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Workmen's Compensation

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before the execution of the codicil the granddaughter's stepfather adopted her. Consequently, it may be assumed that with respect to this granddaughter, testator's will expresses his desires as to the portion of his substantial estate she should receive.

The technical issue in the instant case is whether certain charities named in the will can take, since testator died within a year of the execution of the will and the codicil. If under the Ohio mortmain statute testator was survived by any "lineal descendant," then the bequests to charities are invalid. The probate court properly construed the mortmain statute and the adoption statute *in pari materia.* Therefore, the charitable bequests are valid because after the testator's granddaughter was adopted by her stepfather, under the mortmain statute she was no longer a "lineal descendant" of the testator — her paternal, natural grandfather.

2. *Inheritance by Descendants of Maternal Grandparents*

If a decedent dies intestate survived by two uncles and an aunt who are descendants of his maternal grandparent and is survived by no paternal grandparents or descendants of paternal grandparents, the two uncles and the aunt take to the exclusion of a great-uncle's children who are descendants of his paternal great-grandparents.[36]

ROBERT N. COOK

WORKMEN'S COMPENSATION

Occasionally, a classic case emerges to grace the pages of an annual survey. In the workmen's compensation field two such cases came over the horizon last year — a rare and exciting legal treat indeed. Both cases demand extensive study.

In *Johnson v. Industrial Comm'n*[1] the Supreme Court attempted to resolve a long standing conflict over when, if ever, a disease can be called an injury to permit compensation under the Workmen's Compensation Act. The majority opinion, written by Judge Taft, excellently analyzes the development of Ohio law on this subject, sharply distinguishes four prior cases dating back as far as 1918, and overrules two cases (one as recent as 1947) The details of this major legal operation are included in the following summary·

[36] *In re* Estate of Kelly, 165 Ohio St. 259, 135 N.E.2d 378 (1956).

Case	Year	Division of Court	The Incident	The Decision	The Opinion
*Industrial Comm'n v Roth, 98 Ohio St 34, 120 NE 172	1918	4 0	E inhaled poisonous paint fumes after heating paint; became ill within 48 hours; died within 3 weeks	Not compensable as a death from occupational disease	Accidental and unforeseen inhaling of specific poison not occupational disease, for not contracted in usual and ordinary manner over period of time like lead poisoning which is slow, insidious and chronic
Industrial Comm'n v Cross, 104 Ohio St 561, 136 NE 283	1922	5-1	E drank water from spring; contracted typhoid fever; died within 1 month	Not compensable as a death from injury	Not an "injury" within act, for "injury" does not include diseases contracted as distinguished from diseases occasioned by or following as a result of physical injury
Renkel v Industrial Comm'n, 109 Ohio St 152, 141 NE 834	1923	5 0	E operated machine to mill or plane cast iron; formed dust which E inhaled; tuberculosis set in	Not compensable as an injury	Disease contracted in employment not occasioned by or result of physical injury
*Industrial Comm'n v Burckard, 112 Ohio St 372, 147 NE 81	1924	5 0	E, a chemist, developing metanitraniline by reducing metadinitrobenzol with iron dust and acid; suffered aniline poisoning from faulty equipment and accidental mishandling; progtessively in worse condition till death 18 months after	Compensable as a death from injury	Death occasioned by or followed as result of physical injury, not in a natural or ordinary course of employment but in an unusual and extraordinary hap ening both accidental and unforeseen
Industrial Comm'n v Polcen, 121 Ohio St 377, 169 NE 305	1929	5 0	E worked in sulphuric acid department; fumes emitted causing particular heavy coughing spell, which specific spell resulted in hernia	Compensable as an injury	Not a continuous condition but a particular condition induced the hernia; a happening by chance, unexpectedly, not in the usual course of events
Industrial Comm'n v Middleton, 126 Ohio St 212, 184 NE 835	1933	5-0	E worked outside in cold on dump trucks; rode 11 miles in open truck while in heated condition; 3 weeks later suffered stroke of facial paralysis identified as Bell's palsy	Not compensable as an injury	No distinct, traceable trauma; only heavy lifting and exposure in the natural course of this employment, no sudden happening but rather prolonged heavy lifting and exposure

