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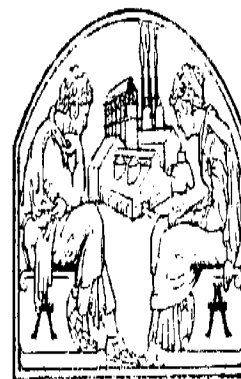
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**AIR HYGIENE FOUNDATION OF
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Legal Series, Bulletin No. 1, Part iv



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

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

PITTSBURGH, PENNSYLVANIA

JULY 8, 1936

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FOREWORD

This part (iv) of Bulletin No. 1, Legal Series, Air Hygiene Foundation of America, contains an analysis of the statutes and court decisions, affecting occupational disease, of ten 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, Arizona, Arkansas, and California; part iii covered Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa and Kansas.

Section v will be published soon.

H. B. MELLER,
Managing Director

Thackeray Ave. and O'Hara St.,
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July 8, 1934

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LEGAL SURVEY

PART iv

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

Prepared for the Legal Committee

of

AIR HYGIENE FOUNDATION OF AMERICA, INC.

by

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CHAPTER XIX

KENTUCKY

I. Workmen's Compensation Act.

1. Statutes. Carroll's Kentucky Statutes, 1930, Secs. 4880-4987.

2. Administration. The Act is administered by the Workmen's Compensation Board composed of three members appointed by the Governor for terms of four years each. Communications may be addressed to the Board at Frankfort, Kentucky.

3. Scope of the Act. Sec. 4880 provides that compensation will be granted for

" * * * personal injuries sustained by the employee arising out of and in the course of his employment, or for death resulting from such accidental injury; provided, however, that personal injury by accident as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall they include the results of a pre-existing disease (but shall include injuries or death due to inhalation in mines of noxious gases or smoke, commonly known as 'bad air', and also shall include the injuries or death due to the inhalation of any kind of gas.) Any employers and employees who are, by provisions of this section, excepted from the provisions of this act, including employers having less than three employees, may subject themselves thereto by joint voluntary application to the board, in writing, for such period as may be stated in the application, which shall be irrevocable during such period and effective thereafter until a written revocation be filed with the board or the employment be terminated, (and any employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or in the manufacture, treating or handling of sand may, with respect to the disease of silicosis caused by the inhalation of silica dust, in like manner voluntarily subject themselves thereto as to such disease.)" (Bold face type and brackets ours.)

The bracketed part of this section dealing with "bad air" and gas was added in 1924; the bracketed part dealing with silicosis was added and became effective June 14, 1934.

In the absence of an election by the employer with respect to silicosis, where a disease results from the inhalation of dust

polluted air in the course of employment and not from inhaling bad air in a mine or any kind of gas, compensation is recoverable only when such disease results naturally and directly from a traumatic injury by accident.

The wilful misconduct of an employee will bar his recovery under the Act. With regard to silicosis, this includes: (1) failure or omission of an employee to observe the rules and regulations adopted by the employer and approved by the Workmen's Compensation Board; (2) failure or omission of an employee truthfully to state, upon the employer's inquiry, to the best of his knowledge, the place, nature, and duration of his previous employment; (3) failure or omission of an employee, upon the employer's inquiry, truthfully to furnish to the best of his knowledge full information about the previous status of his health, habits, and medical attention that he or his blood relatives may have heretofore received; and (4) failure or refusal to submit to medical examination to determine his physical condition with reference to silicosis whenever such examination is ordered by the Board, or to evade or obstruct such examination (Sec. 4882).

Where the employee's injury or death results from the deliberate intent of the employer to produce such injury or death, the compensation may be received in a lump sum to be used, if desired, to bring suit against the employer for any amount that he may desire. Where death results under such circumstances, the dependents may elect to claim under the Act or sue at law (Sec. 4882).

Notice of an accident must be given an employer as soon as practicable after the occurrence, and a claim made within one year after the accident, or, in case of death, within one year after the death. In cases involving silicosis, claims must be filed within one year after the last exposure to silica dust (Sec. 4914). Where silicosis is involved, it is not clear by this section whether, when death occurs, such period is extended to permit a filing of the claim within one year after the death, or whether even then the claim must still be filed within one year after the last exposure.

The notice required will not be invalid because of any inaccuracy unless the employer was misled by such to his injury. A want of notice or a delay in giving the same will not bar a claim if the employer or his representative had knowledge of the injury or if such failure or delay was occasioned by mistake or other reasonable cause (Sec. 4917).

