability.

In **Dondeneau v. Industrial Accident Commission, 249 P. 820 (1926),** compensation was allowed and affirmed for glaucoma resulting from inflammation contracted while fighting a forest fire for four days. The reasoning of the court is interesting. It stated that the injury was without doubt both external and violent; that the result of the workman's effort was unexpected and unusual; that the fire itself was an unlooked for event; that "the respondent voluntarily entered into the work of fighting the fire but he did not intentionally admit the poisonous gas and smoke into his eye. The fact that the injury was caused by smoke or gas, together with superexertion does not change the cause of the injury. It is as much an accident as though a live cinder had been received into the eye and the eye burned resulting in the loss of sight. The means of the injury was unexpected and unusual."

It was argued that the workman could not fix the exact date of the injury to the eye and that the injury was, therefore, not accidental. The court said that such construction would be too strict; that the workman could have received the injury to the

eye during any one of the four days of the fire, and yet not be able to tell exactly the time the injury was received.

> "The injury is no less the result of accidental means on that account."

In **Huntley v. Industrial Accident Commission, 6 P. 2d., 209 (1931)**, compensation was allowed for blood poisoning which developed in and around an abrasion on the leg. The abrasion was due to the rubbing of the leather of heavy shoes worn on a certain day while required by his duties to walk over rocky surfaces and rough ground.

In **Banister v. Industrial Accident Commission, 19 P. 2d., 403 (1933)**, great importance is attached to the word "or" which appears in Section 1827 of the Act. There the workman, while cutting brush, inadvertently came into contact with poison-oak; was poisoned by it and disabled for several weeks. The court held that this was accidental and caused by "external" means. We quote the court as follows:

> "In the instant case, the disease contracted by claimant through contact with poison-oak brush was not an occupational disease in the sense that it was the natural and unavoidable result of the employment. Plaintiff's contact with the poison-oak brush happened by chance. He was in ignorance of its character. The contact was involuntary and unintentional upon his part and, although it resulted from his conscious act, the result was unexpected. This contact arose out of and in the course of his employment and resulted in his disability. It was not an accident caused by violence, but it was caused by external means. * * * While so working, plaintiff sustained the injury complained of and there was present all the elements essential to compensation under the statute."

The following cases establish that compensation is allowable where an existing diseased condition is aggravated.

In **Elford v. Industrial Accident Commission, 17 P. 2d., 568 (1932)**, it was held that lifting of sacks of nuts was the proximate cause of the employee's death, which resulted from rupture of cancer; and that the death was therefore compensable.

In **Armstrong v. Industrial Accident Commission, 31 P. 2d., 186 (1934)**, the workman received an accidental injury on October 5th, when a pile of automobile wheels fell over, striking him on the back of the neck and shoulders. He continued to work a portion of the time until October 23rd, when he had to quit; and he fell dead October 28th. Post-mortem showed



that death was from "coronary thrombosis with infarction". Causal connection between the injury and the thrombosis was established and compensation was allowed.

The court said:

> "An award of compensation may be made, although there was a pre-existing heart disease, if that disease was aggravated and accelerated by an accidental injury arising from the employment and was the proximate cause of disability or death."

Although occupational disease is not compensable and the Act contains no reference to disease, it is manifest from the foregoing decisions that the Supreme Court of Oregon has gone a long way toward making possible recovery of compensation for disease, if it can in any way be attributable to an injury by accident arising out of violent or external means. Disease or weakened condition due to previous inhalation of dust, gases, or fumes might be so aggravated or accelerated by some minor accident, happening at a definite time, as to bring the entire disability within the provisions of the Act for compensation.

**B. Exclusiveness of Remedy.**

The language of **Section 1814** hereinabove quoted, is definite to the effect that the right to receive compensation shall be in lieu of all claims against the employer on account of such injury or death as is covered by the Act.

It is settled by **Steinfeld v. Industrial Accident Commission, 16 P. 2d., 639 (1932), and Nixon v. Hawley Pulp & Paper Co., 41 P. 2d., 807 (1935)**, that the right of an employee to compensation under the Act is a complete bar to an action by him at law for an injury which is compensable. The inference is equally clear, from the latter case, that the workman is not barred from bringing a common law action based upon negligence, if the injury suffered is not covered by the Workmen's Compensation Act.

**II. Other Statutes.** (All references are to Oregon Code 1930 and supplements).

**1. Food and Food Commissioner—Sanitary Regulations. Section 41-401 through Section 41-410.**

**Section 41-401.** Every building, room, basement or cellar, occupied or used as a bakery, confectionery, cannery, packing house, bottling house, slaughter house, restaurant, etc., or other places used for the preparation for sale, manufacture, packing, storage, sale or distribution of any food must be properly ventilated and kept in a sanitary condition.

2. Labor.

A. State Welfare Commission. Section 49-301 through Section 49-324.

Section 49-303 empowers this Commission to ascertain and declare, among other things, standards of conditions of labor for women or for minors in any occupation within the state and what surroundings or conditions—sanitary or otherwise—are detrimental to the health or morals of women or of minors in any such occupation.

Section 49-312 authorizes and empowers the Commission to prepare, adopt and promulgate rules and regulations for carrying into effect the provisions of the Act.

Section 49-315 makes it unlawful to employ women or minors in any occupation under such surroundings or conditions—sanitary or otherwise—as may be detrimental to their health or morals.

B. Child Labor. Sections 49-401 through 49-421.

Section 49-401 prohibits the employment of children under the age of fourteen years in any factory, workshop, mercantile establishment, store, business office, etc.

C. Inspection, Safety and Sanitary Regulations. Section 49-1101 through Section 49-1118.

Section 49-1102:

> "Every factory, mill, or workshop where machinery is used and manual labor is exercised by the way of trade for the purpose of gain within an enclosed room (private houses in which the employees live, excepted) shall be provided in each work room thereof with good and sufficient ventilation and kept in a clean and sanitary state, and shall be so ventilated as to render harmless, so far as practicable, all gases, vapors, dust, or other impurities, generated in the course of the manufacturing or laboring process carried on therein; and if in any factory, mill, or workshop any process is carried on in any enclosed room thereof, by which dust is generated and inhaled to an injurious extent by the persons employed therein, conveyors, receptacles or exhaust fans, or other mechanical means, shall be provided and maintained for the purpose of carrying off or receiving and collecting such dust."

Section 49-1114:

> "Any person, firm, corporation or association who violates or omits to comply with any of the foregoing requirements or provisions of this act, and such violation or omission shall be the approximate



> cause of any injury to any employee, shall be liable in damages to any employee, who sustains injury by reason thereof; provided, the amount of damages which any one person may recover in an action for or on account of injuries received by reason of any alleged violation of any of the provisions of this act, is hereby expressly limited to the sum of $7,500.00."

Section 49-1115. Notice of the time, place, and cause of the injury must be given to the employer within six months, and the action commenced within one year from the occurrence of the accident causing the injury.

D. Safety Regulations. Section 49-1301 through Section 49-1325.

Section 49-1301:

> "Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein, and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and process as are reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life and safety of such employes."

Section 49-1302:

> "No employer, owner or lessee of any real property in this state shall construct or cause to be constructed or maintained, any place of employment that is not safe."

Section 49-1305:

> "The commission (Industrial Accident Commission) shall have power, after a hearing had upon *its own motion or upon complaint*, by general or special orders, rules and regulations, or otherwise:
>
> "(1) To declare and prescribe what safety devices, safeguards or other means or methods of protection are well adapted to render the employees of every employment and place of employment safe as required by law or lawful order.
>
> "(2) To fix reasonable standards and to prescribe, modify and enforce such reasonable orders for the adoption, installation, use, maintenance, and operation of safety devices, safeguards and other means or methods of protection, to be as nearly uniform as possible, as may be necessary to carry out all laws and lawful orders relative to the protection of the life and safety of employees in employment and places of employment.
>
> "(3) To fix and order such reasonable standards for the construction, repair and maintenance of

places of employment and equipment as shall render them safe.

"(4) To require the performance of any other act which the protection of the life and safety of employees in employments and places of employment may demand."

3. **Employer's Liability. Section 49-1701 through Section 49-1707.**

**Section 49-1701:**

"* * *, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices."

**Section 49-1705:**

"In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act."

**Section 49-1706:**

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

III. **Common Law Liability.**

We can report no case where the right to recover for occupational disease in its broadest sense was in issue. The Oregon court has, however, considered the right of an em-



ployee to recover for injury suffered through the inhalation over a long period of polluted air. Considering occupational disease in the narrow sense; that is, disease caused by negligence and which could have been avoided by the exercise of due care, these cases establish the right of recovery therefor at common law in this state.

The case of **Voshawl v. Northern Pacific Terminal Co., 116 Ore. 237, 240 P. 891 (1925)**, was a common law action for injuries sustained by a common laborer sixty-one years of age through the inhalation of oxalic acid over a period of four months. This was an ingredient of the polish used by him in polishing brass trimmings in Pullman cars. It was alleged that the defendant knew or ought to have known that this preparation was dangerous and that no warning was given. The plaintiff alleged that he inhaled poisonous fumes and dusts therefrom and absorbed its poisonous substances through his fingers. Judgment for the plaintiff was affirmed, as it was a jury question as to whether defendant knew or should have known the danger of the solution prepared and furnished for polishing. In affirming the judgment, the Supreme Court said:

> "Plaintiff, an inexperienced man 61 years of age and a common laborer, had no knowledge whatever of the ingredients of the mixture he was using or that it contained poisonous matter. In the absence of notice to the contrary, he had the right to assume that his employer would furnish him reasonably safe appliances with which to carry on his work. He also had the right to believe that he would be warned of latent dangers incident to his service. Fox v. Peninsular White Lead & Color Works, 84 Mich. 682, 48 N. W. 203; Wiseman v. Carter White Lead Co., 100 Neb. 584, 160 N. W. 985. Since there is evidence of the poisonous and dangerous character of the brass polish, and it is presumed that defendant knew, or ought to have known, the nature and chemical properties of the thing it manufactured, it follows that it owed plaintiff a duty to warn him fully of the danger involved.
>
> " * * * * * *
>
> "We are convinced that whether defendant knew, or ought reasonably to have anticipated, that plaintiff would sustain some injury as a result of its alleged negligence, was a question of fact for the jury to decide."

In **Nixon v. Hawley Pulp & Paper Co., 41 P. (2d) 807 (1935)**, the action was brought at law and the plaintiff alleged that the defendant used large quantities of sulphur and other chemicals in manufacturing its products and that it stored sulphur in its

warehouse in bins that were not air tight or dust proof; that it was the duty of the defendant, and practicable, to construct bins that were air tight and dust proof and to install fans and suction pumps to remove the sulphur dust from the air and to provide the plaintiff with a mask, all of which the defendant failed to do; that he worked under these conditions for nearly five years; that sulphur dust escaped and permeated the warehouse and shipping department where he was employed; and that, by reason of inhaling the same, he sustained permanent injuries to his lungs and heart.

As one defense, the defendant claimed that it was protected by the Workmen's Compensation Act and that the acceptance by the plaintiff of the benefits of that Act were in lieu of any and all claims that the plaintiff might have on account of any injuries he might sustain arising out of and in the course of his employment; and that, by reason thereof, his right of action was barred. The trial court refused to admit any evidence offered by the defendant to this defense, holding that the disability could not come under the Workmen's Compensation Act inasmuch as the circumstances lacked the essential elements of accidental injury.

The Supreme Court reversed a judgment in favor of the plaintiff, but merely because the trial court did not hear the evidence offered by the defendant which may have shown the necessary elements of accidental injury. The court recites that the question at issue was whether the plaintiff was suffering from an occupational disease, to-wit, pneumoconiosis, or from accidental injury arising out of his employment, and that this question should have been submitted to the jury.

This decision recognizes, by inference, the soundness of the sidered all of the evidence and then found that the disease judgment and a right to have it affirmed had the jury concomplained of was an occupational disease.

## IV. Miscellaneous Matters of Interest.

### 1. Statute of Limitation.

By Sec. 1-206, an action for injury to the person must be brought within two years from the time of the accrual of the cause of action. By Sec. 1-216, where death occurs, the action must be commenced within one year from the death.

It is of interest to note that the Supreme Court, in the case of **Lough v. Industrial Accident Commission, 104 Ore. 313, 207 P. 354 (1922)**, construed the provisions of the Workmen's Compensation Act with respect to the giving of notice of injury so strictly as to require the notice to be given within the time specified even though the injured person suffered mental in-



capacity by reason of the injury until after the time for filing claim had elapsed.

### 2. Surveys and Legislation.

No official survey of dust hazards in the industries of this state has been made. We are advised that no bills are pending in the Legislature relating to dust hazards or which would make dust diseases compensable under the Workmen's Compensation Act.

# CHAPTER XXXX

# PENNSYLVANIA

**I. Workmen's Compensation Act.**

**1. Statutes. Purdon's Pennsylvania Statutes 1929 Permanent Edition, Title 77 and supplements thereto.** The original act was passed in 1915 and became effective January 1, 1916.

**2. Administration.** The law is administered by the Bureau of Workmen's Compensation of the Department of Labor and Industry, under the supervision of the Workmen's Compensation Board, of which the Secretary of Labor and Industry is ex-officio a member. Inquiries may be addressed to the Department of Labor and Industry at Harrisburg, Pennsylvania.

**3. Scope of the Act.** Occupational disease as such is not compensable under this Act.

**Article I, Sec. 1** provides that the Workmen's Compensation Act "shall apply to all **accidents** occurring within this Commonwealth * *."

**Article III, Sec. 301** provides that when the employer and the employee shall by agreement, express or implied, accept the provisions of the Act, "compensation for **personal injury** to, or for the death of, such employee, by an **accident**, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, * *." (Bold face type not in text.)

The same section contains the following pertinent definition:

> "The terms 'injury' and 'personal injury' as used in this act shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom; and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such violence and its resultant effects, and occurring within three hundred weeks after the accident. The term 'injury by an accident in the course of his employment', as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment; but shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or

elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon * * *"

It will be observed that there is no provision for compensation for disease. If however disease results from, or is augmented by, injury of a violent character, workmen's compensation will be awarded to cover the entire disability. This is indicated by cases hereinafter cited and discussed.

The Act provides for compensation being payable directly from the employer to the employee. The Act is elective, but both parties are presumed to have accepted its provisions in the absence of expression of contrary intention. (Sec. 302).

Rejection of the Act by the employer subjects the employer to a right of action for damages for injury to an employee with the common law defenses denied to the employer. (Art. II, Secs. 201-204).

The maximum compensation for total disability is $6500, for partial disability, $4500, and for death, $4680, with various small amounts added in case the deceased leaves dependent minor children. (Sec. 306).

Employees claiming compensation must submit to physical examination by physicians designated by the Workmen's Compensation Board, but there is no provision for the functioning of a medical board. (Sec. 314).

Compensation payable to minors under 18 years of age employed in violation of law is doubled as a penalty for such violation. (Sec. 320a).

4. **Court Construction.** The citations following do not exhaust the authorities. They merely illustrate the trend of court decisions.

A. **Exclusiveness of Remedy.**

Article III, Sec. 303 provides that

> "Such agreement" (express or implied, to be bound by the Act) "shall constitute an acceptance of all the provisions of article three of this act, and shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or to any method of determination thereof, other than as provided in article three of this act. * *"

Article III, Sec. 320 (g) provides that if the parties are bound by the Act

> "they shall be held * * to have waived any other



> right or remedy at law or in equity for the recovery of damages for injuries occurring under the circumstances herein described." (Bold face type not in text.)

