

## Articles

# WORKMEN'S COMPENSATION: HALF CENTURY OF JUDICIAL DEVELOPMENTS \*

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Workmen's compensation has reached the half-century stage in some of our states. Provisions for it appear today in the statute books of every one of our fifty states and our territories. Such acts date back to 1884 in Germany and to 1897 in England. There is scarcely an English speaking nation without some form of workmen's compensation. In addition, wherever there is a factory system or wherever personal injuries at work are common, no matter what the language of the people, some form of workmen's compensation legislation can usually be found.<sup>1</sup>

Despite its universality, the subject of workmen's compensation has rarely been dramatized. It has no appeal to the average *un-injured* layman. But when someone in the family is brought home in an ambulance or in a coffin, inquiry is then made into workmen's compensation laws.

If, in a city of 2 million people, simultaneous factory explosions—nuclear accidents for example—would injure every human being and cause funerals to be held for 15,000 of them, the newspapers, radio and television would flash the word to every corner of the world. Legislatures would rush into action to prevent future recurrences and to recompense the victims of these explosions. Yet the same number, 15,000 annually, die as a result of work accidents in our fifty states, one here and one there; 100,000 are maimed for life, a few here and a few there; and over 2 million<sup>2</sup> suffer temporary incapacities for varying periods of time, few—except the injured parties and their families—can be stirred to ask what is being done about the matter.

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† Because of the author's association with the *NACCA LAW JOURNAL*, he has referred to it often as a parallel case citation when the case appeared in the *JOURNAL*. The author also gratefully acknowledges the help of his son Paul, and the assistance of Nieves Baens del Rosario, Chairman of the Workmen's Compensation Commission of the Philippines for adding the Philippine citations to the footnotes. *The Editor*.

<sup>1</sup> Other early foreign acts include Austria, 1887; Norway, 1894; Finland, 1895; Denmark, France and Italy, 1898; Greece, 1901; Belgium and Russia, 1903. See FRANKEL & DAWSON, *WORKMEN'S INSURANCE IN EUROPE* (1910).

<sup>2</sup> U.S. BUREAU OF LABOR STANDARDS, DEPT. OF LABOR, BULL. No. 161, *STATE WORKMEN'S COMPENSATION LAWS 2* (Rev. 1960).

The half-century mark in workmen's compensation is a good time to review its progress. Many forces have shaped the path of workmen's compensation and have helped to mold its progress. Among them are the courts, workmen's compensation administrators, lawyers, legislators, labor unions, insurance companies, employers, professors and writers. Of utmost importance to all injured employees is the judiciary—the courts who interpret the provisions of the statutes after the administrators find the facts. The last fifty years has been a period of numerous developments in judicial decisions.

### I. CHANGES IN LEGAL CONCEPTS

The old common law, with its defenses of contributory negligence, the fellow-servant rule, and assumption of risk, and its procedure of trials by judges and juries, has failed to give injured workers the necessary financial relief; they lost most of their cases in court. A new system was needed. The idea of making industry which profits from human labor pay for its human losses appealed to the legislatures. The German scheme, as improved in England, formed the background of our early acts.

Unquestionably, compensation laws were enacted as a humanitarian measure, to create liability without relation to fault, actual or moral, and to put upon industry the initial cost of the human wreckage that was related, directly or indirectly, to its work or work-environment.<sup>3</sup> Workmen's compensation was a revolt from the old common law—the creation of a complete substitute and not a mere improvement. It meant to make liability dependent on a relationship to the job, in a liberal, humane fashion, with litigation reduced to a minimum.<sup>4</sup> It was truly "sui generis."<sup>5</sup>

Workmen's compensation meant to end the common-law doctrines of fault, fellow-servant, assumption of risk, scope of employment, need for control and the like, and to substitute a new kind

<sup>3</sup> *Wilson v. Chatterton* (1946), 1 K.B. 360, 366 (to put upon employer obligation to pay for personal injuries "incidental to his employment." In "a sense it made his employer an insurer," and it was "realized from the start that the risk would be re-insured"). *Goodyear Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 398, 158 P.2d 511 (1945) (a change against industry, like repairs on a broken machine); *Baltimore Steel Co. v. Burch*, 187 Md. 209, 213, 49 A.2d 542, 544 (1946) ("[T]o protect the public from the care and expense resulting from human derelicts due to accidents" in industry); *Ahmed's Case*, 278 Mass. 180, 179 N.E. 684 (1932); *Williams v. Hartshorn*, 296 N.Y. 49, 69 N.E.2d 557 (1946).