Under the Act the employer, in the case of injury or of death

within two years of the injury, must pay, in addition to any other compensation, a maximum of \$100, or, in the Board's discretion, a maximum of \$200 for medical, surgical, and hospital treatment to cure and relieve the employee from the effects of such injury (Sec. 4883). If these are furnished in such a manner that there is reasonable grounds to believe that the life, health, or recovery of the employee is being endangered thereby, the Board may order a change to be made under reasonable regulations at the expense of the employer (Sec. 4885).

Where death results within two years of the accident, the employer shall pay, in addition to the medical expenses, a sum not to exceed \$75 for burial expenses, plus a death benefit of not more than \$4,000 (Secs. 4893-4896). In cases of total disability, the maximum is fixed at \$6,000; by a schedule certain injuries are deemed total and permanent (Sec. 4897). In cases of partial disability, both temporary and permanent, the maximum amount payable is \$4,000 (Secs. 4898 and 4899).

Where an accident is caused by the employer's intentional failure to comply with any statute or lawful regulation communicated to the employer relative to safety appliances or methods, the compensation will be increased 15%; where such is caused by the employee's intentional failure to use any safety appliance furnished by the employer or to obey any lawful and reasonable rule, order, or regulation of the Board or the employer for the safety of employees or the public, the compensation will be decreased 15% (Sec. 4910).

Where a minor is employed in wilful and known violation of the child labor laws, there is an election to claim compensation or to sue at law for damages. If there is a misrepresentation of age and death occurs, the only right which the representative or parent has is a claim for compensation under the Act (Sec. 4911).

Where a claim for silicosis is made, the Board will, upon application by the employer or employee, appoint one, two, or three disinterested and qualified physicians to examine the employee. Their findings shall be certified to the Board and shall include (1) at what stage, if any, the employee is suffering from silicosis, (2) whether the disability is temporary, partial, or total, and (3) the extent, if any, of the impairment of capacity to work (Sec. 4941).

The filing of a false or fraudulent claim constitutes a misdemeanor punishable by a fine of from \$50 to \$500 or imprisonment from 10 to 90 days (Sec. 4945).

Employers electing to accept the Act are required to insure

their liability for compensation in some authorized corporation, association, or organization or furnish the Board with satisfactory proof of their financial ability to make direct payments, in which case they must also deposit acceptable security, indemnity, or bond to meet the compensation liabilities as they occur. Until such have been complied with, the employer is liable, from the date of the acceptance of the Act, either at law or under the Act (Sec. 4946).

Employers may, subject to defined limitations, form mutual insurance associations (Sec. 4948) and also enter into or continue any agreement with employees to provide a system of insurance (Sec. 4949).

Employers who carry their own risk are assessed against their payroll a maintenance fund tax computed by taking two per cent of the basic premiums chargeable against the same or a similar industry, taken from manual insurance rates for compensation in force in the state (Sec. 4968-8). All insurance carriers insuring employers against liability under the Act are correspondingly taxed (Sec. 4968).

Every employer who comes within the terms of the Act, but who does not elect to operate thereunder, loses the common law defenses of assumed risk, contributory negligence, and negligence of fellow servant in a suit against him by an employee to recover for personal injury or death by accident (Sec. 4900). The defenses are also abrogated when both the employer and the employee fail to come within the Act. If, however, the employee elects not to operate under the Act and the employer does elect, then, in such a suit, the three defenses would be available to the employer (Sec. 4961).

As regards the exclusiveness of the Act, by Sec. 4882 it is provided that where an employer has elected to furnish and accept compensation under the Act, the employer "shall be released from all other liability whatsoever; * * *". However, in *Jellico Coal Co. v. Adkins*, 197 Ky. 684, 247 S. W. 972 (1923), the Supreme Court decided that this clause does not bar a common law action for disability, caused by negligence of the employer, when the disability is not included within those for which compensation is provided in the Act.

4. **Court Construction.** As a result of the decisions of the Kentucky courts, where there has been no election by employer and employee in regard to silicosis and where the disability is not caused by inhalation of bad air in a mine or by inhalation of gas, diseases resulting from the breathing of polluted air over a long period of time, in the course of em-

ployment, are not compensable under the Workmen's Compensation Act. This is because they cannot be deemed a "traumatic injury by accident" as is required under the Act.

The first case involving an occupational disease was that of *Jellico Coal Co. v. Adkins*, *supra*, brought before Sec. 4880 was amended, to recover at law for damages resulting from working in an improperly ventilated mine. On a certain day the plaintiff and a fellow employee had fired certain shots in a room in which they were working and had waited outside for thirty minutes for the smoke to clear before resuming work. In a properly ventilated mine ten minutes is sufficient time, but for several days this room had not cleared in less than half a day. That exposure had caused severe headaches to the plaintiff, but he had not realized there was any danger. Later that day during the process of work he fainted and was taken home. Disablement resulted from a disease known as endocarditis, an inflammation of the lining of the heart.