In view of the fact that the Act purports to cover only accidental injuries, and that "injury" is defined in the Act as meaning violence to the physical structure, it is reasonable to assume that compensation is intended as the exclusive remedy only with respect to those injuries or disabilities which fall within the Act and for which compensation is obtainable.

In **Kane v. Federal Match Corporation, 5 F. Supp. 507 (1934)**, the United States District Court had before it an action at law for damages for personal injury of an employee. The defendant contended that the plaintiff's only right, if any, was under the Workmen's Compensation Act, and to that contention the Court said:

> "With this contention, I cannot agree. Section 303 of the Pennsylvania Workmen's Compensation Act does not affect the release of an employee's common law right of action for injuries against his employer, except within the scope of the Act. The mere fact that the Act deals with one phase of the relationship between employer and employee cannot possibly be construed as meaning that every other obligation existing between employer and employee is rendered a nullity. It cannot be that the Workmen's Compensation Act was designed to take away any right of action as respects a claim, like the one here involved. I therefore am of the opinion that the plaintiff's injury, not arising from an accident, is not limited by the provisions of the Pennsylvania Workmen's Compensation Act."

No decisions of the state court are found to conflict with the foregoing federal decision.

B. **Construction of "Injury by Accident."**

The following cases illustrate the manner in which disease may become an important factor in determining the compensation allowable where an accidental injury is suffered.

In **McCauley v. Imperial Woolen Co., 261 Pa. 312, 104A. 617 (1918)**, workmen's compensation was allowed where the employee contracted external anthrax, which is primarily a disease of animals, such as sheep, and which could be transmitted when handling infected animal material. The claimant was a wool sorter. The germ found its way into a scratch on the claimant's neck, causing swelling within a few hours and death within three days. This was construed by the Court as

disease or infection resulting from an injury, in that it could be traced to a certain time when there was a sudden and violent change in the physical structure of the body.

In **Clark v. Lehigh Valley Coal Co., 264 Pa. 529, 107A. 858 (1919)**, workmen's compensation was awarded where death was caused by the rupture of the aorta, which was the result of vomiting brought on from noxious gases or the smell of burnt clothing or fright from the discovery of clothing being on fire while the decedent was making an examination under ground. The decedent was affected with a fatal disease condition from which he might have died at any moment, but notwithstanding which he might have lived four or five years. The Court held that his death was due to a mishap or accident, and that recovery was not barred because of his chronic ailment, which rendered him more susceptible than the ordinary person to such injury.

In **Kelly v. Watson Coal Co., 272 Pa. 39, 115A. 885 (1922)**, the claimant was struck in the side by a crank on a rotary drum, and a tubercular condition developed at the point of injury and his death resulted. Workmen's compensation was allowed.

In **Mauchline v. State Ins. Fund, 279 Pa. 524, 124A. 168 (1924)**, workmen's compensation was allowed for disability caused by emphysema, which is a lung disease brought about by the inhalation of smoke and fumes; but the Court reversed the award and held that such disability was compensable under workmen's compensation laws only where the inhalation of smoke and fumes augmented the condition resulting from an injury. It was pointed out that, where the condition was normally of slow development and came on gradually from continued contact with smoke and fumes, the requirements of the statute were not met, and workmen's compensation therefore could not be allowed.

In **Swingle v. Mill Creek Coal Co., 116 Pa. Super. 97, 176A. 828 (1935)**, workmen's compensation was awarded, and the award was affirmed for the death of a miner who sustained a fractured rib, but who, prior to that time, had suffered from anthracosis (miner's asthma), and whose death was attributed by the physicians to the anthracosis. The Court said that, if death resulted from anthracosis alone, no compensation could be recovered, but, if the employee suffering from anthracosis is injured, and the injury hastens his death, the case is compensable.

The consistency of the courts' reasoning is evidenced by the decision in **Peluai v. Joseph Maudes & Sons, et al., 109 Pa.**



**Super. 439, 167A. 456 (1933)**, where compensation was denied. The decedent, a laborer, was handicapped by "chronic, degenerative disease of the circulatory system and of the kidneys, with a specialized diseased process involving the arch of the aorta." He died instantly while moving wet cement in a wheelbarrow, without the intervention of any unusual circumstance which could be construed as an accident.

In the case of **Kane v. Federal Match Corporation**, cited above, the plaintiff's work was to inspect and test matches in a small room in the defendant's factory. A flue erected to expel the poisonous gases and fumes became defective and failed to work. The plaintiff contracted phosphorous poisoning. She applied for workmen's compensation, but it was denied on the ground that phosphorous poisoning had resulted from a long and continuous exposure to poisonous fumes which established her ailment as an occupational disease—not embraced within the provisions of the Workmen's Compensation Act.

While the foregoing decisions do not involve silicosis, they clearly indicate that air pollution may be an important factor in determining the amount of compensation allowable, under the Workmen's Compensation Act.

Out of the multitude of cases which have been decided by the Pennsylvania courts, we call attention to the following as of general interest in connection with the subject covered by this survey.

In **Gerst v. Smith-Faris Co., 162 A. 490 (1932)**, compensation was allowed for death resulting from breathing carbon monoxide gas for three days; the circumstances were held as constituting an accident.

In **Sinkiewicz v. Susquehanna Collieries Co., 175 A. 757 (1934)**, compensation was allowed for death where the workman breathed smoke and fumes from a dynamite charge in a mine. After certain shots were fired, he returned to the site of the shots, and it was found that the quantities of smoke were not unusual. Nevertheless, he became violently ill at once, and died on the day following. Although the other workmen were not affected, this was held to have been an accidental death.

In **Poklembo v. Hazle Brook Coal Co., 176 A. 850 (1935)**, death of the mine employee from pneumonia was held not compensable on the ground that the exposure to water and dampness in the mine was in the usual course of the employment, and was therefore not accidental.

II. **Other Statutes** (All references are to Purdon's Pennsylvania Statutes, annotated, 1929 Permanent Edition, and supplements thereto.)

1. Workshops and Factories.

Title 43, Section 5, requires the installation of certain safety devices and machinery guards, and the maintenance of certain conditions conducive to safety of the workmen. This section includes the provision:

> "* * Exhaust fans of sufficient power, or other sufficient devices, shall be provided for the purpose of carrying off poisonous fumes and gases, and dust from emery wheels, grindstones, and other machinery creating dust * *."

Section 6 of the same title requires the employer to provide not less than 250 cu. ft. of air space for each and every person in every workroom, and that all workrooms, halls and stairways be kept clean, sanitary and properly lighted.

The administration of labor laws, including the statutes above mentioned, is delegated to the Department of Labor and Industry; and the Industrial Board of the Department of Labor and Industry is empowered to formulate regulations necessary for applying the industrial statutes to specific conditions. The Department of Labor and Industry has issued from time to time numerous pamphlets which contain its regulations, which pamphlets and regulations will be referred to more at length in a subsequent section of this chapter.

Personal injuries resulting from violation of the above quoted statutes, which are compensable under the Workmen's Compensation Act, would not now form the basis of any other action. If, however, the employer has not complied with the Workmen's Compensation Act, and an employee is injured because of violation of the foregoing statutes, it is important to note, that such violations constitute negligence per se and that recovery for such actions is therefore certain. Illustrating this rule we cite the following cases all of which were decided prior to the enactment of the Workmen's Compensation Act, but which would still be controlling precedents if the employer is not operating under the Act.

In **Jones v. American Caramel Co., 225 Pa. 644, 74A. 613 (1909)**, the employee caught his hand in a revolving fan which had been installed in compliance with statutory requirement, but which was unguarded.

In **Booth v. Stokes, 241 Pa. 349, 88A. 490 (1913)**, the defendant had failed to provide a guard on a suction pump.

In **Lanahan v. Arasapha Mfg. Co., 240 Pa. 292, 87A. 286 (1913)**, the workman was caught by an unguarded set screw and whirled to his death around a revolving shaft.

In **The American Ice Co. v. Porreca, 213 F. 185 (Third Circuit, 1914)**, the accident was caused by an unguarded saw.



In **Kelliher v. Brown & Co., 242 Pa. 499, 89A. 589 (1914)**, death was caused by the failure to provide a belt shifter as required by this statute. In this case, the Court said:

> "The statute is mandatory, and the failure to comply with it, resulting in injury to another without the latter's fault, is actionable negligence * *. It is immaterial that the defendant company had permitted for several years its employees to attach the chute without stopping the machine, in view of the mandatory provisions of the act * * *."

These and other cases which might be cited indicate the mandatory character of this statute with respect to the installation of sufficient devices for carrying off poisonous fumes, gases, and dust—that provision being an integral part of the section construed in the above mentioned cases.

The foregoing statutes merit serious consideration with respect to occupational disease, particularly disabilities arising from dust and other air pollution, inasmuch as such disabilities are not covered by the Workmen's Compensation Act, and there probably exists, in Pennsylvania, the right to sue therefor at common law. If such action is brought at common law or is based upon the violation of the foregoing statutes, such violation constitutes negligence per se.

Illustrating such application of the statutes, is the case of **Fritz v. Elk Tanning Co., 258 Pa. 180, 101A. 958 (1917)**. There the plaintiff inhaled fumes from an acid tank used in the process of bleaching hides, and thereby contracted sulphuric acid poisoning, with resultant loss of health. The jury's verdict in favor of the plaintiff was affirmed by the Supreme Court with the following comment:

> "* * * under section 11 of the act of May 2, 1905 (Title 43, Section 5, Purdon's Statutes), it was defendant's duty to know the character of the fumes and gases arising in its bleach-room, and, if poisonous, to provide for their elimination by exhaust fans or other sufficient devices. As no attempt was made to comply with the statute, and no claim that it could not have been done, if the fumes were poisonous, and the plaintiff was injured thereby, without negligence on his part, he was entitled to recover as the provisions of the act are mandatory * * *."

2. Female Labor, Title 43, Section 111.

"Any person who shall employ or permit any female to work in any establishment in which pois-

onous or injurious dust, fumes, or gases shall be created by the machinery or material in process of manufacture, shall provide proper hoods and pipes connected with exhaust-fans of sufficient capacity to remove such dust, fumes, or gases at their point of origin, and prevent them from mingling with the air in the room, and such fans shall be kept running constantly while such dust, fumes, or gases shall be generated."

3. **Compressed Air Works, Title 43, Section 442.**

"Every tunnel caisson, compartment, or place to which this act applies shall be so constructed, equipped, arranged, operated, and conducted as to provide such protection to the lives, health, and safety of all persons employed therein as the nature of the employment will reasonably permit."

4. **Lead Manufacturing Establishments, Title 43, Sections 471 and following:**

Because of their length, we cannot quote these sections in full. In substance, they require the employer to provide reasonably effective devices, means, and methods to prevent the contraction of illness or disease incident to the manufacture of lead (under various designations), and the manufacture thereof is specifically declared dangerous to the health of employees. To protect the employees from exposure to lead dusts, lead fumes, or lead solutions, the employer is required to provide adequate light and ventilation, sufficient change of air, certain partition walls, certain sanitary conditions, and adequate devices for protection against lead dust or lead fumes. When necessary, the employer must provide at least one reasonably effective respirator for each employee engaged in such work. These statutes must be read in detail by one particularly interested in this industry.

5. **Mines and Mining, Title 52.**

The statutory provisions with respect to mines are voluminous and they cannot be here discussed in detail. The administration of the regulatory provisions of the statutes is delegated to the Department of Mines, to which department inquiries for bulletins should be directed.

With particular reference to anthracite mines, **Sec. 292 of Title 52** provides:

"In all coal breakers where the coal dust is so dense as to be injurious to the health of persons employed therein, the owner, operator or superintendent of said breaker shall, upon request of the inspector, immediately adopt measures for the removal of the dust, as far as practicable."



**Sec. 298** provides that every person who fails to comply with the provisions of these statutes shall be guilty of an offense against the Act.

**Secs. 551, 552, and 553** require the maintenance of a constant adequate supply of pure air, specify two hundred cubic feet per minute per person employed in a mine as the minimum, and require the ventilating currents to be so conducted as to dilute, render harmless, and sweep away smoke and noxious or dangerous gases to such extent as to render the mine a safe place to work.

**Secs. 1011 and 1016,** which apply particularly to bituminous coal mines, also cover in considerable detail the requirements with respect to fresh air and ventilating fans.

Although disease, such as anthracosis, contracted by reason of failure to clear the mines of dust and gas would not be compensable under the Workmen's Compensation Laws, the disease would be an important factor in connection with workmen's compensation if the laborer suffered an accident while in such weakened condition, as hereinabove pointed out. Failure to install required equipment, or reasonably efficient equipment, where the statutes are not specific as to what should be installed, would probably constitute actionable negligence of the employer at common law.

### III. Departmental Regulations and Bulletins.

Pursuant to statutory authority, the Department of Labor and Industry has adopted and promulgated specific regulations to be observed in many industries. These are in bulletin form and may be procured upon request addressed to the Department of Labor and Industry. Particular attention is called to the following:

1. **Regulations for Foundries:** 1933 Edition.

There are 19 pages in this bulletin, and it cannot be discussed in detail.

Rule 3 requires the installation and operation of hoods and ventilators, fans, or other mechanical means of ventilation where smoke, steam, gases or dust arising from any of the operations of the foundry are dangerous to health or eyes, and where a natural circulation of air does not carry off such smoke, steam, vases or dust. It also contains regulations for protection from chipping and cleaning of castings, requires exhaust systems on tumbler mills, and contains regulations with respect to compressed air and sand blasts.

Rule 9 makes the general regulations above quoted appli-

cable to brass foundries and contains many other specific provisions with respect to operation of brass foundries.

2. **Regulations for Head and Eye Protection; 1935 Edition.** This bulletin comprises 27 pages.

Rule 1 requires that during hazardous processes the workmen shall wear goggles, helmets, shields, hoods or masks.

Rule 3 requires the wearing of goggles as a protection from dust and flying particles and the wearing of goggles, masks or hoods as a protection from gases, fumes and liquid; also the wearing of a hood as protection against dust and small particles. The bulletin contains detailed classifications for goggles, masks and helmets for which reference must be made to the bulletin itself.

Of special interest is Rule 15 which did not appear in previous issues of this bulletin. It covers the subject of respirators, classifying them by type and designating the permissible use of each type.

3. **Regulations for Miscellaneous Hazards and Conditions of Employment; 1935 Edition.**

These regulations are published in a 14 page bulletin. They are made to apply to every "establishment" and that term is defined to mean any place within Pennsylvania where work is done for compensation; supervision over which has been given, by statute, to the Department of Labor and Industry.

Attention is called particularly to Rule 2 relating to "Exposure to Dust, Fumes, Vapors, Gases and so forth." It reads:

> "All dust, fumes, vapors, gases, fibers, fogs, mists, or any other atmospheric impurities that, in connection with any process of manufacture or use, are created in, emitted into, or disseminated through areas where persons are employed, in such quantities as in the judgment of the Department, would (or might) tend to injure the health of employes, shall be removed by means of suction devices at their point of origin or by other methods acceptable to the Department.
>
> "When required by the Department the employer shall have determinations made of the kind and amount of the atmospheric impurities from a sample taken under conditions and at a point or points indicated by the Department. This shall be performed by an analyst qualified for the purpose.
>
> "The quantity of any impurities as shown by the determinations shall not be of an amount considered by the Department to be injurious to the health of employes."