<sup>4</sup> Bear, *Survey of the Legal Profession—Workmen's Compensation and the Lawyer*, 51 COLUM. L. REV. 965 (1951).

<sup>5</sup> *Lipe v. Bradbury*, 49 N.M. 4, 8, 154 P.2d 1000, 1002 (1945); *accord*, *Alabama By-Products Co. v. Landgraff*, 32 Ala. App. 343, 346, 27 So. 2d 209, 212 (1946) ("The act is sui generis and superseded and replaced many previously existing theories of personal injury damages arising out of common law and statutory actions.").

of liability.<sup>6</sup> That new liability was for "personal injury by accident arising out of and in the course of employment." The amount payable was to depend on the extent of "disability" or "incapacity" as a percentage of wage loss, and not on pain and suffering and the full wage loss. It meant to give medical treatment at once, when needed, as of right, and not to await the end of a tort trial to see if there was fault, hence liability.

## II. GROWTH

The early cases tended to be strict. Courts trained in the common law found difficulty in thinking along new lines—of liability based upon a relationship to the job. Judges found it distasteful to make awards to workers morally to blame<sup>7</sup> for their injuries, even though these injuries were work-related. They found it difficult to extend the benefits of the acts to the guilty, the negligent and the awkward. It was even more difficult to allow awards when the injuries did not occur within the common-law scope of employment, nor meet with the common-law concept of "cause," proximate or otherwise.

Yet to the everlasting credit of the modern courts, they have, when pertinent, repeatedly confessed error in allowing common-law concepts to creep into their decisions in disguised garb.<sup>8</sup> A half-century of workmen's compensation has shown that the modern trend is to construe the acts broadly and liberally and to protect the interests of the injured worker and his dependents. For that reason, courts throughout the compensation-world now refuse to follow the more narrow, older cases.<sup>9</sup> Judges today realize that most acts arbitrarily cut down the injured employee's monetary opportunities for recovery by giving far smaller amounts than currently awarded

<sup>6</sup> In overruling *Harbroe's Case*, 223 Mass. 139, 111 N.E. 709 (1916), the court in *Baran's Case*, 336 Mass. 342, 145 N.E.2d 726 (1957), stated: "Those considerations would be proper in assessing liability in tort. We are dealing, however, with a workmen's compensation case. The findings of the board show that the employment brought the employee in contact with the risk of being shot by the particular bullet which struck him." *Id.* at 345, 145 N.E.2d at 727. *Gloria Enciso v. Mariano Dy-Lisaco*, 57 Phil. 446 (1932).

<sup>7</sup> *Hartford Acc. & Indem. Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940), 15 NACCA L.J. 37 (1955). See *aggressor* cases in note 101 *infra*.

<sup>8</sup> Some recent overrulings of old cases because tort concepts misled the earlier court:

Arizona: *Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 143, 235 P.2d 605 (1955).

Arkansas: *Bryant Stave & Heading Co. v. White*, 277 Ark. 147, 296 S.W.2d 436 (1956).

California: *State Compensation Ins. Fund v. Industrial Acc. Comm'n*, 38 Cal. 2d 659, 242 P.2d 311 (1952), 9 NACCA L.J. 64 (1952).

Colorado: *Divelbiss v. Industrial Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959).

Massachusetts: *Baran's Case*, 336 Mass. 342, 145 N.E.2d 726 (1957).

Michigan: *Van Dorpel v. Haven-Busch*, 350 Mich. 135, 85 N.W. 2d 97 (1957), 21 NACCA L.J. 207 (1958).

New Jersey: *Ciuba v. Irvington Varnish & Insulator Co.*, 27 N.J. 127, 141 A.2d 761 (1958).

Tennessee: *Ramson v. H. G. Hill Co.*, 205 Tenn. 377, 326 S.W.2d 659 (1959).