Since both parties were under the Workmen's Compensation Act, the plaintiff first filed his claim thereunder; but the Board ruled that it was without jurisdiction, since the disability did not result from a traumatic injury by accident. The plaintiff appealed that decision.

Meanwhile this action was filed, and in the appeal of the Board's decision, the action at law was pleaded in bar. The court judged the plea good but further affirmed the action of the Board in finding that it had no jurisdiction in the matter.

There was a judgment for the plaintiff in the lower court and that decision was affirmed on appeal. The upper court considered the injury to be an occupational disease not compensable under the Act, because it was not a traumatic injury. The court, in its opinion, said:

"It will be observed that all of these definitions of 'trauma' and 'traumatic' imply the presence of physical force, and this is the generally accepted meaning of the word. Evidently, the act implies that some external force must occur in order to constitute traumatic injury by accident, * * *".

Since the court makes no reference to a definition of "accident", it seems that the court's decision hinges on the single word "traumatic" and that an injury resulting from the breathing of noxious gases would not come within their definition of that word. Subsequent decisions have, however, greatly broadened the meaning of this term. The legislature, in 1924, in the session immediately following this decision, amended Sec. 4880 of the Act and made injuries or death due to inhalation in mines

of noxious gases or smoke, commonly known as "bad air," or injuries or death due to the inhalation of any kind of gas, compensable under the Act. *Crutcher Dental Depot v. Miller*, 66 S. W. (2d) 466 (1933) adds this bit of historic information.

Elkhorn Coal Co. v. Kerr, 203 Ky. 804, 263 S. W. 342 (1924) and *Midland Coal Co. v. Ruckers*, 211 Ky. 582, 277 S. W. 838 (1925), likewise involve actions at law for injuries sustained by breathing impure air and noxious gases in mines. The actions were brought before the 1924 amendment to Sec. 4880 became effective, and the verdicts were for the plaintiffs on the authority of *Jellico Coal Co. v. Adkins*, *supra*.

Although not involving a dust disease, the case of *The Great A. & P. Tea Co. v. Sexton*, 242 Ky. 266, 46 S. W. (2d) 87 (1932), is important because of the court's definitions of the words "accident" and "trauma" as used in the Act. In that case the plaintiff contracted a disease commonly known as rabbit fever while cleaning, for shipment, rabbits which were infected with that disease. The germ entered plaintiff's system through a scratch on his hand. The action was at law, the plaintiff alleging that he did not know that the rabbits were diseased and that the defendant knew or should have known of their diseased condition. The court held that the disease was the result of a traumatic injury by accident and therefore, since both parties had accepted the Workmen's Compensation Act, it was compensable only under the Act. The Court said:

"If an injury is suffered in the course of employment, unexpectedly, and without design, and can be traced to a definite time, place, and cause, it is an accident within the popular sense of that term and as it is used in the compensation law. * * *

" * * * * "

"In the definition of 'trauma,' as given by Webster and quoted in the foregoing opinions, we find the following: 'A wound or injury directly produced by causes external to the body.'

"It will be noted that this does not include within its scope only physical force in the sense of a blow, a current of electricity, or like terms implying power, vigor, violence, or energy in the commonly accepted meaning of its terms, but may be as consistently construed to include any independent influence or cause external to the body coming into direct contact with, and causing injury to, the physical structure thereof."

It will be observed that this definition of "trauma" greatly broadens the meaning of that term as construed by the court in *Jellico v. Adkins*, *supra*.

Following this decision, in *Schable v. Riddell-Robineau Mfg. Co.*, 245 Ky. 409, 53 S. W. (2d) 750 (1932), compensation was granted to dependents where the death of an employee was caused by the inhalation of sawdust in the course of his employment. Here, however, a water pipe burst, and in attempting to make repairs, it was necessary to disconnect certain pipes which blew sawdust into the furnace of a boiler. The inhalation of the sawdust, which extended over a period of less than a day, satisfied the requirements that the injury be traumatic and by accident. It would be difficult to find, in regard to an injury's being traumatic, any distinction between an injury caused by the inhalation of dust polluted air and an injury caused by the inhalation of air polluted with sawdust.

It has also been held that where there is an acceleration of a preexisting latent disease, the resulting disability is compensable under the Act (*Robinson-Pettet Co. v. Workmen's Compensation Board*, 258 S. W. 318 (1924)); that death resulting from a sunstroke is not compensable (*Smith v. Sanitary Mfg. Co.*, 277 S. W. 806 (1925)); and that disability caused by typhoid fever resulting from drinking impure water furnished by the employer is not compensable thereunder (*Mills v. Columbia Gas Constr. Co.*, 55 S. W. (2d) 394 (1932)).