## IV. Common Law Liability.

No decision of a Pennsylvania court has been found where the right to recover at common law for occupational disease was squarely in issue. The right of recovery for injury, not traumatic in character, due to negligence of the employer in not furnishing a safe place to work, or in not warning the employee of the dangerous character of the work, has been recognized by the Pennsylvania courts. It is therefore reasonably safe to conclude that a common law right of action exists for disease caused by the negligence of the employer and under such circumstances as not to come within the Workmen's Compensation Act.

A few decisions may be cited as supporting this conclusion, including the following:

**Wagner v. H. W. Jayne Chemical Co., 147 Pa. 471, 23A. 772, (1892).** The plaintiff, who was a common laborer, and not familiar with the particular task which he was called to do, inhaled poisonous fumes while assisting in a certain process in the making of dinitro-benzole. He assisted in this process for a short time only and on a single day; he complained that he could not stand the fumes, but was ordered to return to work with the assurance that there was nothing harmful in them. He became seriously ill and was disabled for a long period of time. The Court allowed him to recover against the employer on the ground of negligence.

In **Baumgartner v. Pennsylvania R. Co., 292 Pa. 106, 140A. 622 (1928),** a judgment in favor of the employee Baumgartner was affirmed. The action was brought under the Federal Employer's Liability Act. Baumgartner was 30 years of age and in good health. For ten weeks he was employed as a common laborer to shovel ashes from an ash pit constructed in the usual manner under a track, and into which pit the ashes, cinders and so forth were cleaned from the fire boxes of the defendant's engine. Fatally poisonous carbon monoxide gas was generated by the water being thrown upon the hot ashes, which gas he inhaled and his death resulted. He had received no instructions as to the proper performance of the work, or as to the dangers to which he was subjected, and the Court allowed recovery for his death.

Aside from the question of the right to recover at common law, this case is of interest in connection with air pollution cases, because of the elaborate statement therein contained with respect to assumed risk. The Court said in part:

> "* * * the master is presumed to know the nature and qualities of the materials he places in the hands

of his servants. In other words, he is presumed to have such knowledge of matters pertaining to his business as is possessed by those having special acquaintance with the subjects involved * * *. An employer is presumed to be familiar with the dangers latent, as well as patent, ordinarily accompanying the business in which he is engaged."

The Court further quotes, with approval, other decisions to the effect that it is the duty of the master to warn and instruct his servants as to the defects and dangers of which he knows, or ought in the exercise of reasonable care and diligence to know, and of which the servant has no knowledge, actual or constructive. This case is essentially one involving air pollution, and suggests the far reaching extent of the employer's duties, entirely aside from statutory provision.

In the case of **Kane v. Federal Match Corporation, 5 F. Supp. 507 (1934)**, cited above, the plaintiff was held to have a good cause of action at common law for phosphorous poisoning, resulting from working as a match tester in a room inadequately ventilated.

## V. Miscellaneous Matters of Interest.

### 1. Statutes of Limitation.

**Purdon's Pennsylvania Statutes, Title 33, Section 34** provides:

"Every suit hereinafter brought to recover damages for injury wrongfully done to the person, in cases where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death, the limitation of action shall remain as now established by law."

**Sec. 1603** provides:

(where death results) "* * * the action shall be brought within one year after the death and not thereafter."

It is difficult to apply these statutes to actions arising out of exposure to dust or contaminated air, as it is difficult to determine "the time when the injury was done." It appears to be an open question in Pennsylvania as to whether the time the statute would begin to run would be on the date of the last exposure, or at the time the injury was discovered, if that was later than the date of last exposure. This uncertainty is evidenced in the case of **Byers v. Bacon, 250 Pa. 564, 95A. 711 (1915)**. In that case a surgeon, when operating, neglected to remove a drainage tube. The patient left the hospital in March, 1910 and brought this action against the doctor in February,



1913. The defendant claimed that the two year statute of limitations barred the action. The Supreme Court did not decide that particular question, but propounded it and left it undecided as to whether the statute should properly have been regarded as running against the plaintiff until such time as he could reasonably be charged with knowledge of the fact that the tube had been overlooked and left in the wound. Although this case did not arise out of the breathing of impure air, it involves the same question of knowledge, as a prerequisite to the beginning of the statute of limitations, as would be involved in such case.

### 2. Surveys.

The Department of Labor and Industry published in 1931, and has for distribution, as "Special Bulletin No. 41", a very comprehensive report with respect to Anthraco-Silicosis (miners' asthma). This bulletin contains a report of a survey made by The United States Public Health Service at the request of Governor Pinchot.

Two bulletins published by The Department of Labor and Industry cover the subject of Asbestosis. The first one being "Special Bulletin No. 37", is dated October 1, 1934, and is designated "Part I—The Collection and Counting of Dust Encountered in Asbestos Fabricating Plants." The second bulletin, being identified as "Special Bulletin No. 42" was published September 20, 1935, and is designated "Part II—The Nature and Amount of Dust Encountered in Asbestos Fabricating Plants" and "Part III—The Effect of Exposure to Dust Encountered in Asbestos Fabricating Plants on the Health of a Group of Workers."

The surveys underlying the foregoing reports were quite extensive, and the reports are so comprehensive that they cannot be here discussed in detail.

### 3. Pending Legislation.

We are informed that no bills are now pending in the Pennsylvania State Legislature relating to precautionary measures to be taken with respect to dust hazards. A proposed occupational disease compensation bill was defeated in the Senate at the last session of the legislature.

# CHAPTER XXXXI

# RHODE ISLAND

## I. Workmen's Compensation Act.

**1. Statutes. General Laws of Rhode Island 1923, Section 1205 to Section 1294.**

**2. Administration.** Originally the Workmen's Compensation Act was administered by the Commissioner of Labor. By the Administrative Code Act, Chapter 2250 of the 1935 laws, the duties heretofore performed by the Commissioner of Labor were placed in the hands of a Director of Labor. Such director is appointed by the Governor, by and with the advice and consent of the Senate, and holds office at the pleasure of the Governor. There is also a provision for a division of labor relationship with a Chief of Division to be appointed by the Director of Labor, which division has supervision over the enforcement of the Workmen's Compensation Act as amended. Communications may be addressed to the Director of Labor, Providence, Rhode Island.

**3. Scope of the Act.**

**A. General Provisions of the Act.**

Compensation is provided for personal injury or death by accident arising out of and in the course of employment (Sec. 1212). No mention is made of diseases, occupational or otherwise, but by an amendment effective September 15, 1936, enumerated occupational diseases are made compensable (See Sec. I. 4-B of this chapter).

With some few exceptions, the Act covers all private employments wherein more than three workmen are regularly employed in the same business (Sec. 1207).

The Act is elective as to both employers and employees. Employers elect by filing with the Director of Labor a written statement accepting the provisions of the Act (Sec. 1209). Employees of employers who have so elected to be bound by the Act are held to have waived their right of action at common law to recover damages for personal injury unless they have given notice to the employer that they claim such right and have filed a copy of such notice with the Director of Labor (Sec. 1210). If the employer does not so elect to be bound by the Act, he loses the common law defenses of the employee's negligence, the negligence of a fellow servant, or assumed risk in an action to recover for personal injury or death by an ac-

cident (Sec. 1205). Where the employer elects to be bound by the Act, and the employee rejects its provisions, the three common law defenses are available to the employer in such an action (Sec. 1208).

Sec. 1211:

> "The right to compensation for an injury, and the remedy therefor granted by this chapter, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this chapter while it is in effect."

Provision is made for physical examination of employees to be had at the request of employers. There is no provision however for a state medical board (Sec. 1232).

Every employer accepting the Act must insure and keep insured his liability thereunder in a duly authorized stock or mutual company or association; or by satisfying the Director of Labor of his financial responsibility to pay directly to injured employees or their dependents; or by furnishing security, indemnity or a bond reasonably satisfactory to said Director, guaranteeing the payment of such compensation; or by combination of the latter two methods (Sec. 1262). The failure of an employer who has accepted the provisions of the Act to so secure the payment of compensation is deemed a misdemeanor punishable upon conviction by a fine not exceeding $100 (Article V, Sec. 13).

B. **Occupational Disease.**

Article VIII (comprising twelve sections) covering occupational disease was added by Chapter 2358 of the laws of 1936 and will become effective September 15, 1936. Understanding of this new Act requires extended comment and quotation as follows:

Sec. 1 (c):

> "The term 'occupational disease' means a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment."

Sec. 2: It is provided that the disablement from an enumerated occupational disease is to be treated as the happening of a personal injury by accident and that the procedure and practice provided for in the Act shall apply to such disability. Compensable occupational diseases are as follows: anthrax; poisoning from arsenic, brass, lead, manganese, mercury, phosphorus, wood alcohol, carbon bisulphide, benzol, carbon monoxide, nitrous fumes, nickel carbonyl, formaldehyde, chrome, radium, methyl chloride, sulphuric, hydrochloric or hydrofluoric acid; dope poisoning, cancer or ulceration due to tar, pitch, bitumen, mineral oil, or paraffin, etc.; glanders; compressed air illness; miners' disease; cataract in glassworkers; disorders due to contact with petroleum products and their fumes; disability arising from blisters or abrasions, bursitis or synovitis, frost-bite, hernia; and infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to oils, cutting compounds, or lubricants, dust, liquids, fumes, gases or vapors.

The list does not include silicosis or other dust diseases.

By Section 3, the schedule of compensation provided in Article II (applicable to accidental injuries) is made applicable to disability or death from scheduled occupational diseases. This has the effect of making applicable Secs. 6, 10, and 11 of Article II (Code Secs. 1217, 1221, and 1222). The maximum amounts of compensation payable under those sections are as follows: For total disability $10,000 (Sec. 1221); for partial disability $9,100 (Sec. 1222); for death $8,000 (Sec. 1217) plus reasonable burial expenses not to exceed $300 (Sec. 1220); and for reasonable medical and hospital services and medicines $250 (Sec. 1216).

> **NOTE:** The maximum amounts of compensation set out above do not become effective until September 15, 1936, at the same time when the provisions relating to occupational diseases become effective. The maximum amounts payable for accidental injury or death until that time are as follows: For total disability $5,000; for partial disability $3,000; for death $4,200 plus reasonable burial expenses not to exceed $200; and for medical and surgical aid $150.

Sec. 4: Compensation for an occupational disease is not payable to an employee or his dependents unless such occupational disease "is due to the nature of his employment and was contracted therein, or in a continuous employment similar to the one in which he was engaged at the time of his disablement, within twenty-four months previous to the date of disablement, whether under one or more employers." This time limit does not apply in the case where an employee has contracted such occupational disease in the same employment with the same employer by whom he was employed at the time of his disablement and has continued in the same employment

with the same employer from the time of contracting such disease up to the time of his disablement.

Sec. 5: The Director of Labor is directed to appoint one or more physicians to examine any claimant under this article and to make reports in such form as the Director may require.

Sec. 6: The date of disablement "shall be such date as the director or the court may determine on the hearing on the claim."

Sec. 7: A wilful or false representation in writing by an employee at the time of entering into employment that he has not previously suffered from the disease which is the cause of the disability or death will bar any recovery therefor.

> "* * * 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, the compensation payable shall be such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation, to be effected by reducing the number of weekly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interests of the claimant or claimants."

Sec. 8: The total compensation due is 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. Provision is made for the apportionment of the compensation among those employers who, since the contraction of the disease, shall have employed such employee in the employment to the nature of which the disease was due.

Sec. 9: The notice of death or disability is required to be given, and the claim to be made, against the employer who last employed the employee during the said 24 months in the employment to the nature of which the disease was due; such notice and claim is deemed seasonable as against prior employers. Notice of injury or death must be given within 90 days after the date of the disablement; and the claim for disability must be filed within one year after the date of disablement and, in case of death, within one year after the death.

Sec. 10:

> "The employee, or his dependents, if so requested, shall furnish the last employer or the director



> of labor with such information as to the names and addresses of all his other employers during the said twenty-four months, as he or they may possess; and if such information is not furnished, or is not sufficient to enable such last employer to take proceedings against a prior employer under section eight of this article, unless it be established that the occupational disease actually was contracted while the employee was in his employment, such last employer shall not be liable to pay compensation, or, if such information is not furnished or is not sufficient to enable such last employer to take proceedings against other employers under section eight of this article, such last employer shall be liable only for such part of the total compensation as under the particular circumstances the director may deem just; but a false statement in the information furnished as aforesaid shall not impair the employee's rights unless the last employer is prejudiced thereby."

Sec. 11:

> "Nothing in this article shall affect the right of an employee, or his dependents, to recover compensation in respect to a disease to which this article does not apply, if the disease, apart from this article, is one for which compensation is payable under the other provisions of this chapter."

Sec. 12:

> "This article shall not apply to cases of occupational disease in which the last injurious exposure to the hazards of such disease occurred prior to the fifteenth day of September, A. D. 1936."

**4. Court Construction.** Pending the effective date of the recent amendment making certain enumerated occupational diseases compensable under the Act, only injuries or death by accident are compensable thereunder. It is therefore important to examine the court decisions to determine whether disability or death resulting from the inhalation of noxious dust or gases would be compensable as an injury by accident within the meaning of the Act.

The Rhode Island courts seem never to have determined whether or not such disease or disability could be deemed an accidental injury within the meaning of the Act. The courts have however construed the meaning of the word "accident" in several of their opinions.

In **Walsh v. River Spinning Co., 41 R. I. 490, 103A. 1025 (1918)**, compensation was sought for the death of an employee as a result of heat exhaustion received, on a fixed day, while employed as a fireman in the defendant's boiler room.

The Court, in granting compensation on the ground that this was death by accident, stated that the unusual condition producing the sudden death "constituted a chain of circumstances which may fairly be regarded as an unlooked-for mishap not designed and undoubtedly unexpected."

In **Gibbons v. United Electric Rys. Co., 48 R. I. 353, 138A. 175 (1927)**, the plaintiff sought compensation for the loss of several toes when amputation was made necessary as a result of freezing. The plaintiff had worked continuously from 7 A. M. of one day to 7 A. M. of the next day, and, while so engaged, his toes were frostbitten by reason of the continued exposure to extreme cold and snow. The Court found that the excessive cold and the long continued exposure to the numbing and chilling effect of the snow in which he was obliged to work resulted in a sudden breaking down of the power of the heat of his body to resist external cold, and produced the condition of frostbite. In granting compensation for this as an injury by accident, the Court again defined "accident" as "an unlooked-for mishap, an untoward event, which is not designed or expected, and, being unexpected, has in it an element of suddenness."

In **Keith v. Narragansett Electric Co., 164A. 907 (Supreme Court, 1933)**, the plaintiff was struck across the abdomen by a falling steel cabinet. Some two months later, he was operated on for cancer and died when complications set in. The Court affirmed the finding of the trial court, that the petitioner had failed to sustain the burden of proving that the accident caused or aggravated the cancerous condition. The Court stated:

> "It is well settled that the Compensation Act is not intended to allow recovery for a death resulting from a disease not caused by an accident arising out of and in the course of the employment, unless it is proved that the accident affected the normal progress of the disease to the extent that the employee's ability to labor was thereby diminished, or the date of death substantially advanced. * * *"

In **Shewczuk v. Contrexeville Mfg. Co., 165A. 444 (Supreme Court, 1933)**, compensation was sought for the death of an employee caused by drinking acid. The trial court found, as a matter of fact, that the employee did not drink the acid by mistake. The court denied compensation, stating that, when a person does what he intends to do, it cannot be said to be an accident. The court distinguished **Archibald v. Workmen's Compensation Commissioners, 77 W. Va. 448, 87 S. E. 791**, stating that, in that case, although plaintiff's death was caused



by drinking a poisonous fluid, he believed at the time that he was drinking water.