Case	Year	Division of Court	The Incident	The Decision	The Opinion
*Industrial Comm'n v Palmer, 126 Ohio St 251, 185 NE 66	1933	6 0	E subjected to chronic carbon monoxide gas poisoning while handling open coke furnaces; suffered from two specific occasions of severe gas emissions about 70 days apart; died within 3 months of latter attack from carbon monoxide poisoning	Compensable as a death from injury	An "accident" resulted on the two specific occasions of strong gas emissions, hence an injury occurred; the fact that but for such injury E might have died from chronic gas poisoning does not prevent compensation which is given for the injury not the disease
Industrial Comm n v Franken, 126 Ohio St 299, 185 NE 199	1933	5 0	E, a pressman handling dies of 25 to 40 pounds with aid of an apparatus; felt ill with indigestion and pain in chest; went home early; died 25 days later from heart disease	Not compensable as a death from injury	Compensable cases require injury and the law comprehends only such injuries as are accidental in origin and cause; no evidence of any extraordinary or unusual happening; so no accident
*Industrial Comm n v Helriggle, 126 Ohio St 645, 186 NE 711	1933	5-0	E working in coal mine demonstrated and used pellet powder; exposed to carbon monoxide fumes; heart and lungs weakened and impaired; died within four hours	Compensable as a death from injury	E was subjected to a sudden and unusual hazard in the mine in a peculiar degree, causing death due to carbon monoxide poisoning
*Industrial Comm'n v Bartholome, 128 Ohio St 13, 190 NE 193	1934	7 0	E, school custodian, removed soot semi-annually from combustion chamber of boiler; on one occasion overcome by soot and fell down in soot 1 3 feet high in chamber; severe inhaling of soot, coughing heavily and expectorating; helped outside by another; cough persisted, lost weight; within 5 months quit work; died 9 months after exposure as result of tuberculosis	Compensable as a death from injury	Extraordinary, unusual duty to clean chamber; compensation is given for the 'tear' not the "wear" of the human body; the incident of overexposure to soot in the chamber was an injury which caused the contraction of tuberculosis or aggravated a latent tubercular condition
Industrial Comm n v Armacost, 129 Ohio St 176, 194 NE 23	1935	7-0	E handled dresses with dyes; both eyes became infected with chemical conjunctivitis; prior to incident and after she had similar attacks	Not compensable as an injury	Medical trauma produced by microbe or microscopic foreign substance coming in contact with an uninjured mucous membrane of body during an uncertain period of time is not legal trauma to sustain an injury under the Workmen's Compensation Law

Case	*Year*	*Division of Court*	*The Incident*	*The Decision*	*The Opinion*
Industrial Comm'n v Brumm, 130 Ohio St 248, 198 N E 863	1935	6 0	E, court bailiff, exposed to cold air draft for whole day when ventilating system out of order; extreme cold suffered; acute endocarditis developed; followed by thrombosis; then death within a month	Not compensable as a death caused by injury	Medical trauma may be present but not legal trauma; no sudden happening nor any special occurrence at any particular time causing immediate physical injury either externally or internally
*Sebek v Cleveland Graphite Bronze Co , 148 Ohio St 693, 76 N E 2d 892	1947	7 0	E received certain meals as part of compensation from employer; contracted ptomaine poisoning from eating contaminated food	Civil action for damages banned; compensable under Workmen's Compensation Law as an injury	An unexpected experience on a particular occasion constituted an injury
Johnson v Industrial Comm'n, 164 Ohio St 297, 130 N E 2d 807	1955	4-3	E, 67 years old, and 7 others on windy, cold, rainy, February day unloaded 100 pound wet and slippery calcium sacks from railroad car to truck; walked ½ mile up hill; unloaded from truck to tipple; rode back on truck to railroad car; repeated this activity working 2½ hours overtime; shivering and shaking at end of day; went home, ate, went to bed; confined for 2 weeks then died from lobar pneumonia with influenza indicated as an antedecent cause; influenza had been diagnosed 2 weeks before the incident and 4 weeks before death	Not compensable as a death from injury	Two conflicting lines of authorities have developed on whether a disease can be an injury The *Cross, Brumm, Renkel, Armacost, Middleton* and *Franken* cases would conclude that pneumonia cannot be an injury The *Sebek, Bartholome, Roth, Palmer, Helriggle, Burckard,* and *Polcen* decisions would conclude that pneumonia may be an injury within the Workmen's Compensation Act The *Cross* rule is preferable so the reasoning and decision in the *Bartholome* case where inconsistent with the *Cross* syllabus and decision are overruled The *Sebek* case is overruled for ptomaine poisoning is caused by germs or microbes The *Roth, Palmer, Helriggle, Burckard* and *Polcen* cases were "injuries" claimed to have been suddenly caused by gas or chemicals not microbes, so these cases are "not necessarily inconsistent" with the *Cross* case and the instant decision

* Cases overruled or distinguished by Johnson v Industrial Comm n

Suffice it to say that at least in the eyes of four Supreme Court judges the Workmen's Compensation Law now means this: to be eligible for compensation for death, an injury must be established proximately causing the death; since "occupational diseases" are not comprehended within the term "injuries," diseases other than "occupational diseases" are not compensable; the term "injury" does not include disease; pneumonia cannot be an "injury", and weakened resistance to infection from pneumonia even though it represents a derangement of bodily functions is not an "injury."