Where there has been no election to come under the Act as to silicosis, and where that part of Sec. 4880 dealing with the inhalation of bad air in a mine or of gas is inapplicable, an injury caused by the inhalation of dust polluted air will be compensable under the Act only where it can be deemed to be a traumatic injury by accident. That such an injury may be considered as resulting from a trauma seems settled by the decision in *Schable v. Riddell-Robineau Mfg. Co.*, *supra*.

II. Other Statutes.

1. State Board of Health.

Sec. 2062f-1. "All persons, firms or corporations operating any factory or workshop where emery wheels or emery belts of any description are used, either solid emery, leather, leather covered, felt, canvas, linen, paper, cotton, or wheels or belts rolled or coated with emery or corundum, or any other abrasive material, or cotton wheels used as buffs, shall for the protection of the health of the employees, provide the same with suction or exhaust systems, or similar apparatus, which shall be placed over, beside or under such wheels or belt in such a manner as to protect the person or persons using the same from the particles of 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 dust; provided that grinding machines upon which water is used at the point of grinding contact and solid emery wheels that are used occasionally for tool grinding, or emery wheels used only in connection with fitting operations necessitating only momentary contact with wheels, also flexible shaft grinding and swing frame grinding, shall be exempt from the provisions of this act."

Sec. 2062f-2. "It shall be the duty of every person, firm or corporation operating any such factory or workshop to provide or construct such appliances, apparatus, machinery or other things necessary to carry out the purpose of this act, as set forth in the preceding section, as follows: Each and every such wheel shall be fitted with a sheet or cast iron hood or hopper of such form and so applied to such wheel or wheels that the dust or refuse therefrom will fall from such wheels or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to said hood or hopper."

Sec. 2062f-3. "Each and every such wheel six inches or less in diameter shall be provided with a three-inch suction pipe; wheels six to twenty-four inches in diameter with four-inch suction pipe; wheels from twenty-four inches to thirty-six inches in diameter with five-inch suction pipe; and all wheels larger in diameter than those stated above shall be provided each with a suction pipe not less than six inches in diameter. The suction pipe from each wheel so specified must be full size to the main trunk suction pipe and the main suction pipe to which smaller pipes are attached shall, in its diameter and capacity, be equal to the combined area of such smaller pipes attached by the same, and the discharge pipe from the exhaust fan, connected with such suction pipe or pipes, shall be as large or larger than the suction pipe."

Sec. 2062f-4. "It shall be the duty of every person, firm or corporation operating any such factory or workshop to provide the necessary fans or blowers to be connected with such pipe or pipes, as above set forth which shall be run at a rate of speed as will produce a velocity of air in such suction or an equivalent suction or pressure of air equal to raising a column of water not less than five inches in a U-shape tube. All branch pipes must enter the main trunk pipe at an angle of forty-five degrees or less; the main suction or trunk pipe shall be either upon the floor or beneath the floor on which the machines are placed to which such wheels are attached. All bends, turns or elbows in such pipes must be made with easy, smooth surfaces, having a

radius in the throat of not less than two diameters of the pipe on which they are connected."

Sec. 2062f-5 places upon the Department of Labor the duty of supervising and enforcing these provisions.

Sec. 2062f-6 provides penalties for a failure to comply with the provisions.

2. Rules and Regulations Adopted by the State Department of Health. Under authority of Sec. 2049 of the Kentucky Statutes, the Board of Health adopted rule 190, which reads:

"Every person, firm or corporation operating a factory, mill, mine, quarry, store, office, workshop or work place of any description, including building and construction work, employing one or more persons to labor shall make the following provisions for the protection of the health of their employees and the community in which the establishment or work is located: * * * 3. The ventilation, heating and lighting of the places of employment shall be adequate and shall be maintained with strict regard for the health, comfort and safety of employees. * * *"

The State Board of Health has also made recommendations for compliance with the above rule. After enumerating specific requirements as to the amount of air to be supplied, the recommendation continues:

"Every such factory, mill, store, office, workshop or workplace should be kept free from gas or effluvia arising from sewer, drain, privy or other nuisance on the premises. All poisonous or noxious fumes or gases arising from any process, and all dust of a character injurious to health of the persons employed, which is created in the course of a manufacturing process, within such factory, mill or workshop, should be removed, as far as practicable, by either ventilating or exhaust systems.

"All decomposed matter and all refuse of any workplace which may become a nuisance or menace to health should be removed and disposed of, in such a manner as not to cause a nuisance; and all cleaning shall be done, as far as possible outside of working hours; but if done during working hours, should be done in such a manner as to avoid the unnecessary raising of dust or noxious odors."