England: *Wilson v. Chatterton* (1946), 1 K.B. 360.

See also case cited notes 54, 57, and 384 *infra*.

<sup>9</sup> *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 559, 201 S.W.2d 573, 575 (1947) ("there is an ever-growing tendency to construe the acts liberally to allow compensation."); *accord*, *Goodyear Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 393, 158 P.2d 511 (1945); *Texas Employers Ins. Assn. v. Holmes*, 145 Tex. 158, 195 S.W.2d 399 (1946); *Francisco v. Conching*, 63 Phil. 354 (1936).

in successful common-law cases. Even in successful compensation cases, the employee and his dependents actually suffer the greater part of the financial load.

Courts recognize that in close or borderline cases<sup>10</sup> it is better to put the loss on the employer (or the insurer), and hence on the ultimate consumer of the product or services, than upon the injured employee or his family who rarely can pay and who must therefore pass it on to charity. Since one of the purposes of workmen's compensation is to keep workers from becoming public charges,<sup>11</sup> a reasonable, liberal, practical common-sense construction is preferable to a narrow one.<sup>12</sup> These acts are for the giving of compensation; they are not for its denial.<sup>13</sup>

Compensation insurance partakes of the nature of social insurance, of an enterprise liability, and not of the common-law type of insurance.<sup>14</sup> It is:

. . . so profound in character and degree as to take away, in large measure the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions.<sup>15</sup>

This study based upon fifty years of workmen's compensation cases discloses how much the courts have conceded in favor of this humanitarian legislation and how far they have eradicated the old common-law bases of liability in favor of the new bases "more in harmony with these changed condition."<sup>16</sup>

<sup>10</sup> *Smith v. University of Idaho*, 67 Idaho 22, 26, 170 P.2d 404, 406 (1946) ("doubtful cases should be resolved in favor of compensation, and not given "narrow technical construction"); accord, *Simmons Nat'l Bank v. Brown*, 210 Ark. 311, 195 S.W.2d 539 (1946).

<sup>11</sup> *Baltimore Steel Co. v. Burch*, 187 Md. 209, 213, 49 A.2d 542, 544 (1946) (it was the intention "to relieve workers from the hazards of industrial employment and to protect the public from the care and expense resulting from human casualties due to accidents" in industry).

<sup>12</sup> *Clark v. Village of Hemingford*, 147 Neb. 1044, 1056, 26 N.W.2d 15, 22 (1947) ("liberally construed and its beneficent purposes not to be thwarted by technical refinement or interpretation"); accord, *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 509 (1951) (Minton, J. dissenting) ("common-sense, every-day, realistic view"); *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 589, 55 So. 2d 381, 386 (1951) ("liberal and sensible interpretation"); *Schechter v. State Ins. Fund*, 6 N.Y.2d 506, 510, 160 N.E.2d 901, 903, 190 N.Y.S.2d 656, 660 (1959) ("common-sense viewpoint" of the average man); *In re Jensen*, 63 Wyo. 88, 100, 178 P.2d 897, 900 (1947) ("to be reasonably and liberally construed").

<sup>13</sup> Everett, Book Review, 62 L.Q. Rev. 300, 301 ("[C]ertainly the higher tribunals both in England and in America seemed to have lived up to the dictum 'that this is an Act for the giving and not the withholding of compensation.'").

<sup>14</sup> *Wilson v. Chatterton* [1946], 1 K.B. 360, 366 ("The object of the legislation was essentially social . . . [A]s an item in the cost of production or of services rendered, the community at large of course has had to carry the ultimate burden of the social reform in the price of good or services."); *Hebert v. Ford Motor Co.*, 285 Mich. 607, 610, 281 N.W. 374, 375 (1938) ("It should be administered substantially as insurance of a social character."); Small, *Effect of Workmen's Compensation on Tort Concepts*, 12 NACCA L.J. 21 (1953).

<sup>15</sup> *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423 (1923).