The majority viewed their decision as making definite and certain complicated precedents on a complex problem. Exactness in the law is meritorious, especially in the workmen's compensation area, where simple rules are the goal to provide injured workmen or their dependents with speedy compensation at a minimum of expense. Forty years of litigation on this subject, however, have produced complex rules, caused expensive lawsuits and delayed compensation. It remains to be seen, however, whether the majority's attempt to recast the disease-injury issue in simple, exact terms will achieve the basic purposes of workmen's compensation. Three judges dissented from the reasoning and opinion, although they did join in the judgment. Two dissenters contended that there was a lack of evidence of a recognizable "accident" in the instant case upon which to affix the disease of pneumonia to make it compensable. All three dissenters concurred in the belief that *Sebek* and *Bartholome* should not be overruled on the issue of a disease being an injury.

Six months after the *Johnson* case the second classical case was decided. In *Dripps v. Goodyear Tire and Rubber Co.*[2] the employee was a "swing line man" on a boom. For nine weeks prior to the incident he had been exerting greater pull on the line because the boom had become unbalanced. While applying tension to the line, the employee claimed that he was injured when "all of a sudden something just came down on my shoulder and clear on out to the fingers like an electric shock or something like it might have hit my crazy bone."[3] No outside agency struck the claimant. A majority of five judges held that "injury" as required by the law comprehended a "physical or traumatic damage or harm accidental in character and as a result of external and accidental means in the sense of being the result of a sudden mishap, occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place."[4] Disability resulting merely from exerting more effort or being

[1] 164 Ohio St. 297, 130 N.E.2d 807 (1955)
[2] 165 Ohio St. 407, 135 N.E.2d 873 (1956)
[3] *Id.* at 408, 135 N.E.2d at 874.
[4] *Id.* at 408, 135 N.E.2d at 875, quoting from *Toth v. Standard Oil Co.*, 160 Ohio St. 1, 113 N.E.2d 81 (1953)

subjected to greater strain in itself is not compensable. One member of the majority contended that the present decision overruled two prior cases and urged that the court so state to avoid confusion. In *Malone v. Industrial Comm'n*,[5] a worker in the 113° temperature of a foundry on a hot August day collapsed from heat exhaustion and died within 12 hours; and in *Maynard v. B. F Goodrich Co.*[6] the employee lifted a heavy roll of fabric severely straining his back which prevented working and terminated in death. Both cases granted compensation. The unanimous court in the latter case relied on the *Malone* decision and further stated that since the Workmen's Compensation Act was amended to include "*any* injury received in the course of, and arising out of, the injured employee's employment,"[7] the statute now does not expressly require the injury to be accidental. Cases decided prior to the amendment had denied compensation for injury sustained while lifting heavy objects.[8] The court in the *Maynard* case indicated the amendment changed the meaning of injury to exclude the requirement of accidental.

The two dissenting judges in the *Dripps* case expressed the belief that the amendment now included "any injury" not merely accidental injury; thus the *Malone* and *Maynard* cases were good law and should be followed.

On the same day that the *Dripps* decision was rendered, the Supreme Court held that stacking "reroll liners" to a height of seven feet instead of the normal five which caused a back injury was not compensable, for no sudden mishap or happening occurred and thus no legal injury existed.[9]

In both the *Johnson* and *Dripps* cases legal fermentation over the complex issue of what is an injury is apparent.

This legal fermentation is also displayed in the major changes provided by the 1955 amendments to the law. One of the new provisions reached the interpretation stage of the trial court on an employer appeal from the Industrial Commission order. After the notice of appeal, containing the name of the claimant, employer and administrator of the Bureau of Workmen's Compensation with the claim number, had been filed, the employee moved to make the notice definite and certain. The court denied the motion as the notice satisfied the statutory requirements for appeal to the common pleas court.[10]

[5] 140 Ohio St. 292, 43 N.E.2d 266 (1942)

[6] 144 Ohio St. 22, 56 N.E.2d 195 (1944).

[7] OHIO REV. CODE § 4123.01.

[8] Matczak v. Goodyear Tire and Rubber Co., 139 Ohio St. 181, 38 N.E.2d 1021 (1942); Industrial Comm n v. Franken, 126 Ohio St. 299, 185 N.E. 199 (1933).

[9] Artis v. Goodyear Tire and Rubber Co., 165 Ohio St. 412, 135 N.E.2d 877 (1956).

[10] Bilek v. Cleveland, 134 N.E.2d 600 (Ohio C.P. 1956).