These rules are contained in a pamphlet entitled "Kentucky Labor Laws," distributed by the Department of Labor of Kentucky.

3. Mines and Mining (Coal)

Sec. 2739-19 treats at length the method of ventilation, the action to be taken where the ventilation is interrupted, maps and plans to be submitted for approval before any additional openings are made, the amount of air to be supplied, the number of men permitted on each air current or split, and other matters pertaining to ventilation. The section in its entirety should be carefully scrutinized by mine owners.

Sec. 2739-20 "In all mines accumulations of fine dry coal dust shall, as far as practicable, be removed from the mine and all dry and dusty operating sections kept thoroughly watered or rock dusted or dust allayed by such other methods as may be approved by the Chief of the Department of Mines and Minerals."

4. Children.

Sec. 331a-1 prohibits the employment of children under fourteen years of age in any factory, mill, workshop, mercantile establishment, etc.

Sec. 331a-2 prohibits the employment of children between fourteen and sixteen years of age in any factory, mill, workshop, mercantile establishment, etc., unless the employer procures an employment certificate.

Sec. 331a-9 prohibits children under sixteen years of age from operating or assisting in operating certain machines among which are saws, wood shapers, planers, sandpaper or wood polishing machines, emery or polishing wheels, leather burnishing machines, rolling mill machinery, etc.; from working in any processes in which dangerous or poisonous acids are used; from working in the manufacture or packing of paints, colors, or white or red lead; from working in occupations causing dust in injurious quantities; from working in the manufacture of dangerous or poisonous dyes; and numerous other occupations dangerous to the life or limb or injurious to the health or morals of such children.

Sec. 331a-13. "The walls and ceiling of each room in every manufacturing establishment where minors are employed, shall be lime washed or painted when, in the opinion of the labor inspector, it shall be conducive to the health or cleanliness of the persons working therein."

Sec. 331a-16 enumerates the penalties for permitting children to work in violation of the Act.

5. Sanitation of Food Establishments.

2060b-1 provides that every establishment used for the preparation, manufacture, packing, storage, sale or distribution of any food intended for sale must be properly and adequately lighted, drained, plumbed and ventilated, and conducted with strict regard to the health of the employees and to the purity and wholesomeness of the food.

2060b-13 enumerates the penalty for a violation of the sections dealing with the sanitation of food establishments.

III. Common Law Liability.

As previously observed in discussing the scope of the Workmen's Compensation Act, the case of *Jellico Coal Co., v. Adkins*, *supra*, definitely decided that the Workmen's Compensation Act was exclusive only as to such injuries as were compensable under the Act; whereas, other injuries not covered by the Act, for which there was a recovery at common law, are unaffected by the Act.

In that case, a verdict for the plaintiff was affirmed where the injury for which damages were sought was the disability resulting from a disease known as endocarditis, an inflammation of the heart, caused by the breathing of foul air in a mine during the course of employment.

The negligence upon which plaintiff's action was predicated was the breach of a statute which provided that no working place should be driven more than sixty feet beyond a breakdown except with the consent of an inspector. There was no claim that such consent had been given.

The court affirmed the verdict of the jury in plaintiff's favor, declaring that since the defendant had failed to conform to a statutory duty, it could not rely on the defense of assumed risk; and, furthermore, the plaintiff was not guilty of contributory negligence as a matter of law in continuing to work after discovering the danger of which he complained.

Royal Collieries Co. v. Wells, 244 Ky. 303, 50 S. W. (2d) 948 (1932), also involves an action at law for injuries alleged to have resulted from inhaling bad air in defendant's mine. The cause of action also arose before the 1924 amendment to Sec. 4680 of the Workmen's Compensation Act, making injuries so sustained compensable thereunder. In affirming a judgment for the plaintiff, the court made an interesting statement regarding contributory negligence:

"* * * A servant may know a thing is defective, and yet by reason of his inexperience be incapable of comprehending the danger from it. By continuing at work the servant cannot be said to be negligent

unless he not only knows the defects but knows the danger, or by the exercise of ordinary care in the exercise of his employment should know it (citing cases). There is a peculiar reason for applying this rule in the case of a subtle poison pervading the air, whose effect is only known to the medical profession, or those who have studied the subject. Kitchen may have been willing to undergo the discomforts of a headache or the temporary sickness that resulted from the mine, but it may be that he would not have been willing to take the risk of the noxious gases if he had known their effect on the constitution, and the danger of destroying his entire vitality if he continued to work in the mine. The rule to be applied to an ignorant servant should be more liberal in the case of a subtle agency like bad air than in the case of those physical things like the want of props or the cracking of a roof which he could plainly see and any man of prudence would understand the danger."