These cases are not particularly enlightening, but it seems quite clear that there is no possibility of a dust disease being compensable, unless it should be acquired suddenly and by accident. It is practically impossible to fulfill these requirements.

## II. Other Statutes.

### 1. Factories and Workshops.

**Ch. 85, Sec. 9 (Code Sec. 1117)** provides:

> "It shall be the duty of the proprietor of any factory or workshop * * * to provide adequate heating, lighting, ventilating and sanitary arrangements for such factory or workshop so that such heating, lighting, ventilation or sanitation shall not be injurious to the health of persons employed therein or persons within an area of one thousand feet. * * *"

The Chief Industrial Inspector is vested with the authority to direct proper changes in condition.

### 2. Report of Occupational Diseases.

The following is quoted from Chapter 153 of the General Laws of 1923.

**Sec. 23 (Code Sec. 2175):**

> "Every physician in this state attending on or called in to visit a patient whom he believes to be suffering from poisoning from lead, phosphorus, arsenic, brass, wood-alcohol, mercury or their compounds, or from anthrax, or from compressed-air illness, or any other ailment or disease, contracted as a result of the nature of the patient's employment, shall within forty-eight hours of such attendance send to the State Department of Health a report stating:
>
> "(a) Name, address and occupation of patient.
>
> "(b) Name, address and business of employer.
>
> "(c) Nature of disease.
>
> "(d) Such other information as may be reasonably required by the state board of health.
>
> "The reports herein required shall be on or in conformity with the standard schedule blanks hereinafter provided for. The posting of the report, within the time required, in a stamped envelope addressed to the office of the Director of Public Health, shall be a compliance with this section."

**Sec. 24 (Code Sec. 2176):**

> "The Director of Public Health shall prepare and

furnish, free of cost to the physicians included in Section 23, standard schedule blanks for the reports required under said section. The form and contents of such blanks shall be determined by the Director of Public Health."

Sec. 25 (Code Sec. 2177):

"Reports made under Sections 23 and 24 of this chapter shall not be evidence of the facts therein stated in any action arising out of the disease therein reported."

Sec. 26 (Code Sec. 2178):

"It shall furthermore be the duty of the Director of Public Health to transmit a copy of all such reports of occupational disease to the Chief Factory Inspector."

3. **Employment of Minors.**

Code Secs. 1109 and following cover this subject in great detail. Extensive restrictions are placed upon the employment of children under sixteen years of age.

Employment of minors under sixteen years of age is prohibited in many lines of work, including, among others, the operation of sand paper or wood-polishing machinery; the operation of any burnishing machines in any tannery or leather manufactory; the preparation of any composition in which dangerous or poisonous acids are used; the manufacturing or packing of paints; "or in any other work, occupation, place or process declared by the Department of Public Health to be injurious, dangerous or hazardous for minors under sixteen years of age."

4. **Division of Industrial Hygiene.**

By an act effective May 1, 1936, a Division of Industrial Hygiene was created under the Department of Public Health. The Director of Public Health was directed to appoint a Chief of Division, who must be a physician versed in the diagnosis, treatment and care of industrial and occupational diseases. This Division is directed to study the occupational disease problem in industry, to recommend to the legislature enactments which it deems advisable, and to maintain records of its studies, recommendations, and other activities (Chapter 2358, Laws of 1936).

III. **Common Law Liability.**

There is a dearth of decisions dealing with common law liability for disease incurred in the course of employment and due to the negligence of the employer. That such liability would exist is however indicated by the following decision:



**Cox v. American Agricultural Chemical Co., 24 R. I. 512, 53A. 871 (1902).** The plaintiff employee brought an action on the case for negligence, alleging that he was employed as a laborer at the defendant's fertilizer works; that, without warning or caution, he was directed by the superintendent to clean out and empty a certain dangerous waste pipe or drain which had become stopped up; that he was ignorant of and did not know of the dangerous condition of said drain; that the defendant had carelessly and negligently allowed said drain to become full of foul, decayed, and putrefying animal matter which produced noxious, poisonous, and deadly gases; that, while working upon said drain, and in the exercise of due care, he was overcome by said gases, was poisoned, became totally blind, and otherwise sick and disordered.

The defendant demurred to the complaint, principally on the ground that the defendant assumed the risks of which he complained. The Court overruled the demurrer, holding that the danger of which the plaintiff complained was a latent danger, and hence not assumed. The Court said that it could not, as a matter of law, hold that the defendant could not have known of the presence of the gases or that it was free of a duty to have known thereof before directing the plaintiff to do said work. The complaint therefore alleged a good cause of action on which recovery might be had if the evidence sustained the complaint.

IV. **Miscellaneous Matters of Interest.**

1. **Statute of Limitations.**

"* * * Actions for injuries to the person shall be commenced and sued within two years next after the cause of action shall accrue, and not after." (Sec. 4876)

"If any person, for or against whom any of such causes shall accrue, shall die before the time limited for bringing action, or within sixty days after the expiration of said time, and the cause of such action shall survive, such action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within one year after the decease of the person so dying, and not afterwards, if barred by the provisions of this chapter." (Sec. 4883)

There is a wrongful death statute which provides that such an action must be commenced within two years after the death of such person (Sec. 4862).

2. **Surveys and Pending Legislation.**

We are advised that no official survey of dust hazards or

silicosis has been made by the Department of Labor. Since the passage of the Act making occupational disease compensable after September 15, 1936, under the Workmen's Compensation Act, there is no further pending legislation of interest.



# CHAPTER XXXXII

# SOUTH CAROLINA

## I. Workmen's Compensation Act.

### 1. Statutes; Act Number 593, Acts of 1935, Secs. 1-78.

**2. Administration.** The Act is administered by the South Carolina Industrial Commission which is composed of five persons appointed by the Governor with the advice and consent of the Senate for terms of six years each. No more than two of the members may be classed either as representatives of employees or of employers. The Governor designates one as chairman, but such member cannot be a representative of employees or of employers. Communications may be addressed to the Commission at Columbia, South Carolina.

**3. Scope of the Act.**

The Act is a recent enactment, the administrative features having become effective June 1, 1935, and the liability features September 1, 1935.

Compensation is provided for personal injury or death by accident arising out of and in the course of employment (Sec. 4).

"Injury" is defined in Sec. 2 (f) as follows:

> "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

The Act covers practically all private employments wherein 15 or more employees are regularly employed in the same business (Sec. 2a). It is elective as to both employees and their employers, but both employees and employers are presumed to have accepted the provisions thereof, unless proper notice to the contrary is given (Secs. 4 and 6).

Employers who elect not to operate under the Act lose the common law defenses of assumed risk, contributory negligence and negligence of a fellow servant in any suit at law brought by an employee to recover damages for personal injury or death by accident (Sec. 15). Where the employer has elected to be bound by its terms, and the employee has elected not to be bound thereby, these common law defenses are available to the employer in a suit at law by such employee (Sec. 16). Where both employer and employee elect not to operate thereunder, such defenses are not available to the employer (Sec. 17).

The total compensation payable under the Act is limited in all cases to $5,500 (Sec. 41).

Where an injury or death is caused by wilful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation will be increased 10%. Where such injury or death is caused by the wilful failure of the employee to use a safety appliance, or to perform a statutory duty, or by the wilful breach of any rule adopted by the employer and approved by the Commission, and brought to the knowledge of the employee prior to the injury, compensation will be reduced 10%. (Sec. 13).

Employers who accept the provisions of the Act must insure their liability, or furnish to the Commission satisfactory proof of their financial ability to pay compensation directly to employees (Sec. 67). A failure or neglect to secure such compensation is punishable by a fine of not to exceed $50 for each day of such refusal or neglect, and also subjects such employer, during the continuance of such refusal or neglect, to liability either for compensation under the Act, or at common law. If the action is brought at law, the common law defenses of assumed risk, contributory negligence, and the negligence of a fellow servant are not available to the employer. (Sec. 68).

**Sec. 11**

> "The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Act, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against employer at common law, or otherwise, on account of such injury, loss of service, or death."

**4. Court Construction.**

Due to the recentness of the effective date of the Act, there are no decisions pertinent to this investigation.

**II. Other Statutes.**

Only the few state statutes herein enumerated were found to be relevant. The section numbers are those contained in the South Carolina Code of Laws of 1932.

**1. Offenses against Public Health, Chapter 74, Secs. 1448-1504.**

**Sec. 1469**

> "No child under the age of 14 years shall be employed in any factory, mine, or textile establishment of this state."



**Sec. 1475** makes it the duty of the employer to post in each room of the factory in which children are employed, notices to the effect that said children are forbidden to clean any gears, etc., or to clean in proximity thereto, while the same are in motion.

**2. Compulsory School Attendance Law, Article 6, Chapter 122, Secs. 5662-5675.**

**Sec. 5675** provides that children shall not be employed during the usual school hours, unless the employer shall first secure a proper certificate from the superintendent or teacher of the school where the child last attended.

**III. Common Law.**

No pertinent cases can be reported.

**IV. Miscellaneous Matters of Interest.**

**1. Limitations of Actions.**

By **Sec. 388 (5)**, an action for injury to the person must be brought within 6 years after the cause of action shall have accrued. Where death occurs, **Sec. 413** provides that the action must be brought within 6 years from the death of such person

**2. Pending Legislation.**

We are informed that, although an amendment was to have been offered this year including occupational diseases within the jurisdiction of the Workmen's Compensation Act, the Legislature made no changes in that Act.

# CHAPTER XXXXIII

# SOUTH DAKOTA

## I. Workmen's Compensation Act.

### 1. Statutes, Compiled Laws of South Dakota, 1929, Secs. 9437-9491.

*2. Administration.* The Act is administered by the Industrial Commissioner. The Governor appoints the Attorney General to serve as such Commissioner during his term as Attorney General. Hearings are before a board of arbitration consisting of three persons, one of whom is the Attorney General, and the other two of whom are persons named respectively by the parties. Communications may be addressed to the Commissioner at Pierre, South Dakota.

*3. Scope of the Act.*

Compensation is provided for personal injury or death by accident arising out of and in the course of employment (Sec. 9437 and 9440). Section 9490 contains the following definition:

> "'Injury' or 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except as it shall result from the injury."

The Act, with some few exceptions, covers all private employments (Secs. 9490 and 9443). It is, however, elective both as to employers and employees, but there is a presumption that both have accepted its provisions in the absence of notice to the contrary (Secs. 9437-9438).

Where an employer elects not to operate under the Act, he loses the common law defenses of contributory negligence, negligence of a fellow servant, and assumed risk, in any action at law brought by an employee electing to operate thereunder to recover damages for personal injury or death by accident (Sec. 9444). Where an action is by an employee who elects not to operate under the Act, against an employer who has elected to be bound thereby, such employer may avail himself of these common law defenses (Sec. 9445). The Act makes no provision for a situation where both employer and employee have elected not to be bound by its terms.

No compensation is payable in the absence of written notice within 30 days after the occurrence of the injury or death, unless a reasonable excuse is made to the satisfaction of the

Industrial Commissioner (Sec. 9455), and unless a claim is filed within one year after the injury or, if death results therefrom, within one year after the death (Sec. 9457).

Each employer must secure the payment of compensation by insuring his liability in one of several authorized ways or he must furnish satisfactory evidence to the Commissioner of Insurance and the Industrial Commissioner of his solvency and financial ability to pay the compensation provided in the Act (Sec. 9482).

4. Court Construction.

A. Injury by Accident.

As previously observed, the Act awards compensation only for injury or death by accident arising out of and in the course of the employment, and does not include a disease in any form, except as it shall result from an injury. No cases were found wherein recovery was sought under the Act for an injury or death caused by the inhalation of dust in the course of employment. The following cases have been included for the definition of the word "accident" as used in the Act.

**In Edge v. City of Pierre, 59 S. D. 193, 239 N. W. 191 (1931),** the plaintiff suffered an injury when a piece of iron pipe fell upon his leg. After having been confined to the hospital, he returned to work, but after having worked a short time, he became ill and again stopped work. Three weeks later he died of a form of meningitis. The Court recognized that compensation would be payable for injury or death resulting from a disease, if it could be established that such disease was consequently caused by the accident. The Court denied compensation on the ground that the plaintiff had not established that the accidental injury to his leg was the proximate cause of the disease.

**In Johnson v. La Bolt Oil Co., 62 S. D. 391, 252 N. W. 869 (1934),** the plaintiff, while lifting heavy timbers in the course of his employment, suffered a hernia. Compensation was awarded on the ground that the plaintiff had sustained an accidental injury.

The employer contended, as its defense, that where an employee exerts himself in an ordinary manner and as intended and where hernia results from the mere exertion and a bodily weakness, there is no "accident", and hence no right to compensation. The employer argued that the workman did not slip or fall and that nothing unusual happened and that there would have been no hernia if there had not been a weakness in respondent's bodily structure.



In support of these arguments, the employer cited the court's former decision in **Frank v. Chicago, Milwaukee and St. Paul Railway Co., 49 S. D. 312, 207 N. W. 89 (1926),** where the court said:

> "Claimant was doing his work in the usual manner, as intended, without unusual strain or mishap. Before he can recover it must appear that some mishap, some untoward and unexpected event, occurred without design; that some accidental injury was suffered, traceable to a definite time, place, and cause."

The above quoted portion of the decision in the Frank case was specifically renounced and overruled in this decision, and the law was announced anew in the following language:

> "We are of the opinion that to constitute an injury 'by accident' within the meaning of Section 9440, R. C. 1919, it is sufficient that the injury itself is unexpected, and that it is not necessary that the cause of the injury should be untoward and unexpected, occurring without design."

The Court further said:

> "The fact that the respondent had a weakness in his bodily structure or that he was predisposed to hernia, * * * would not, we believe, prevent him from recovering compensation under the Workmen's Compensation Act."

**In Meyer v. Roettele et al., 264 N. W. 191 (December, 1935),** compensation was sought under the Act for the death of a son resulting from the eating of poisonous food, furnished deceased by his employer. In awarding compensation for death by accident, the Court said that the disease was attributable to an unexpected and undesigned occurrence of the presence of poisonous toxin in the food, and was assignable to a definite time, place and circumstance. The Court made the following comment:

> "We are of the view that disease may be an 'injury by accident' within the meaning of our statute. The exclusion is of any disease which is not an accidental injury, or which does not result from such injury. It is generally recognized that accident as contemplated by the Workmen's Compensation Law, is distinguished from so-called **occupational diseases** which are the natural and reasonably to be expected result of workmen following certain occupations for a considerable period of time. On the other hand, if the element of suddenness or precipitancy is present, and the disease is not the ordinary or reasonably to be anticipated result of pur-

suing an occupation, it may be regarded as an injury by accident, and compensable." (Bold face type not in text.)

B. **Exclusiveness of the Act.**

Section 9440 provides:

> "The rights and remedies herein granted to an employe subject to this article, on account of personal injury or death by accident arising out of and in the course of employment, shall exclude all other rights and remedies of such employe, his personal representatives, dependents or next of kin, on account of such injury or death."