Another case decided by the Supreme Court also involved the 1955 amendments, in which the court granted an original writ of procedendo ordering the Industrial Commission to order the Board of Review and administrator to proceed with a hearing on relator's appeal in a compensation proceeding. Employer-relator's procedure was proper. The sole appeal from the Board or Industrial Commission is on claimant's right to participate. Where the commission or board wrongfully denies jurisdiction to hear, no adequate remedy at law exists and the extraordinary remedy is available.[11]

Further agitation can be found in the social aspects of compensation. An emerging concept appears to be that the wage earner and his family should be protected from any death, injury or disease not merely those associated with employment. Witness the union contracts with accident and health benefits for the worker.

The economic aspect of Ohio Workmen's Compensation also continues under most active discussion. This gigantic insurance business operated by the state government involves annual premiums totalling $99,000,000; 340,000 annual claims which require over $60,000,000 in compensation payments; 120,000 insured risks and a reserve fund of $250,000,000. Insurance rates, benefits paid, and costs of administration influence greatly the location of new industry and commerce in the state as well as the retention of present businesses. The issue of whether to allow private insurance carriers to operate in Ohio remains sharp also as an economic factor.

Finally, the political implications of workmen's compensation are not so obvious but may well be the most dynamic. With the extension of the Federal Social Security program on July 1, 1957, to permit payments to the permanently and totally disabled worker at 50 years of age the first major federal recognition of the worker's physical disability has begun. Will the federal program be extended to cover all workers regardless of age? Temporary disability? Partial disability? The history of the Social Security program has been one of continual expansion of benefits. Will a Federal Social Security program evolve to submerge the present state's workmen's compensation programs *sub silentio* in the next decade or two?

Two other cases in 1956 wrestled with the proximate cause issue. The need for words of probability to connect the trauma to the physical disability was clearly reemphasized. When the medical expert stated that the blow had a "bearing on" the cause of the condition, had a "detrimental effect on the man's chance of recovery," was "bad," or "deleterious" the

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[11] State *ex rel.* Federated Dept. Stores v. Brown, 165 Ohio St. 521, 138 N.E.2d 248 (1956)

court held the relation was not probable but conjectural.[12] To instruct the jury on the requisites of proximate cause poses a real challenge. Just because a jury asks for further instructions on the issue is not enough to indicate that the jury was confused so as to warrant setting aside the verdict for defendant.[13] The trial judge incidentally used the following words to describe proximate cause: "direct result," "close," "near," "without this injury there would be no disability" and "proximate cause is the real cause."

A divorced wife was held not to be a dependent, so that no attachment for nonpayment of alimony could be made upon the employee's compensation payment due.[14] A father could not recover reimbursement for his son's funeral expenses, for he was not a dependent.[15]

An additional award for violation of specific safety requirements was considered in one case. Whether a violation of a specific safety requirement existed was a fact exclusively for Industrial Commission determination. However, the issue of whether the requirement was specific was a question of law which was appealable to the courts.[16]

In other cases it was held: that the statutory amendment eliminating unanimous approval of the Commission before additional medical benefits could be paid was a substantive change, so the rule in effect at the time of injury was applicable;[17] that an interrogatory on the claimant's ability to do the same work was rightly refused, for compensation is not based on this element;[18] a hypothetical question which includes a fact not in evidence was defective, so medical opinion based thereon must be excluded;[19] sufficient medical evidence also existed to support a dependent claimant's verdict for a death award where the worker was burned on the leg, was given first aid, worked through the following day, was at home three months before returning to work, quit work one year after the incident, became bedfast 27 months after, 35 months later had uremic poisoning, died 47 months from the incident, having been under employer's medical care during the entire period.[20]

OLIVER SCHROEDER, JR.

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[12] Kanoff v. Industrial Comm n, 99 Ohio App. 357, 133 N.E.2d 635 (1954)

[13] Plothow v. General Motors Corp., 131 N.E.2d 687 (Ohio App. 1954)

[14] Bruce v. Bruce, 100 Ohio App. 121, 130 N.E.2d 433 (1955).

[15] State *ex rel.* Pyles v. Industrial Comm'n, 131 N.E.2d 628 (Ohio App. 1953)

[16] State *ex rel.* O'Neill v. Troy Sunshade Co., 99 Ohio App. 115, 131 N.E.2d 837 (1954).

[17] State *ex rel.* Jeffrey v. Industrial Comm n, 164 Ohio St. 366, 131 N.E.2d 215 (1955)

[18] McIntyre v. B.F. Goodrich Co., 137 N.E.2d 567 (Ohio App. 1955)

[19] Olsen v. Electric Auto-Lite Co., 164 Ohio St. 283, 130 N.E.2d 363 (1955)

[20] O'Hara v. Republic Steel Corp., 132 N.E.2d 128 (Ohio App. 1954)

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