A recent case directly in point is *Christopher's Admr. v. Blanton Stone Co.*, 258 Ky. 587, 80 S. W. (2d) 590 (1935). The action was at law for the death of an employee caused by the inhalation of dust and small particles of limestone rock while employed for approximately a year in defendant's rock quarry. The petition alleged that the plaintiff did not know of the danger and that the defendant knew or should have known of such danger. The court held for the defendant on the ground that the petition was insufficient because the plaintiff had alleged a failure to provide a mask, whereas, there was no statute imposing such a duty upon an employer and the petition did not allege negligence of the employee. The court also declared that the fact that the work was hazardous did not make the employer liable for all injuries to his employees but only for such injuries as were caused by his negligence in breaching some duty owed the employees.

Under these decisions, it is apparent that, except as modified by the Workmen's Compensation Act, there is a common law action for disability resulting from an occupational disease caused by the inhalation of dust in the course of employment if based upon the negligence of the employer.

"Personal injury by accident" specifically includes injuries or death due to inhalation in mines of noxious gases or smoke, commonly known as "bad air," and also injuries or death due to the inhalation of any kind of gas (Sec. 4880); therefore, it seems clear that under Sec. 4900 an employee is denied the common law defenses in an action brought for such disability if the employer has not elected to operate under the Act.

The effect upon the employer's right to the common law defenses, when sued on account of silicosis, in case of his failure to elect to operate under the Act as to silicosis, is not so clear. Sec. 4880 does not define silicosis as a "personal injury by accident"; Sec. 4900 denies the common law defenses to the employer, in case of failure to elect to operate under the Act, "in any suit at law, * * * to recover damages for personal injury or death by accident." It therefore appears to be an open question whether the employer, not operating under the Act, would be barred the use of the common law defenses if sued on account of silicosis.

IV. Miscellaneous Matters of Interest.

1. *Statute of Limitations.* By Sec. 2516 of the Kentucky statutes, an action for personal injuries or death must be commenced within one year after the cause of action has accrued.

2. *Pending Legislation.* There are at present no bills pending in the legislature relating to precautionary measures to be taken with respect to dust diseases, nor has any official survey of dust hazards or dust diseases been made.

CHAPTER XXII

MARYLAND

I. Workmen's Compensation Act.

1. Statutes. Bagby, Annotated Code of Maryland, 1924, Article 101, Sec. 1 through Sec. 65.

2. Administration. The Act is administered by the State Industrial Accident Commission, composed of five members appointed by the Governor for terms of five years each. Communications may be addressed to the Commission at Baltimore, Maryland.

3. Scope of the Act.

A. Definitions.

Sec. 65 (6) provides:

"'Injury' and 'personal injury,' as used in the Act, mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom."

Attention is called to the phrasing "accidental injuries," as contradistinguished from "injuries by accident", which occurs in numerous Workmen's Compensation Acts. The case of *Victory Sparkler & Specialty Co. v. Francks*, *infra*, stresses the importance of this difference in phrasing.

The wording of this definition would indicate that there can be no recovery by an employee under the Act for a disability due to an occupational disease arising out of and in the course of his employment. The courts have, however, so construed "accidental injuries" as to include disease resulting from a condition negligently allowed to exist; hence, disease caused by negligence seems to be compensable.

This construction was first announced in 1925 in the case of *Victory Sparkler & Specialty Co. v. Francks*, *infra*. A careful examination of that and subsequent decisions is necessary for an understanding of the Maryland law.

B. Compulsory Character and Exclusiveness of Liability.

As a means of specifying the occupations and employments covered by this Act, it designates, in paragraph 32, certain employments as being extra hazardous. There are forty-six subparagraphs, and they enumerate practically every trade, business, or occupation carried on by private employers, and they include specifically practically all industries where dust or other forms of air pollution are to be encountered. Certain

mon law, for it is not caused by the employer's negligence. This decision, while denying the employee an action at common law for damages, still preserves a right of recovery, where the employer's negligence is the cause, by giving the employee the benefit of compensation under the Act.

Disposition of the court to expand the Workmen's Compensation Act, by construction, so as to cover all possible situations, is not in evidence in *Atlantic Coast Shipping Co., et al., v. Stasiak*, 153 Md. 349, 146 A. 452 (1930), where compensation was denied the claimant who developed a hernia as a result of lifting tin plates onto trucks. The court concluded that he did not suffer accidental injury, for

"* * * there was no evidence that the injury was caused by any unusual strain or by any condition not incident to claimant's employment."