*This section was the subject of comment in* **Freese v. John Morrell & Co., 58 S. D. 634, 237 N. W. 886 (1931).** In that case, the plaintiff's action was at law to recover for injuries sustained when certain machinery fell upon him. Because of such injury, the plaintiff lost his sexual powers and became impotent. Both parties were operating under the Workmen's Compensation Act. The defendant demurred to the petition of the plaintiff on the ground that the plaintiff's sole remedy was under the Workmen's Compensation Act. The plaintiff contended that since no provision was made in the Act for the injury for which recovery was sought, his common law right of action for such injury was not affected by the provisions of the Act. The Court held that the plaintiff's injury was compensable under the Act, and that he therefore had no common law right of action. In the course of the opinion the Court makes the following remarks which relate to the situation where the injury complained of is not compensable:

> "* * * in Donnely v. Minneapolis Manufacturing Co., 161 Minn. 240, 201 N. W. 305, the employee, because of the actionable fault of the employer in *failing to provide adequately ventilated working* rooms as required by statute, acquired 'chronic bronchitis with chemical poisoning,' which disease was not among the diseases listed as occupational diseases to be treated as accidental injuries and compensable under the act, and the court very properly held in that case that the Compensation Act *did not apply, and the employee might have his* action at law."

Although this statement is obiter dictum, it indicates that the court will hold, when the question is directly presented to it, that the employee still has his common law rights of action for such injury or death as are not compensable under the Workmen's Compensation Act.



II. **Other Statutes.** (Compiled Laws of South Dakota, 1929 and supplements.)

1. **Employer and Employee, Chapter 7 of Title I, Part 4, Secs. 1071-1107 P.**

**Sec. 1072**

> "An employer must indemnify his employe, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the direction of the employer, even though unlawful, unless the employe, at the time of obeying such directions, believed them to be unlawful."

**Sec. 1073**

> "An employer, except as otherwise specially provided, is not bound to indemnify his employe for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employe."

2. **Mining Regulations, Article 2 of Title 6, Part 16, Chapter 9, Secs. 8719-8725.**

**Sec. 8722**

> "Any person operating any smelter or dry crushing reduction works shall install therein exhaust fans and dust chambers or some other contrivance for the removal of all gases, fumes, dust and other impurities that accumulate, at all times, in the operation of such works."

**Sec. 8724**

> "Proof of the failure of any such person to comply with the provisions of the second preceding section shall be prima facie evidence of negligence on the part of such person."

3. **Labor of Women and Children, Chapter 5 of Title 6, Part 21, Secs. 10014-10022 E.**

Sec. 10014 limits the hours of employment of any woman, girl or child under the age of 16 years.

**Sec. 10015**

> "No child under 14 years of age shall be employed at any time in any factory or workshop or about any mine, nor shall he or she be employed in any mercantile establishment except during the vacation of the public schools, or outside of school hours, but

in no case after 7 o'clock P. M. No child under 16 years of age shall be employed at any time in any occupation dangerous to life, health or morals."

Sec. 10019 provides that every factory, mill or workshop where women, girls or children are employed must be properly ventilated and kept at all times in a sanitary condition.

Sec. 10020 provides that the interior of every factory or workshop where women, girls or children are employed must be whitewashed or painted at least once in every twelve months, and the floors of the rooms cleaned with soap and water at least once in two weeks.

III. **Common Law Liability.**

No decisions were found pertinent to the issue as to whether or not an employee has a common law right of action in South Dakota for injury or death resulting from breathing dust polluted air in the course of his employment, predicated upon the negligence of his employer.

IV. **Miscellaneous Matters of Interest.**

1. **Statutes of Limitations.**

By Sec. 2299, an action for personal injury must be commenced within three years after the cause of action shall have accrued. Where death occurs, Sec. 2931 provides that the action must be commenced within three years after the death.

2. **Pending Legislation and Surveys.**

We are not able to ascertain that there is any pending legislation with regard to dust hazards or designed to make occupational diseases compensable under the Workmen's Compensation Act.

No official survey of dust hazards has been made.



# CHAPTER XXXXIV

# TENNESSEE

I. **Workmen's Compensation Act.**

1. **Statutes. Code of Tennessee 1932, Secs. 6851-6901.**

2. **Administration.** Disputed claims are to be submitted to the judge or chairman of the county court, in which an accident occurs, for hearing and judgment (Secs. 6885 and 6886). The power to enforce the provisions of the Act relating to the insurance of liability is placed in the hands of a Commissioner of Insurance and Banking (Sec. 6900). Other administrative duties are performed by the Department of Labor, Division of Workmen's Compensation (Secs. 6854, 6884, 6889 and 6895). Communications may be addressed to the Division of Workmen's Compensation, Department of Labor, Nashville, Tennessee.

3. **Scope of the Act.** Compensation is provided for injury or death by accident (Sec. 6859).

Sec. 6852 (d) defines injury as follows:

> "'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of employment, and shall not include a disease in any form except as it shall naturally result from the injury."

The Act, with some few exceptions, covers all private employments wherein not less than five persons are employed for pay (Secs. 6852 (a) and 6856). The Act is elective as to both employers and employees, but there is a presumption of acceptance on the part of both employers and employees in the absence of a proper notice of a rejection of its terms (Secs. 6853-6854).

If an employer, within the terms of the Act, elects not to operate thereunder, he loses the defenses of contributory negligence, negligence of a fellow servant and assumed risk, in any suit brought against him by an employee who has elected to operate under the Act, for personal injury or death arising from an accident (Sec. 6862). Where such action is by an employee who has rejected the terms of the Act against an employer who is operating thereunder, these common law defenses are available to the employer (Sec. 6863). Where both employer and employee have elected not to operate under the

Act, such defenses are not available to the employer (Sec. 6864).

Each employer bound by the Act must either insure his liability thereunder or furnish to the Division of Workmen's Compensation satisfactory proof of his financial ability to pay all claims directly. In the latter case, the Commissioner of Labor shall require the deposit of acceptable securities or bond. Until these provisions are complied with, the employer is liable to an employee, either for compensation under the Act or at law. If the suit is brought at law, the defenses of contributory negligence, negligence of a fellow servant and assumed risk are not available to the employer (Sec. 6895).

Sec. 6859 provides:

> "The rights and remedies herein granted to an employee subject to this chapter on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death."

A claim for compensation will be barred unless, in the absence of a reasonable excuse, written notice is given the employer within thirty days after the occurrence of an accident (Sec. 6872) and unless the claim is filed within one year after the accident (Sec. 6874).

An injured employee must submit to an examination at all reasonable times if requested to do so by an employer (Sec 6875). There is no provision for a state medical board.

4. **Court Construction.** The decisions of the Tennessee courts indicate that compensation will be awarded for injury or death resulting from the inhalation of noxious dusts in the course of employment only when such can be deemed to result from an accident.

The case of **Meade Fiber Corporation v. Starnes, 147 Tenn. 362, 247 S. W. 989 (1923),** is directly in point. There the plaintiff contracted a disease as the result of inhaling dust from soda ash in the course of his employment. The soda ash, in pulverized form, was stored in sacks in the basement of the employer's building. It was claimant's duty to move such sacks to an upper floor. The usual effect of inhaling the dust was an irritation of throat and lungs, but such had rarely caused any harmful results. The Court, in denying compensation, declared:

> "* * * It is quite true that the use of the word 'accident' or 'accidental' in compensation statutes



> is not to be given a technical or literal meaning, but this does not mean that they are to be given no qualifying meaning at all. Certainly they imply that the injury must partake of the unusual, casual, or fortuitous. The word 'accident' is derived from the Latin 'ad cidere', meaning to fall, a befalling, or not designed, and is usually applied to an event or happening in the nature of a misfortune, casual or fortuitous. In some of the statutes the word 'accident' has been defined to mean an unexpected or unforeseen event, happening suddenly or violently, with or without careless fault, producing some objective symptom of injury. The courts generally in dealing with the word have given it a somewhat similar definition. Under statutes like ours, occupational diseases have almost uniformly been held not to be included within the term.
>
> "We cannot conceive that the breathing of dust caused to arise necessarily from the very work being performed, has in it any element of accident. The material being moved was in the form of dust. It was contained in sacks. The very nature of the material and its container, and the movement thereof, necessarily, and not accidentally, caused the dust to float in the air, and to be breathed by the workmen. There was no accident in the form of the material, its container, or method of movement. The escape of dust in its movement did not result from any fortuitous circumstance; it was necessarily incident thereto. It seems to us that the same reasons which exclude occupational diseases must apply here, and exclude an injury which is produced by the necessities of the occasion, in the absence of any accident entering into the cause of or as producing the particular occasion." (Bold face type not in text.)

In **King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 296 S. W. 3 (1927),** compensation was sought for the death of an employee from pneumonia resulting from heat prostration occurring in the course of his employment. Deceased, a fireman in a boiler room, was stricken on an extremely hot day. Nothing unusual occurred on that day, except the fact of this misfortune. **Compensation was awarded** for death by accident on the ground that this event could not be said to be a necessary incident or an expected result of the employment, but that it was a sudden, unforeseen and unexpected casualty and misfortune. Although the fireman expected to be hot, he did not expect to become overheated to the point of prostration.

The Court made this interesting observation in regard to **Meade Fiber Corporation v. Starnes,** supra:

"If the dust inhaled by the workman in the case just referred to had brought about such an irritation in his throat, while he was at work, as to cause a sudden and violent paroxysm of coughing, resulting in the rupture of a blood vessel, from which the workman suffered incapacity or death, we do not think the reasoning of the court denying compensation would have been applicable."

In *Hartford Accident & Indemnity Co. v. Hay*, 159 Tenn. 202, 17 S. W. (2d) 904 (1929), an employee who drove a laundry wagon was infected by a germ from his horse. While caring for the horse, his germ-laden fingers had unexpectedly come into contact with an abrasion. In awarding compensation for the injury by accident, the Court said:

"* * * an accidental injury is not necessarily of traumatic origin, strictly speaking. If it be an injury not reasonably to be foreseen, unexpected and fortuitous, it is an accidental injury whether occasioned by heat, germs, or more abrupt or perceptible physical force."

In Sears-Roebuck & Co. v. Starnes, 160 Tenn. 504, 26 S. W. (2d) 128 (1930), compensation was sought for an injury resulting from an infection following the formation of a callus upon the claimant's finger tip. This callus was occasioned by the operation of a listing machine which worked with considerable resistance or stiffness, and on which the employee was required to make about 10,000 operations daily. The claimant had been using the machine about five weeks when there developed an infection under the callus upon her finger and this necessitated a minor operation, and brought about the disability. In awarding compensation, the Court said:

"In the instant case the employee might have expected a callous to appear on her finger tip, just as callouses often do upon the finger tips of stenographers and violinists, but the appearance of an infection therefrom was something fortuitous, not to be expected, an unusual event or result, and therefore accidental.

"If it be said that the callous required too long to develop to be regarded as an accident, it may be answered that it is not the callous, but the superadded infection, which constitutes the injury, and that this manifested itself suddenly, albeit not instantaneously."

See also Morrison v. Tennessee Consol. Coal Co., 162 Tenn. 523, 39 S. W. (2d) 272 (1931), discussed in Section III of this chapter.



II. Other Statutes.

1. Employment of Minor Children and Females—Ch. 18 of Title 12, Secs. 5314-5330.

These sections make unlawful the employment of children under fourteen years of age in factories, workshops and other places; limit the h rs of employment of children under sixteen; and also pre it the employment of children under sixteen in connectic with numerous items of dangerous machinery, including he operation of woodworking machinery, picker machines, emery or polishing wheels and washing, grinding, or mixing mills.

2. Workshops and Factories—Ch. 19 of Title 12, Secs. 5331-5347.

The Division of Workshops and Factories, under the direction of the Chief Inspector, is charged with the duty of inspecting, among other matters, the ventilation of workshops and factories.

Sec. 5339:

"Every factory, workshop, association, or other establishment in which five or more persons are employed shall be so ventilated while work is carried on therein that the air shall not become so exhausted as to become injurious to the health of the persons employed therein, and as to render harmless, as far as practicable, all gases, vapors, dust, or other impurities generated in the course of the manufacturing process or handicraft carried on therein."

Sec. 5340:

"Every factory, workshop, association, or other establishment where a work or process is carried on by which dust, filaments, or injurious gases are produced or generated, that are liable to be inhaled by persons employed therein, the person by whose authority the said work or process is carried on shall cause to be provided and used, in said workshop, factory, association, or establishment, exhaust fans, conveyors, receptacles, or blowers with pipes and hoods extending therefrom to each machine, contrivance or apparatus by which dust, filaments, or injurious gases are produced or generated; or provide other mechanical means to be maintained for the purpose of carrying off or receiving and collecting such dust, filament, devitalized air, or other impurities as may be detrimental to the health of those in or about, or in connection with, such place as herein mentioned. Provided, that if natural ventilation sufficient to exclude the harmful elements above enumerated be

provided, the requirements of this section shall have been complied with by such firm, corporation, association, or other establishment as herein mentioned. Said fans, blowers, pipes and hoods shall be properly fitted and adjusted and of power and dimensions sufficient to effectually prevent the dust, filaments, or injurious gases produced or generated by said machines, contrivances, or apparatus from escaping into the atmosphere of the room or rooms of said factory, workshop, or other establishment, where persons are employed."

Sec. 5341:

"Not less than two hundred and fifty cubic feet of air space shall be provided for each employee or operative at work in a room or place within the meaning of this act, between the hours of six o'clock in the morning, and the hours of six o'clock in the evening, and not less than four hundred cubic feet of air space for each person so employed between the hours of six o'clock in the evening and six o'clock in the morning."

**3. Regulation of Mines—Ch. 24 of Title 12, Secs. 5539-5643.**

Sec. 5569:

"Class B shall include every coal or other mine that is dry and dusty to such an extent as, in the judgment of the chief inspector, renders the same dangerous from dust explosions; and when coal or other dust is deposited on timbers, sides and bottoms of the airways, entries, or other workings of the mine, and where dangers would be increased by too great a velocity of the ventilating currents in mines of this class, the minimum amount of fresh air supplied by ventilating currents shall not be less than one hundred cubic feet per minute for each person and five hundred cubic feet per minute for each animal * * *."

Sec. 5634:

The operators of all Class B mines must

"* * * remove any and all the dangerous accumulations of dust from the mine and see that all * * * working places are maintained in a safe and moist condition, by sprinkling, spraying, saturating the sides and bottom and other places with water or otherwise, so as to maintain the mine in a safe condition from dust explosions. * * *"

Sec. 5636:

"Whoever violates any of the provisions of this chapter or does any act whereby the health or life of persons * * * is endangered, * * * shall be guilty of a misdemeanor, and be fined not less than $50 nor more than $500 and all costs and imprisonment * * *."



**4. Sanitation of All Food-Producing and Sale Establishments, Ch. 20 of Title 12, Secs. 6597-6617.**

Sec. 6597:

"Every building, * * * occupied or used as a bakery, confectionery, cannery, packing house, * * *, or other place or apartment used for the preparation for sale, manufacture, packing, storage, sale, or distribution of any food shall be properly * * * ventilated and conducted with strict regard to the influence of such condition upon the health of the operatives, * * *."

**5. Department of Labor, Subdivision 8 of Title 3, Ch. 2, Article V, Secs. 335-338.**

By Sec. 335, the Department of Labor is empowered to collect information with respect to labor conditions; to inspect with respect to sanitary conditions, lighting and ventilating of rooms, etc.; to declare and prescribe what safety devices or other means of protection are adapted to render employees or places of employment safe; to order reasonable changes in construction; and to require the performance of any act necessary for the protection of life, health and safety of the employees.

We have been unable, to date, to ascertain definitely whether or not any safety rules have been published by the Department of Labor.