<sup>16</sup> *Ibid.*

### III. PERSONAL INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT

#### A. PERSONAL INJURY

Most of the acts failed to define the words "personal injury," and the early courts struggled to supply that definition. As one court stated: "In common speech the word 'injury,' as applied to a personal injury to the human being, includes whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability."<sup>17</sup> Personal injury also was defined to include damage to the body,<sup>18</sup> and "any harm or damage to the health of an employee, however caused, whether by accident, disease, or otherwise."<sup>19</sup>

However, certain things were clear even though no one general definition ever satisfied all of the states. In general, these words were not to be construed as establishing a system of health insurance;<sup>20</sup> and conversely, these words were not to be limited to the old, narrow accident insurance policy definition of injuries by violent, external and accidental means, nor to require external trauma.<sup>21</sup> It was clear that traumatic injuries such as broken bones and external physical injuries—which make up the bulk of compensation injuries—came under the definition of personal injury.

#### (1) *Property Damage*

Many of the early cases concerned damage to wooden legs, false teeth, eye-glasses and clothes where there was no damage to the human body or tissue surrounding the prosthetic appliance or clothes. The early courts all denied liability,<sup>22</sup> and claims for such "property damage" are now rarely made. By statute a few states expressly compensate for them; and, in most states, if the surrounding tissue is damaged, such items as wooden legs, artificial arms and false teeth may be obtained as part of the statutory "medical treatment."<sup>23</sup>

<sup>17</sup> Burns Case, 218 Mass. 8, 12, 105 N.E. 601, 603 (1914).

<sup>18</sup> Sullivan's Case, 265 Mass. 497, 164 N.E. 457 (1929).

<sup>19</sup> Miller v. American Steel & Wire Co., 90 Conn. 349, 380, 97 Atl. 345, 355 (1916) (dissenting opinion).

<sup>20</sup> Tweten v. North Dakota Workmen's Compensation Bureau, 69 N.D. 369, 287 N.W. 304 (1939); Maggelet's Case, 228 Mass. 57, 116 N.E. 972 (1917).

<sup>21</sup> Texas Employers Ins. Ass'n v. Wade, 197 S.W.2d 203 (Tex. Civ. App. 1946) (need not be externally visible); Long-Bell Lumber Co. v. Parry, 22 Wash. 2d 309, 156 P.2d 225 (1945) (cleaning sawdust, induced coronary occlusion).

<sup>22</sup> London Guarantee & Acc. Co. v. Industrial Comm'n, 80 Colo. 162, 249 Pac. 642 (1926) (a wooden leg is a man's property, not a part of his person and no compensation can be awarded for its injury); accord, Pacific Indem. Co. v. Industrial Acc. Bd., 215 Cal. 461, 11 P.2d 1 (1932) (dictum) (wooden leg; excludes injury to clothes, tools, etc.); Southern Elec., Inc. v. Spall, 130 So. 2d 279 (Fla. 1961) (no provision made for compensation for injuries to artificial limbs; classed as personal property and not part of the person—award reversed).

<sup>23</sup> U.S. BUREAU OF LABOR STANDARDS, DEPT OF LABOR, BULL. No. 73, 310 (1946) (forty-two acts required the employer "to furnish artificial limbs and other appliances").

(2) *Disease*

The early courts thought of "personal injury" as akin to a broken bone—some definite organic injury taking place suddenly, and traceable to a single event.

When it was first suggested that a disease could be a personal injury, the court looked for a lesion or cut through which some microbe could enter and set up the disease. In short, some judges looked for organic injury which created a portal of entry and thus led to a compensable disease. Under this theory they were willing to compensate for such diseases as anthrax.<sup>24</sup> But if the germ should enter by the ordinary passage—by normal breathing through the nose or mouth—there was no personal injury, even in a state not using the additional words "by accident."<sup>25</sup>

Today there is practically nothing left of this doctrine. All employment-related disease are regarded as "harm to the body" and hence personal injuries. Awards have been sustained, as "personal injuries," for such diseases as tuberculosis,<sup>26</sup> smallpox,<sup>27</sup> scarlet fever,<sup>28</sup> typhoid fever<sup>29</sup> and pneumonia.<sup>30</sup> It has been said that all diseases are covered except the common cold<sup>31</sup>—and even that, in a proper work-related setting, may well be compensable.<sup>32</sup>

(3) *Neurosis and Emotional Strain*

Similarly to their reaction to disease, early courts could not get themselves to accept a nervous condition as a personal injury.<sup>33</sup> A few granted that a neurosis produced by an organic injury (traumatic neurosis) was compensable as "functional" harm.