In *Gunter v. Sharp & Dohme, et al.*, 159 Md. 438, 151 A. 134 (1930), compensation was denied the plaintiff who was employed by the defendant to mix bicarbonate and cyanide powders, having been so engaged for three years preceding the disability, and for three years before that in making other kinds of powders.

Compensation was denied on the ground that claimant had not received an accidental injury within the Act.

In *Cambridge Mfg. Co. v. Johnson*, 160 Md. 248, 153 A. 283 (1931), the claimant was employed as the foreman of the defendant in mixing poultry and dairy feed from September, 1923, to October, 1928. The operation of mixing the feed caused the air to be impregnated with dust, at times quite thickly. The claimant developed pulmonary tuberculosis, which the medical testimony showed was exaggerated by the inhalation of dust during his employment. The court refused compensation on the ground that this was not an accidental injury within the meaning of the Act.

In *Sinsko v. A. Weiskettel & Sons Co.*, 163 A. 851 (Court of Appeals, 1933), the claimant sought to recover compensation for the death of her husband, who had been employed as a sand blaster by the defendant. The deceased used a pressure gun in a small room to clean rusty tubs with the sand. There was only one fan on the side, and anyone working there always inhaled a great deal of dust. One doctor for the claimant testified that the decedent died from "pneumoconiosis or occupational disease."

The court denied compensation under the Act, saying:

"* * * all the evidence shows it was an occupational disease, and there is no evidence of negligence on the part of the appellees." (Bold face type not in text.)

In *Schemmel v. T. B. Gatch & Sons Co.*, 164 Md. 671, 166 A. 39 (1933), which involved the right of an employee to compensation, under the Workmen's Compensation Act, for a cerebral hemorrhage resulting in a disability, the court, in holding for the claimant, reviewed and reaffirmed its definitions of "occupational disease" and "injury" as follows:

"An injury may be said to arise out of the employment when it results from risks or perils peculiar to and inherent in the nature and scope of the work and its obligations, *Schneider Workmen's Compensation, Sec. 262*, but it is only compensable under the act where it is accidental in character. So an occupational or industrial disease resulting from conditions necessarily incident to the occupation, while it may be said to arise out of the employment, is not compensable, because it is not accidental, *Gunter v. Sharpe & Dohme*, 159 Md. 444, 151 A. 134, while a disease, even though gradual and insidious in its approach, which is caused by casual unexpected conditions in the employment which increase its hazards, but which the employee is not bound to anticipate not only arises out of the employment, but is compensable, because it is accidental * * * (citing cases)" (Bold face type not in text.)

Hence it appears that the Maryland court adheres to its unique construction and holds that disease caused by negligence is "accidental injury" and therefore compensable under the Workmen's Compensation Act. As previously stated, such right under the Act bars a common law action, if the employer complies with the Act.

II. Other Statutes.

1. Mines—Article 89.

Sec. 99—This section is quite long and should be consulted with respect to the character of ventilation required to carry off gases and provide adequate fresh air. This section provides certain minimums and also requires compliance with any order of the District Mine Inspector as to the furnishing of fresh air in excess of the statutory minimums.

Sec. 17—This section defines "gas" as used in the mining statutes.

The foregoing sections do not place any statutory obligation

upon the mine operators with respect to dust hazards.

2. Minors—Article 100.

Sec. 8—This prohibits the employment of any child under 16 years of age in a long list of enumerated industries, including particularly those where dangerous and poisonous acids are used and occupations causing dust in injurious quantities.

Sec. 22—This section prohibits the employment of any child under 18 years of age in certain classes of employment, including particularly the operation of emery wheels or in operations where any abrasive polishing or buffing wheel articles of the baser metals or iridium are manufactured.

3. Dust Statutes—

There are no other statutory provisions with respect to workshops and factories creating any specific duty on the part of employers in regard to dust elimination.

III. Common Law Liability.

The right of the employee to recover damages for a diseased condition caused by the negligent acts of the employer is discussed at some length in a preceding section of this chapter dealing with construction of Workmen's Compensation Acts. The conclusion is there expressed that the common law right of recovery for disease due to the negligence of the employer existed in Maryland prior to the enactment of the Workmen's Compensation Act, and that it still exists where the employer fails to provide compensation as required by that Act. There is further indication that the Maryland courts recognize the duty of the employer to furnish a reasonably safe place to work and that air pollution, from dust, gases or otherwise, is a factor which the employer must take into consideration. This is indicated by several decisions, a few of which we will cite as illustrative:

State v. Flannegan, 11 Md. 481, 74 A. 818 (1909). In this case, damages were sought by an employee who was overcome by poisonous gas while excavating a trench for a sewer. Although the plaintiff did not recover damages, the court recognizes the usual common law principles of liability in this decision.