## III. Common Law Liability.

As a result of a decision of the Supreme Court of Tennessee in **Morrison v. Tennessee Consol. Coal Co., 162 Tenn. 523, 39 S. W. (2d) 272 (1931)**, it would seem that recovery can be had at common law for an injury or death resulting from an occupational disease caused by the inhalation of dust in the course of employment. In that case, the plaintiff's lung disease resulted from a gradual, long time inhalation of rock dust while operating a drill in removing coal from defendant's mine. The plaintiff charged the defendant with negligence in furnishing unsuitable and unsafe tools and an unsuitable and unsafe place in which to work. The defendant interposed several pleas; among others, the plea that injury was compensable under the Workmen's Compensation Law. The Court upon holding that no injury by accident was involved because the inception of the disease was not assignable to a determinate or single occurrence identified in space or time, overruled defendant's demurrer and remanded the case for further proceedings. This amounted to a recognition by the Court that a good cause of action at law was pleaded.

See also **Brown v. Tennessee Consol. Coal Co., 83 S. W. (2d) 568 (Court of Appeals, 1935; certiorari denied by Supreme Court June 10, 1935)**, discussed in Section IV-1 of this chapter.

### IV. Miscellaneous Matters of Interest.

#### 1. Statute of Limitations.

An action for injury to the person, or for death, must be commenced within one year after the cause of action has accrued (Sec. 8595).

**Brown v. Consol. Coal Co., 83 S. W. (2d) 568 (Court of Appeals, 1935; certiorari denied by Supreme Court June 10, 1935)**, involves two suits at common law by employees against their employer for injuries resulting from silicosis. The Court reversed judgments in favor of plaintiffs, set aside the verdicts, and dismissed the suits on the ground that their actions were barred by the one year statute of limitations. It was the conclusion of the Court that the statute began to run from the date of the negligent act and not from the time when the full extent of the injuries was ascertained. The plaintiffs failed to prove that their injuries resulted from negligence on the part of the defendant occurring during the period of one year prior to their suits.

#### 2. Pending Legislation and Surveys.

No official survey of dust hazards in industry has been made.

No bills are now pending in the legislature relating to precautionary measures to be taken with respect to dust hazards, or making diseases resulting from the inhalation of dust compensable under the Workmen's Compensation Act.



# CHAPTER XXXXV

# TEXAS

### I. Workmen's Compensation Act.

#### 1. Statutes. Texas Statutes 1928, Title 130, Articles 8306-8309.

**2. Administration.** The Act is administered by the Industrial Accident Board composed of three persons appointed by the Governor for terms of six years each. One must be an employer of labor in some industry or business covered by the Act; one must be a person employed in some business industry as a wage earner; and the third must be a practicing attorney of recognized ability. The latter acts as legal adviser of the Board and is its chairman. Communications may be addressed to the Board at Austin, Texas.

**3. Scope of the Act.** The Act is divided into articles as follows:

Part 1: Article 8306 (Secs. 1-19) **Damages and Compensation for Personal Injury;**

Part 2: Article 8307 (Secs. 1-12) **Industrial Accident Board;**

Part 3: Article 8308 (Secs. 1-23) **Employers' Insurance Association; and**

Part 4: Article 8309 (Secs. 1-5) **Definitions and General Provisions.**

Compensation is provided for personal injury or death to an employee in the course of his employment (Art. 8306). Article 8309, Sec. 1, provides:

> "The terms 'injury' or 'personal injury' shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom."

The Texas courts have construed the Act to cover only accidental injury or death (see Secs. 1-4 of this chapter).

With some few exceptions, all private employments wherein three or more employees are employed are covered by the Act (Art. 8306, Sec. 2, and Art. 8309, Sec. 1). The compensation features of the Act are elective as to both employers and employees. Employers elect by becoming subscribers to the Texas Employers' Insurance Association or by insuring liability in some authorized insurance company (Art. 8308, Sec. 18a, 19 and 20, and Art. 8309, Sec. 2). An employee of a subscriber waives his right of action at common law or under any statute to recover damages for injuries, if he does not give proper notice,

in writing, that he claims such right (Art. 8306, Sec. 3a and 3c).

A nonsubscribing employer is liable in an action against him by an employee to recover for personal injury or death sustained in the course of his employment, and in such suit the defenses of contributory negligence, negligence of a fellow servant, and assumed risk are not available to the employer (Art. 8306, Sec. 1 and 4). In an action by an employee who has not waived his right of action at common law, or under any statute, to recover damages for injury sustained in the course of his employment, against a subscribing employer, such common law defenses are available to the employer (Art. 8306, Sec. 3a).

Unless notice of an injury is given to the insurance company or subscriber within thirty days after the happening thereof, and unless a claim for compensation is made within six months thereafter, or, in case of death, within six months after the death, compensation will be barred. For good cause, the Industrial Accident Board may waive strict compliance with the foregoing limitations (Art. 8307, Sec. 4a).

The Industrial Accident Board may require any employee claiming to have sustained injury to submit himself to medical examination. The refusal of an employee to submit to such examination deprives him of the right to any compensation during the continuance of such refusal. When authorized by the Board, the insurer shall have the privilege of having any injured employee examined by a physician (Art. 8307, Sec. 4). No provision is made for a state medical board.

4. **Court Construction.**

A. **Accidental Injury.**

Although in the definition of "injury" and "personal injury" in the Workmen's Compensation Act, no requirement is made that such result by accident, Texas courts have consistently held that such element is essential for recovery thereunder. The following cases, besides setting out this requirement, define the term "accident" as applied to disability or death resulting from the inhalation of poisonous gases, fumes or dust in the course of employment, and set out certain interesting developments of the Texas law governing such claims.

In **Aetna Life Ins. Co. v. Graham et al., 284 S. W. 931 (Commission of Appeals, 1926)**, compensation was sought for the death of an employee resulting from the inhalation of poisonous gases, fumes, and powders while employed for a two year period by the defendant in stirring and boiling various chem-



icals used in the manufacture of shoe polish. The Court held that since the central thought of the Workmen's Compensation Act was that, in order for an injury to be compensable, it must be accidental in nature, no recovery was possible under the Act, because the death resulted from an occupational disease and not from an accident. The Court did not define the terms "accident" or "occupational disease."

In **Gordon v. Travelers' Ins. Co., et al., 287 S. W. 911 (Court of Civil Appeals, 1926)**, plaintiff sought recovery for injuries produced by inhaling into his system, on various occasions during his employment, fumes from gasoline, oils, paints, etc. He further alleged that an occupational disease resulted which was compensable under the Act. The Court, in denying compensation, declared that the disease from which he suffered developed gradually, thereby eliminating the accidental element necessary to make the injury compensable under the Act.

**Barron v. Texas Employers' Ins. Ass'n, 36 S. W. (2d) 464 (Commission of Appeals, 1931)**, is a very interesting case. There, compensation was sought for a disability resulting from tuberculosis, caused by unusual and heavy gassings, on two different occasions, during claimant's employment at defendant's oil well. The defendant contended that the disability resulted from an occupational disease and, as such, was not compensable under the Act. The plaintiff, on the other hand, contended that his injury resulted from an accident.

The Court, in its opinion, said:

> "* * * an injury resulting from accident is something which occurs unexpectedly and not in the natural course of events. It is one which may possibly be prevented by the exercise of due care and caution upon the part of the employer. * * *
>
> "A distinguishing characteristic of an accidental injury is that it can always be traced to a definite time, place, and cause. * * *
>
> "An occupational disease must be restricted to one that is the usual and ordinary result incident to the pursuit of an occupation and must in the nature of things be the result of a slow and gradual development."

The Court concluded that plaintiff's disability was compensable as an accidental injury, for the reasons that it resulted from inhalations traceable definitely to particular gassings, and not to any slow and gradual process of inhaling the same during his employment, and also because it appeared that the employer could have prevented the escape of such a heavy volume of the poisonous gas, by the exercise of proper care

and caution. As to this second point, the Court added that an employer is permitted to avail himself of the defense that an injury resulted from an occupational disease only when he has used due diligence to prevent the employee from being subjected to hazards of the employment.

There is some doubt that the latter rule laid down by the Court is still valid. In **Travelers' Ins. Co. v. Lancaster, et al., 71 S. W. (2d) 318 (Court of Civil Appeals, 1934)**, an inferior court expressly refused to be bound by that ruling. There, the claimant sought compensation for disability resulting from the inhalation of dust, straw, etc., over a period of time while engaged in unpacking goods from boxes and crates for the defendant. The storeroom was very poorly ventilated. The Court first held that, while the general rule is that an occupational disease is not compensable under the Workmen's Compensation Act, there was a recognized exception in Texas law, that, where such disability was caused by the master's negligence, compensation would be awarded. The Court thereupon upheld the decision of the Industrial Accident Board, awarding compensation to the claimant.

On motion for rehearing, the Court reversed its former position and held that the above stated exception was an improper one and had no place in Texas law. As the basis for its conclusion, the Court pointed out that the issue of negligence was foreign to the letter and spirit of the Compensation Act; that the authorities relied upon in support of the exception did not apply to compensation cases, but to common law actions for damages in negligence cases; and finally that the assertion was obiter dictum. The defendant's motion for rehearing was accordingly granted, the judgment reversed, and the cause remanded.

In **Salinas v. New Amsterdam Casualty Co., 67 F. (2d) 829 (Court of Civil Appeals, 5th, 1933)**, compensation was sought for the death of an employee from a brain abscess. Compensation was denied on the grounds that the evidence was insufficient to establish the fact that the death resulted from inhaling cement dust while laying a concrete floor and because, even if such evidence was present, there was no accidental injury involved. Injury was defined to mean "* * * something which occurs unexpectedly and not in the natural course of events, and must be capable of being traced to a definite time, place, and cause. * * *" The Court said that there was nothing to disclose that there was an unusual amount of dust or that there was anything in connection with the work which occurred unexpectedly



or suddenly. No mention was made as to whether or not negligence on the employer's part, if such existed, would have any effect on the Court's conclusion.

In **Associated Indemnity Corp. v. Baker, et al., 76 S. W. (2d) 153 (Court of Civil Appeals, 1934)**, compensation was sought for the death of an employee resulting from the inhalation or absorption of poisonous gases and fumes on a particular day, while engaged in cleaning and blowing out the tubes of a condenser with compressed air. The defendant contended that claimant's disability resulted from an occupational disease and was therefore not compensable under the Act. The Court denied this, saying:

> "An occupational disease is defined by the Commission of Appeals to be one acquired in the usual and ordinary course of an employment which from common experience is recognized to be incidental thereto and is the usual and ordinary result incident to the pursuit of an occupation and must in the nature of things be the result of a slow and gradual development. Barron v. Texas Employers' Ins. Ass'n, supra. There is no testimony in the record that Baker died as the result of any such disease. * * *"

In **Hock, et al., v. Texas Employers' Ins. Ass'n, 80 S. W. (2d) 793 (Court of Civil Appeals, 1935)**, the claimant sought compensation for disability resulting from exposure to cement dust during five months' employment by the defendant. The dust settled on his body and penetrated his clothes, and the perspiration from his body caused the cement dust to cake on his shoulders and caused a suffering and irritation of the legs and body generally. Compensation was denied on the ground that the disability resulted from an occupational disease and not from an accidental injury. No suggestion was made of negligence on the employer's part or of the effect of such negligence, if present, upon the Court's decision.

In **Aetna Life Insurance Co. v. Harris, 83 S. W. (2d) 1087 (Court of Civil Appeals, 1935)**, injury was caused by particles of dust, dye and fuzz getting into an employee's eye, on a certain day, while unpacking wearing apparel in the course of his employment. Compensation was awarded for an accidental injury in the face of the defendant's contention that there must be a physical injury through which germs can enter the body. It was the Court's conclusion that the irritation of the eyes because of the foreign matter in the air constituted an injury, through which injury the disease germs found entry and did their deadly work.

In Maryland Casualty Co. v. Rogers, et al., 86 S. W. (2d) 867 (Court of Civil Appeals, 1935), compensation was sought for the death of an employee resulting from the inhalation of dust from grain fodder known as higera. The deceased had been employed in a feed store and, on a particular day, for two and one-half hours, he ground certain grain fodder which was unusually full of dirt. A dense fog of dust was created and it was not possible for the men to work continuously in it. Death occurred one week later from pneumonia. At that time, there was a mild epidemic of such disease in the neighborhood. The Court reversed the Industrial Accident Board, which had denied compensation, and awarded judgment for the claimant, saying, in part:

> "In this case the employee labored under unusual conditions. The bundle higera was the dirtiest the witness had ever seen. There was a mild epidemic of pneumonia. The employer could have but did not provide protective measures. The injury was unexpected and undesigned. It could be traced to a definite time, place, and cause. * * *"

The sentence of the Court, relating to the failure of the employer to provide protective measures in spite of the fact that such were available, seems to suggest that the employer's negligence may still be one element to be considered in determining whether an accidental injury or an occupational disease is involved. The Court did not elaborate on its statement.

In United States Casualty Co. v. Vance, 91 S. W. (2d) 465 (1936), compensation was sought for an injury caused by the bursting of a blood vessel as a result of the strain of lifting heavy pipe on a certain day. The Court said:

> "Under the statute, as construed by our courts, the injury flowed from 'something out of the ordinary, and unexpected,' and being definitely located as to time and place, it was compensable. * * *"

In Hartford Accident & Indemnity Co. v. Jones, 80 F. (2d) 680 (1936), compensation was sought for disability resulting from a skin cancer suffered by an auto mechanic who had used certain red gasoline for three days in cleaning parts of a motor. The Court, in awarding compensation, said:

> "* * * the inflammation of Jones' hands was due to unusual exposure to this red gasoline at a sufficiently certain time and place and in the course of his employment, and that it was not the manifestation of a disease usual in and recognized as incident to his occupation."



In Jackson v. Texas Employers' Ins. Ass'n, 265 S. W. 1027 (Commission of Appeals, 1924), compensation was denied an employee for disability resulting from pneumonia which had been contracted as a result of exposure to rains while engaged in a hauling trip on the open prairie for the employer.

In Travelers' Ins. Co. v. Smith, 266 S. W. 574 (Court of Civil Appeals, 1924), compensation was granted where death resulted from a severe exposure to chlorine gas, occurring when certain machinery broke down.

In Houston Packing Co. v. Mason, 286 S. W. 862 (Court of Civil Appeals, 1926), compensation was granted where disability resulted from anthrax contracted while engaged in skinning cattle.

B. Exclusiveness of the Act.

Article 8306, Sec. 3, provides:

> "The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association * * *."

NOTE: "Association" is defined in Article 8309, Sec. 1, as follows:

> "'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this law to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees."

It is clear that remedies afforded by the Workmen's Compensation Act are exclusive with respect to injuries or death for which compensation is obtainable. There is however considerable uncertainty as to whether the above quoted section must be construed so broadly as to bar the employee's right of action at law where he suffers disability which has resulted from negligent conduct of the employer, but which is not compensable under the Act.

The Court made a statement in Gordon v. Travelers' Ins. Co., 287 S. W. 911 (Court of Civil Appeals, 1926), supra, which cannot be ignored, but which may be questioned as a final and conclusive statement on the subject. In that case, the plaintiff had been disabled as a result of inhaling into his sys-

tem, on various occasions, fumes from gasoline, oils, and paints. He sought to recover under the Workmen's Compensation Act, or, in the alternative, at common law, alleging negligence on the part of the employer in failing to furnish a reasonably safe place in which to work. After denying the right to compensation on the ground that the disability was in the nature of a disease of gradual development and that any accidental element was lacking, the Court proceeded to say further:

> "Under the facts set up in the petition, appellant's employer was a subscriber under our Compensation Law, and he, by his conduct, had waived his right of action at common law against such employer."