The case of *Victory Sparkler & Specialty Co. v. Francks*, 128 A. 635, is discussed at length in a preceding section of this chapter.

IV. Miscellaneous Matters of Interest.

1. Statute of Limitations.

Maryland Code, Article 57, Sec. 1., provides that actions for

personal injury from negligence must be brought within three years from the time the cause of action accrued.

Article 67, Sec. 2, requires that actions for negligence causing death must be commenced within twelve calendar months after the death occurs.

2. Rules.

Under the Workmen's Compensation Act, the Commission is authorized and directed to formulate rules and regulations for the safety of employees and the prevention of accidents in occupations covered by the Act. Copies of such rules, if and when adopted, may be procured by communication with the State Industrial Accident Commission.

employments are excepted, but the exceptions may be considered immaterial for the purposes of this survey.

As to the occupations and employments enumerated in paragraph 32, the Act is compulsory (paragraph 14) and, by joint election of employer and employee, those not coming within the occupations enumerated in paragraph 32 may become subject to the Act. The compulsory character of the Act consists in the requirement that every employer subject to it shall pay or provide compensation according to the schedules of the Act for disability or death of the employee resulting from accidental personal injury.

The liability of the employer so prescribed is exclusive (paragraph 14). In other words, the employee has no rights against an employer, subject to the Act, except such rights to compensation as are prescribed in the Act. But this rule does not hold if the employer fails to secure the payment of compensation as required by the Act. If he does so fail to secure the payment of compensation, the injured employee, or, in case of death, his legal representative, may, at his option, elect to claim compensation or to maintain an action in court for damages. If, under these circumstances, the employee resorts to the court in an action for damages, the employer is denied the common law defenses of fellow servant, assumed risk, and contributory negligence.

In so far as occupational disease is concerned therefore, the employee can recover only the compensation specified in the Act (when the occupational disease is compensable at all), but, if the employer fails to secure the payment of the compensation, the employee may then pursue any common law remedy which he otherwise would have had.

4. Court Construction.

In *Victory Sparkler & Specialty Co. v. Francks*, 147 Md. 368, 128 A. 635, 44 A.L.R. 363 (1925), the plaintiff, a young girl, brought an action at law for injuries sustained by the gradual contraction of phosphorus poisoning resulting from the inhalation of fumes and gases wrongfully and negligently permitted to be collected where she was employed by the defendant in making fireworks. She was exposed to such fumes and gases during the years 1921, 1922, and 1923. The employer's defense was that her disability was an injury, within the terms of the Workmen's Compensation Act, that her sole right of recovery was the right of compensation, and that she could not maintain this action for damages. The plaintiff was given judgment, in the trial court, for \$22,500.

On appeal from that judgment, two issues were considered by the reviewing court: (1) Was the employer liable at common law to the servant if her injury was not compensable under the terms of the Workmen's Compensation Act, and (2) was not the disease of phosphorus poisoning an injury outside the purview of the Act?

In answering the first question, the court discussed, at length, the recitals in the preamble to the Workmen's Compensation Act and the peculiar wording of several sections, and concluded that all rights of employees to recover against the employers were merged in the Workmen's Compensation Act; that it provides the exclusive remedy; and that no right of common law recovery longer exists for any purpose against an employer, in Maryland, who complies with the Act.

By inference, at least, the decision recognizes that a common law right of the employee to recover for a diseased condition which was due to the negligence of the employer did exist prior to the passage of the Workmen's Compensation Act. It may, therefore, be assumed that the employee still has such right of action for common law damages, under Section 14 of the Act, if the employer fails to secure the payment of compensation.

In answering the second question as to whether or not the disease of phosphorus poisoning was compensable under the Act, the court so defines occupational disease as to limit it to disease which arises from causes incident to the occupation or calling which has its origin in the inherent nature or mode of work, and which is the usual result or concomitant.

If the disease is not the customary or natural result of the profession or industry, per se, but is the consequence of some extrinsic condition or independent agency (in this case, the employer's negligence), it is not, the court said, an occupational disease at all in an accurate sense; it is then an "accidental injury," i. e., an injury occurring through the "accident" or "chance" of the employer's negligence.

This reasoning brought the disability complained of within the Workmen's Compensation Act and limited the claimant to the compensation provided in the Act. The judgment was therefore reversed, and she was denied any recovery, except compensation.

NOTE:

It will be observed that the definition of "occupational disease" adopted in the above case is the one identified as "Definition No. 1" in Chapter 3 of this survey. For occupational disease so construed, the employee has never had a right of action at com-