Several cases were cited to support this holding.

The value of that statement was somewhat lessened by the paragraph of the decision which immediately follows it, and in which the Court says:

> "The appellant could not recover at common law against his employer for the additional reason that no recovery was allowed at common law for occupational or industrial diseases."

It is manifest that it was unnecessary for the Court to give both reasons for its decision. Either one was sufficient, and one with the other was superfluous.

We find no later decisions of the Texas court in which the above case of **Gordon v. Travelers' Ins. Co.** has been either followed or modified with respect to the two questions, to-wit, the exclusiveness of the remedies under the Workmen's Compensation Act and the right to recover at common law for occupational disease.

Among the cases cited in **Gordon v. Travelers' Ins. Co.** with respect to the exclusive character of the remedies under the Workmen's Compensation Act, two cases warrant some discussion. The others are not of that importance, as the disabilities under consideration were such that compensation for them was procurable, and hence the exclusiveness of the Act was not questionable. The two cases warranting comment are:

> **Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S. W. 556 (1916); and**
> **Millers' Indemnity Underwriters v. Braud, 270 U. S. 59, 46 S. Ct. 194 (1926).**

In the Middleton case, the Supreme Court of Texas answered seventeen questions with respect to the constitutionality



of the Workmen's Compensation Act. The opinion does not satisfactorily reveal the character of the action, but it appears to have been an action at law for damages. This opinion, which is quite lengthy, should be read by anyone particularly interested. It discusses the philosophy of workmen's compensation legislation and analyzes the Act as declaring that the employee of a subscribing employer shall have no cause of action against him for damages for personal injuries, nor shall his representatives or beneficiaries in case of death, except that exemplary damages may be recovered where death is caused through the wilful act or gross negligence of the employer. In another statement in the opinion, the Court said:

> "Such employees as are injured in the service of subscribing employers who comply with the Act, are denied all right of action therefor against such employers, * * *" (except injury due to wilful act or gross negligence).

The Court did not specifically discuss the situation which arises when the injury results from disease caused by the negligent act of the employer. Hence this decision might still be modified. Until it is modified however, it is doubtless authority for the broadest construction of the language which makes the remedies under the Workmen's Compensation Act exclusive.

In the **Millers' Indemnity Underwriters** case above referred to, the Supreme Court of the United States held that the Workmen's Compensation Act was sufficiently exclusive to bar a right of recovery under the general maritime law, where the employee was injured while employed in the coast waters of Texas.

## II. Other Statutes.

### 1. Protection of Female Employees, Labor, Title 83 of Civil Code, Ch. 7, Art. 5173-5180.

Art. 5173 provides:

> "In every factory, mill, workshop, mercantile establishment, laundry, or other establishment, adequate measures shall be taken for securing and maintaining a reasonable, and as far as possible, an equable temperature consistent with a reasonable requirement of the manufacturing process. No unnecessary humidity which would jeopardize the health of employees shall be permitted. In every room, apartment, or building used as a factory, mill, workshop, mercantile establishment, laundry or

other place of employment, sufficient air space shall be provided for every person employed therein, and which in the judgment of the Commissioner of Labor Statistics, or of his deputies and inspectors is sufficient for their health and welfare."

Art. 5174 provides:

"All factories, mills, workshops, mercantile establishments, laundries and other establishments shall be kept free from gas or effluvia arising from any sewer, drain, privy or other nuisance on the premises; all poisonous or noxious gases arising from any process; all dust of a character injurious to the health of persons employed, which is created in the process of manufacturing within the above named establishments, shall be removed as far as practicable by ventilators or exhaust fans or other adequate devices."

Art. 5175 provides:

"All decomposed, fetid or putrescent matter, and all refuse, waste and sweepings of any factory, mill, workshop, mercantile establishment, laundry or other establishment, shall be removed at least once each day and be disposed of in such manner as not to cause a nuisance. All cleaning, sweeping and dusting shall be done as far as possible outside of working hours, but if done during working hours, shall be done in such manner as to avoid so far as possible the raising of dust and noxious odors. *"

Note: The preamble to the Act by which the foregoing sections became law is interesting as indicating the scope of the Act. It reads:

"An Act for the protection of the health, safety and comfort of employees in factories, mills, workshops, mercantile establishments, laundries or other establishments where females are employed, providing for proper temperature and ventilation for the protection of the health of employees, * * *"

**2. Employment of Children, Labor, Title 18 of the Penal Code, Ch. 4, Art. 1573-1578a.**

Art. 1573 provides that the employment of a child under the age of fifteen years in a factory, mill, workshop, laundry or in messenger service in towns and cities of more than 15,000 population, is punishable by a fine of from $25 to $200, or by imprisonment for not more than sixty days.

Art. 1574 provides that the employment of a child under seventeen years of age in any mine, quarry or place where explosives are used is punishable by a fine of from $50 to $500, or by imprisonment not to exceed sixty days.

Art. 1576 provides a penalty for the employment of children under fifteen years of age for more than eight hours a day,



for more than forty-eight hours a week, or between the hours of 10 P. M. and 5 A. M.

**3. Mines and Mining, Title 95 of the Civil Code, Art. 5892-5920.**

Art. 5904 provides that throughout every mine there shall be maintained, by means of a fan or other means, currents of fresh air sufficient for the health and safety of all men and animals employed therein, provided that a furnace shall not be used for ventilating a mine in which explosive gases are used. The amount of air required must not be less than 100 cubic feet per minute for each person, and 300 cubic feet per minute for each animal.

"Said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of any kind."

Art. 5905 makes certain provisions in regard to cut-throughs as affecting the ventilation.

**4. Mines and Mining, Title 18 of the Penal Code, Ch. 8, Art. 1594-1602.**

Art. 1596 and 1600 are identical to Art. 5904 and 5905 set out above, with penalties for violation set out in other articles

**5. Unwholesome Food, Drink or Medicine, Title 12 of the Penal Code, Ch. 2, Art. 706-719a.**

Art. 719:

"Any building occupied or used as a bakery * * * shall be clean, properly lighted, drained and ventilated. * * *"

**III. Common Law Liability.**

There is some doubt that an employee has ever had a common law right of action in Texas, for disability or death resulting from occupational disease. If such right existed prior to 1915, when the Workmen's Compensation Act was passed, it was probably legislated out of existence by the provision of that Act which appears to make compensation the exclusive remedy for disability incurred in the course of employment.

We have hereinbefore (Sec. I-4-B) quoted from **Gordon v. Travelers' Ins. Co., et al., 287 S. W. 911 (Court of Civil Appeals, 1926)**, where an employee was disabled as a result of inhaling, over a period of time, fumes from gasoline, oils and paints. He sought compensation under the Workmen's Compensation Act, and, in the alternative, damages at common law,

for the resulting injuries, alleging negligence on the part of the employer in failing to furnish a reasonably safe place in which to work. The Court, after holding that the plaintiff was not entitled to compensation under the Act, for the reason that he was suffering from an occupational disease, expressly declared that the plaintiff could not recover at common law against his employer, for the reason that no recovery was possible at common law for occupational diseases. As sole authority for that statement, the Court cited **Miller v. The American Steel Wire Co., 90 Conn. 349, 97 A. 345.** The statement of the Connecticut Court in that case, which was relied upon by the Texas Court, was at most obiter dictum (see the discussion in Section III of Chapter IX of this survey, covering Connecticut). This decision of the Texas Court stands unreversed, but, if occasion arises, it is possible for the Court to consider the reference to the common law right as obiter dictum and render a contrary decision.

We call attention to the following decision which recognizes, in a limited way, the common law right to recover for disability due to disease if the result of the employer's negligence. It must be noted that this case was decided prior to the enactment of the Workmen's Compensation Act, which became law in 1915, and that such right of recovery, if previously existing, may have been eliminated by the Workmen's Compensation Act.

**Texas & N. O. R. Co., et al., v. Garner, 69 S. W. 217 (Court of Civil Appeals, 1902).** Here, the employee brought an action at common law to recover for personal injuries resulting from the absorption of metallic and chemical poisons by contact and by the inhalation of vapors and gases arising from a heated lye vat about which he worked for some eighteen months. The plaintiff charged the defendant with negligence in failing to warn him of the danger. The Court affirmed a judgment in favor of the plaintiff, declaring that plaintiff could not be held, as a matter of law, to have assumed those risks which were latent and not open to the observation of one not learned in chemistry. The Court also refused to hold that defendant should have learned by experience of his danger, because a man of ordinary prudence would not be put on notice of danger because of stinging sensations produced by particles of the liquid. No mention was made of occupational diseases.

## IV. Miscellaneous Matters of Interest.

### 1. Statute of Limitations.

An action for personal injuries must be commenced within



two years after the cause of action shall have accrued (Art. 5526 (6)). In case of death, the action must be commenced within two years after the death of the party injured (Art. 5526 (7)).

### 2. Pending Legislation and Surveys.

No bills are pending in the legislature relating to precautionary measures to be taken in regard to dust hazards, or making dust diseases compensable under the Workmen's Compensation Act.

No official survey has been made of dust hazards in Texas industries.

the wr[illegible]gful act, neglect or default of the employer or an[illegible] of the employer's officers, agents or employee * * *. In any such action the defendant shall n[illegible] avail himself of any of the following defenses: [illegible]defense of the fellow-servant rule, the defense of assumption of risk, or the defense of contributory negligence. Proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury. * * *" (Sec. 42-1-54)

The employee or his dependents may, in lieu of proceeding against the employer at common law, claim compensation under the Act; and the employer must pay the amount awarded within ten days after receiving notice thereof (Sec. 42-1-55).

"The right to recover compensation pursuant to the provisions of this title for injuries sustained by an employee, whether resulting in death or not, shall be the exclusive remedy against the employer, except as in this title otherwise declared: *provided*, that where the injury is caused by the employer's willful misconduct and the act causing such injury is the personal act of the employer himself, or, if the employer is a partnership, of one of the partners, or if a corporation, of an elective officer or officers thereof, and such act indicates a willful disregard of the life, limb or bodily safety of employees, such injured employee or other person damaged may, at his option, either claim compensation under this title or maintain an action at law for damages. The term 'willful misconduct,' as employed in this section shall be construed to mean an act done knowingly and purposely with the direct object of injuring another." (Sec. 42-1-57)

Any employee claiming compensation may be required by the Commission or its medical examiner to submit himself for medical examination. A refusal to submit to such examination suspends such employee's right to have his claim considered during the period of such refusal (Sec. 42-1-85).

If an employee fails to give notice to his employer of the time and place where the accident and injury occurred and of the nature of the same within forty-eight hours, or fails to report for medical treatment within the same time, the compensation provided in the Act will be reduced 15%. Unless notice of the accident and injury is given to the employer within one year from the date of the accident, the employee's claim is barred (Sec. 42-1-92). Where death occurs, a claim for compensation must be filed with the Commission within one year from the date of the death, and, if at the end of that period no claim



has been filed with the Commission, a sum equal to 20% of the amount payable under the Act for such death shall be paid into the state treasury (Sec. 42-1-64).

Compensation will be doubled in the event of an injury to a minor illegally employed (Sec. 14-6-27).

Sec. 42-1-12 provides:

"No employer shall construct or occupy or maintain any place of employment that is not safe, or require or knowingly permit any employee to be in any employment or place of employment which is not safe, or fail to provide and use safety devices and safeguards, or fail to obey and follow orders of the commission or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety and welfare of his employees. Where injury is caused by the willful failure of an employer to comply with the law or any lawful order of the industrial commission, compensation as provided for in this title shall be increased fifteen per cent, except in case of injury resulting in death." (Bold face type ours.)

Sec. 42-1-14 provides:

"Where injury is caused by the willful failure of the employee to use safety devices where provided by the employer, or from the employee's willful failure to obey any order or reasonable rule adopted by the employer for the safety of the employee, or from the intoxication of the employee, compensation provided for herein shall be reduced fifteen per cent, except in case of injury resulting in death." (Bold face type ours.)

4. **Court Construction.** As a result of certain decisions rendered by the Utah courts, it is apparent that disability or death resulting from the inhalation of dust polluted air in the course of employment is compensable under the Workmen's Compensation Act only where such can be deemed to result from accident.

In **Amalgamated Sugar Co. v. Industrial Commission, 56 Utah 80, 189 P. 69 (1920)**, the plaintiff was disabled from carbon monoxide poisoning which occurred, on a fixed day, in the course of his employment. Without defining "accident," the Court awarded compensation for the resulting injury.

In **Tintic Milling Co. v. Industrial Commission, 60 Utah 14, 206 P. 278 (1922)**, plaintiff, while working in a flue in a furnace repairing a bulkhead, inhaled gas which made him ill. A few

days later, he suffered several hemorrhages, and, upon being examined by a physician, was informed that he had tuberculosis. There was evidence to the effect that the claimant was afflicted with tuberculosis before the date upon which he inhaled the poisonous gas. In awarding compensation, the Court said:

> "* * * What is termed an accident must be something out of the ordinary, unexpected, and definitely located as to time and place. If the injury is incurred gradually in the course of the employment, *and because thereof, and there is no specific event* or occurrence known as the starting point, it is held to be an occupational disease, and not an injury resulting from accident. * * *"

It was the conclusion of the Court that the claimant had, at a definite time and place, while in the course of his employment, received an injury, by inhaling gas, wholly unexpected by him, which injury aggravated and accelerated a pre-existing disease and rendered him wholly unable to continue his usual employment.

In **Cherdron Construction Co. v. Simpkins, 61 Utah 493, 214 P. 593 (1923)**, the plaintiff, while pushing a loaded car up an incline, suffered a heart lesion due to his attempting to prevent the cart from slipping back down the incline. The Court granted compensation for an accidental injury, saying that the underlying principle of an accident seems to be that it happened "suddenly, undesigned and unexpected, and at a definite time and place."

In **McEwan v. Industrial Commission, 61 Utah 585, 217 P. 690 (1923)**, the plaintiff, who was afflicted with a rupture, while lifting a heavy radiator, suffered a descent of the lower bowel due to a strain caused by his labor. The Court, in awarding compensation, said:

> "* * * It has become an established doctrine in this jurisdiction, as well as in most jurisdictions of the country, that an accidental injury which aggravates an existing disease is compensable under the Utah Industrial Act * * *."

As to the element of the injury being accidental, it was pointed out that it had happened suddenly and unexpectedly at a specified time and place.

In **Taggart v. Industrial Commission, 79 Utah 598, 12 P. (2d) 356 (1932)**, compensation was sought for the death of an employee resulting from a hemorrhage of the nose. The deceased had worked in a flour mill, where his task had been to sift phosphate to be mixed with flour. He inhaled phosphate dust,



which had eaten through the membrane of his nose resulting in the development of an ulcer to a point where there had resulted a rupture of a blood vessel in his nose. A single inhalation of the dust did not cause the ulcer, but it resulted gradually over the period of his employment under such conditions. The Court, in denying compensation, said:

> "* * * At the most, the hemorrhage was caused by an occupational disease which is not compensable under our law. * * *"

In **Thompson v. Industrial Commission, 82 Utah 247, 23 P. (2d) 930 (1933)**, the plaintiff had worked in a flour mill for about four years. He had trouble with his eyes, and, while going about his regular duties of oiling and fumigating the machinery and cleaning a dust collector on a certain day, particles of dust entered his eye, causing an ulcer of the right eye to become perforated which resulted in almost total blindness in that eye. The plaintiff claimed that the injury occurred on July 10th, but, in reality, the ulcer did not break until several days later. Between the alleged date of the accident and the time of the breaking of the ulcer, the plaintiff worked two days for his employer. In view of these facts, the Court found that there was no clear and forceful evidence pointing toward an accidental injury; and it affirmed the decision of the Commission, denying an award.

## II. Other Statutes.

### 1. Child Welfare—Employment of Minors.

**Secs. 14-6-1 through 14-6-28** provide in what employments minors are prohibited from working; make certain limitations as to hours of labor; require employers under certain conditions to procure employment certificates; make violation of this chapter a misdemeanor; impose upon the Industrial Commission the duty of administering this chapter; and provide that, in the event of an accidental injury to a minor who is found upon investigation to be illegally employed by an employer subject to the provisions of the compensation law, said minor shall not be debarred from receiving compensation, but shall be entitled to double the compensation to which he would be entitled if legally employed. Space will not permit us to set out the statutes in their entirety, but a close observation should be made of the sections by an employer who comes within their terms.

### 2. Labor, Title 49.

A. **Eight Hour Law, Chapter 3, Sec. 49-3-1 through 49-3-2.**

Sec. 49-3-2 limits the period of employment of working men in all underground mines or workings, and in smelters and all other institutions for the reduction or refining of ores or metals, to eight hours per day except in cases of emergency. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

B. **Employment of Women and Children, Chapter 4, Sec. 49-4-1 through Sec. 49-4-4.**

Sec. 49-4-1 makes it unlawful to employ a child under sixteen years of age, or a female, in a mine or smelter and makes a violation of the provision a misdemeanor.

Sec. 49-4-3 limits the hours of employment for females in certain establishments.

3. **Mines and Mining, Title 55—Coal Mines, Chapter 2.**

Sec. 55-2-5 requires that a constant supply of pure air be conducted and circulated through the entire mine in sufficient quantities to dilute, render harmless and sweep away smoke and noxious or dangerous gases to such an extent that all working places and traveling roads shall be in a safe condition for working and traveling therein.

Sec. 55-2-6 provides that every owner, agent, manager, or lessee of a coal or hydrocarbon mine shall provide and maintain a water system for the purpose of conducting water to the face of each working place, and throughout the entire open part of the mine, in sufficient quantities for sprinkling purposes to wet down dust arising and accumulating in and around the mine. It is made the duty of the superintendent, mine foreman, and the Industrial Commission to see that this is done; provided, that in mines or part of mines where, by reason of naturally wet conditions or moisture derived from the introduction of steam into the air current, or both, such sprinkling may not be necessary, it should not be required.

4. **Safety Orders.**

The Industrial Commission is authorized by Sec. 42-1-16 to ascertain and fix reasonable standards for the life, health, safety and welfare of employees. Under authority of this section, the Commission has adopted and published, in pamphlet form, at least two sets of such orders. The substance of those orders is briefly as follows:

A. **Underground Metal Mining Operations.**

These orders were issued as of July 1, 1931, and are entitled "General Safety Orders." They are published in pamph-



let form. Section numbers herein used conform to those used in the published pamphlet.

Sec. 39 provides in part:

> "The operator of every mine, * * * shall provide and maintain for every such mine a good and sufficient amount of ventilation for such men and animals as may be employed therein, and shall cause an adequate quantity of pure air to circulate through and into all the * * * working places of such mine, and, except in case of an emergency, no man shall be allowed to work in an atmosphere injurious to health."

Sec. 52 provides:

> "(a) No operator or person in charge of any underground mine shall cause to be drilled or bored by any machinery a hole or holes in any working place in ground that causes injurious quantities of dust from drilling unless there is on hand and available for use on such machinery, water jets or sprays or other means to effectively prevent the inhalation of dust by the operator of such machine or other persons in the proximity thereto. The operator or person in charge shall do everything reasonable in his power to encourage the miners to use such appliances for allaying dust, and shall furnish for such machines water that is free from harmful impurities.
>
> "(b) No person or persons shall drill or bore a hole in such working places without using such appliances, and any person or persons who shall wilfully damage or cause to be inoperative, or shall refuse to use any spray, water jet, or any harmless device for allaying rock dust shall be guilty of a violation of these orders.
>
> "(c) Every mine operator shall equip all dusty chutes from which ore or waste is drawn, with an effective device for allaying rock dust, or shall in lieu thereof, furnish, on request, the men loading at such chutes with respirators. Approved respirators must be furnished, and sufficient supplies or material to maintain them in a clean, effective and sanitary condition.
>
> "(d) Every stope where men work and where dust in detrimental quantities emanates, and every ore house, where dusty ore or rock is sorted, shall be supplied at all times with water free from harmful impurities which shall be used for the purpose of preventing dust from arising."

B. **General Coal Mines Safety Orders.**

These orders were adopted in 1924 and are published in pamphlet form. The numbers used herein correspond with those used in the published pamphlet.

Sec. 4 provides:

"All main entries and slopes of coal mines in Utah shall be rock dusted from the mine opening into a point designated by the State Mine Inspector. Intake air courses shall be rock dusted at least into the most distant points, where freezing takes place in the coldest weather. Whenever, by analysis, the rock dust material in any part of a mine so treated, shows a total incombustible content lower than that determined as necessary to render the coal dust inert, the section in question shall be fenced off, or the mine closed until sufficient inert material has been added to allow of safe operation."

Sec. 5 provides:

"At every opening from each working panel or level connecting to any other level or panel, entry or slope, there shall be installed rock dust barriers so placed that an explosion originating in that level or panel cannot extend to other parts of the mine. These rock dust barriers shall be of a type which has been tested and approved by the U. S. Bureau of Mines, and shall be correctly installed."

Sec. 6 provides:

"Coal cutting machines and mechanical loading machines shall not be operated in coal mines in Utah unless equipped with a supply of water applied in a manner to wet down and prevent the raising of fine coal dust into suspension in the air."

Sec. 7 provides:

"Every owner, agent, manager or lessee of coal mines within the State of Utah shall provide and maintain water lines in all working places of sufficient size and pressure to furnish water in sufficient quantities for sprinkling purposes to wet down all coal dust that may arise and accumulate in and around the working face. And each worker shall be kept supplied with a sufficient quantity of water hose to enable all parts of the face region to be thoroughly sprinkled this to be used by the workers in each working place."

Sec. 10 provides:

"Moving of gas (methane) accumulations while the shift is in the mine is absolutely prohibited, even when all mines are on a closed light basis, and the entry in which the accumulated gas is found, together with all workings on the return side of the same split in which the accumulated gas is found, shall be closed down until the gas is removed by approved methods of ventilation."



Sec. 11 provides:

"Before the track is pulled out of the air courses, abandoned rooms, and other places, all coal and coal dust must be cleaned up and loaded out. This, however, does not apply to rock and bone gobs in rooms and other places that have been adequately rock-dusted."

### III. Common Law Liability.

No pertinent decisions were found as regards an employee's right to recover from his employer for injury or death caused by the inhalation of noxious dusts in the course of his employment, based upon the employer's negligence in permitting such conditions to exist.

### IV. Miscellaneous Matters of Interest.

#### 1. Statute of Limitations.

An action for personal injury must be commenced within four years after the cause of action has accrued (Sec. 104-2-30). Where death occurs, the action must be commenced within two years after the death (Sec. 104-2-25).

#### 2. Pending Legislation and Surveys.

There is no bill pending in the legislature relating to precautionary measures to be taken with respect to dust hazards.

No official survey of dust hazards has been made, but we are informed that one is contemplated in the near future.

# AIR HYGIENE FOUNDATION OF AMERICA, Inc.

*Legal Series, Bulletin No. 1, Part vii*



## A Survey of the Statutes and Court Decisions Respecting Occupational Disease from Air Pollution

(For the Confidential Information of members. Not for reproduction, wholly or in part.)

PITTSBURGH, PENNSYLVANIA

SEPTEMBER 30, 1936

# LEGAL SURVEY

PART vii

With respect to Occupational Disease Resulting from Air Pollution, Comprising a Study of the Statutes and Court Decisions of States of the United States.

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

by

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## FOREWORD

Part vii of Bulletin No. 1, Legal series of publications of Air Hygiene Foundation of America, includes an analysis of the statutes and court decisions with respect to occupational disease in Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Following the analysis is a chapter on medical examination and treatment, a general summary and, finally, an index.

Thus is completed this part of the task which, early in the year, was assumed by the Foundation's Legal Committee in recognition of the fact that the problems arising from the presence of hazards in industry due to air pollution are legal as well as medical and engineering, and that no solution of benefit to society as a whole can be reached without intensive study of the manner in which the problem is affected by law.

The work of analyzing the pertinent statutes and court decisions of the forty-eight States and the District of Columbia was assigned to Williams, Eversman and Morgan, and ably carried through under the personal direction of Henry Middleton, of that firm.

It is expected that, from time to time, other bulletins in this series will be prepared for the members of the Foundation, in order that they may be kept informed of the status of the laws of the various states.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
Pittsburgh, Pa.,
September 30, 1936

# CHAPTER XXXXVII

# VERMONT

## I. Workmen's Compensation Act.

1. **Statutes.** **Public Laws of Vermont 1933, Ch. 264, Secs. 6480-6578.**

2. **Administration.** The Act is administered by the Commissioner of Industries who is appointed biennially by the Governor, with the advice and consent of the senate. The Commissioner of Industries, subject to the approval of the Governor, appoints certain deputy commissioners and also a woman inspector. Communications may be addressed to the Commissioner at Montpelier, Vermont.

3. **Scope of the Act.** Compensation is provided for personal injury or death by accident arising out of and in the course of employment (Sec. 6504).

Sec. 6485 provides that words and phrases used in the Act shall be construed as follows:

> "III. 'Injury' and 'personal injury' to include death resulting from injury within two years;"
> "IV. 'Personal injury by accident arising out of and in the course of such employment' to include an injury caused by the wilful act of a third person directed against an employee because of his employment, but not to include a disease unless it results from the injury;"

With some few exceptions, the Act covers all employments wherein more than ten employees are regularly employed (Secs. 6502, 6503 and 6485 I). The Act is elective as to both employers and employees (Sec. 6498); but every contract of employment is presumed to be made subject to the provisions of the Act unless written notice is given by either party to the other, or to the Commissioner, to the effect that the provisions of the Act are not intended to apply (Sec. 6499).

Where an employer has elected not to be bound by the Act, he loses the defenses of contributory negligence, negligence of a fellow servant, and assumed risk, in any action brought by an employee who has elected to accept its terms to recover for personal injuries sustained in the course of his employment (Sec. 6500). Where the action is by an employee who has elected not to be bound by the Act against an employer who has accepted its provisions, the three common law defenses

are available to such employer (Sec. 6501). The Act makes no provision as regards these defenses where both employer and employee have elected not to be bound by the Act.

Employers must secure compensation by insurance in an authorized insurance corporation; by obtaining guarantee insurance with an authorized guarantee company; by depositing security satisfactory to the Commissioner with the state treasurer; by satisfying the Commissioner as to his financial responsibility; or by depositing, in such bank or trust company as the Commissioner may designate, such sum of money as the Commissioner may require, to the joint credit of the Commissioner and employer (Sec. 6559). If an employer fails to secure the payment of compensation for a period of thirty days, he may be enjoined from carrying on his business until he does comply (Sec. 6564).

Sec. 6509 provides:

> "The rights and remedies granted by the provisions of this chapter to an employee on account of a personal injury for which he is entitled to compensation under the provisions of this chapter shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury."

Compensation will be barred unless notice of an injury is given to the employer as soon as practicable after the happening thereof and unless a claim is made within six months after the date of the injury, or, in case of death, within six months after such death (Sec. 6535). An injured employee is required to submit himself to examination if so requested by his employer or ordered by the Commissioner. If a workman refuses to submit himself to such examination, his claim will be suspended during the time of such refusal (Sec. 6534).

4. **Court Construction.** In order for disability or death resulting from a disease caused by the inhalation of dust, gases, or fumes in the course of employment to be compensable under the Vermont Workmen's Compensation Act, such must result by accident. Although no decisions are available wherein the courts have considered claims involving such facts, certain recent decisions contain expressions which define the word "accident" as used in the Act.

In **Morrill v. Charles Bianchi & Sons, 176 A. 416 (Supreme Court, 1935)**, compensation was sought for the death of an



employee from tuberculosis shortly after he had sustained a chest injury as the result of a fall from the platform of a saw machine at which he was working. The medical evidence showed that the employee, a granite cutter by trade, was afflicted with silicosis at the time of his fall. In awarding compensation, the Court said:

> "* * * Clearly compensation is not allowable under our statute for disability or death resulting solely from so-called occupational diseases.
>
> "There is no question but that Morrill sustained personal injuries 'by accident.' The question is whether his disability and death resulted therefrom within the meaning of our statute. The evidence, as we have seen, tended to show that such injuries 'lighted up,' aggravated, or accelerated a pre-existing disease with which he was then afflicted causing disability, and death earlier than would otherwise have occurred. * * * It cannot be that one who has incipient silicosis when injured is precluded from compensation because it, or consequent ailments, may ultimately result in disability or death, or both. If not, at what point in its progress is the prohibitive mark to be placed? While our Compensation Act is not a substitute for disability or old age pension, and cannot be strained to include that kind of relief, it prescribes no standard of fitness to which the employee must conform, and compensation is not based on any implied warranty of perfect health or immunity from latent and unknown tendencies to disease which may develop into positive ailments if incited into activity by accidental injury received in the performance of the work for which he is hired."

In **Giguere v. E. B. & A. C. Whiting Co., 177 A. 313 (Supreme Court, 1935)**, plaintiff sought compensation for a hernia caused by a strain from lifting certain trays. On the morning in question, he had lifted some fifteen heavy trays of fiber when he started to lift a bottom tray; suddenly he felt a sharp pain in his side. Although he worked the remainder of the day, it was determined that he received the hernia at that time. He was doing his work in the usual and regular way, and there was nothing different in the way he did his work on that day from the way he did it on previous days. The Court concluded:

> "Construing the expression 'accident' in our act in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed, we hold, in harmony with the English decisions and the de-

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## *Purposes*

Conducts scientific studies and investigations to find ways and means to prevent occupational diseases, and to promote the health of workmen.

Collects and evaluates data on industrial health and serves as a central clearing house for dissemination of this information.

## *Services*

Develops new knowledge needed to combat industrial health problems through scientific research sustained at four leading science centers.

Issues informative reports giving practical engineering measures, medical knowledge, and legal information for preventing industrial diseases and for improving employee health.

Counsel of specialists, comprising Foundation's Engineering, Medical and Legal committees, available within reasonable limits.

Provides monthly abstracts summarizing current literature on occupational health subjects. This is an important labor-saver for company officials. Further, it insures executives against missing vital new developments.

Special problems, surveys, etc., undertaken and supervised for members at cost.

Affiliated companies may turn to one central institution for available knowledge in this field. Membership places a company in contact with many other industrial concerns whose experiences with similar problems often prove helpful.

## *Broad Problems Require Broad Approach*

**Air Hygiene Foundation represents an effort by employers, physicians, and engineers to promote the health of the 15 million workmen in "heavy" industry. Healthful working conditions pay dividends to the employer, it is true. But at the same time they contribute to the welfare of the workman, and indirectly to the welfare of his family and the community. Industrial health, per se, is the concern of the individual employer. Yet basically, employee health problems confront all employers through laws and regulations, industrial relations, and public opinion. Plainly then, broad problems demand a broad approach, and call for organized employer action.**

# AIR HYGIENE FOUNDATION OF AMERICA, Inc.



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