Today the courts have accepted the concept that "harm to the body" includes both functional and organic harms. Hence a per-

<sup>24</sup> *Heirs v. John A. Hull & Co.*, 178 App. Div. 350, 164 N.Y. Supp. 767 (3d Dep't 1917) (through a scratch on the hand); *Chicago Rawhide Mfg. Co. v. Industrial Comm'n*, 291 Ill. 616, 126 N.E. 616 (1920) (pimple on the neck).

<sup>25</sup> *Smith's Case*, 307 Mass. 516, 30 N.E.2d 536 (1940) (nurse inhaled tuberculosis germs; but changed by MASS. GEN. LAWS ANN. c. 152, secs. 1-7a [1958]). *Contra*, *Benner v. Industrial Acc. Comm'n*, 26 Cal. 2d 346, 159 P.2d 24 (1945) (nurse contracted pulmonary tuberculosis).

<sup>26</sup> *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (2d Cir. 1939), *cert. denied*, 308 U.S. 570 (1939) ("grain scooper" lighted up dormant tuberculosis); *Dobbs v. Bureau of Highways*, 63 Idaho 290, 120 P.2d 263 (1941) (tuberculosis precipitated by dust); *Blue Bar Coconut Company v. Joaquin Boo, G.R.* (Phil.) No. L-6920, September 28, 1954 (pulmonary tuberculosis as a result of the nature of employment).

<sup>27</sup> *Vilter Mfg. Co. v. Jahncke*, 192 Wis. 362, 212 N.W. 641 (1927) (outside engineer at isolation hospital contracted small-pox—ate infected ice cream given him by hospital janitor).

<sup>28</sup> *Gaites v. Society for the Prevention of Cruelty to Children*, 251 App. Div. 761, 295 N.Y. Supp. 594 (3d Dep't 1937) (matron at shelter contracted scarlet fever when children vomited, coughed or took their medicine).

<sup>29</sup> *Broden's Case*, 124 Me. 162, 126 Atl. 829 (1924) (typhoid fever from employer's water); *McPhee's Case*, 222 Mass. 1, 109 N.E. 623 (1915) (pneumonia from becoming wet while helping to put out employer's fire).

<sup>30</sup> *Smith's Case*, 307 Mass. 516, 30 N.E.2d 536 (1940) (dictum) (common cold excluded); see note 25 *supra*.

<sup>31</sup> *Mercier's Case*, 315 Mass. 238, 52 N.E.2d 380 (1943) (award upheld for a series of colds caused by working conditions added to overwork and sudden changes in temperature). See Horowitz, *Current Trends in Basic Principles of Workmen's Compensation*, 20 ROCKY MT. L. REV. 16, n.64 (1947).

<sup>32</sup> *Cf. Holt v. Yates & Thom.*, 3 B.W.C.C. 75 (1909) (brooding over injury, award denied):

sonal injury embraces: (1) A physical injury leading to neurosis;<sup>34</sup> (2) a non-traumatic injury (*e.g.*, psychic shock) leading to a physical injury, *e.g.*, a psychic shock which causes paralysis or heart attack<sup>35</sup> and (3) a non-traumatic injury (*e.g.*, a mental stimulus or psychic shock) which leads to psychic injury such as work-fear and mental disturbance which results in a disabling neurosis.<sup>36</sup> Awards for neurosis are made even though financial, marital or other worries play a part in causing the disorder.<sup>37</sup>

The question in these cases is no longer whether they are personal injuries, but whether they are "by accident" and "arise out of" the employment or work-environment.

#### (4) *Single Event and Wear and Tear*

The notion that a personal injury must originate in a single event no longer has legal potency. Massachusetts early grasped at the notion of "wear and tear." A cigar maker's back condition, due to many years of bending, was held not to be a personal injury but merely wear and tear.<sup>38</sup> Today, however, even in that Commonwealth, a condition caused by months of repetitive motion, or blindness due to insufficient lighting,<sup>39</sup> is a personal injury. In Massachusetts, one no longer points to fifteen years of imperceptible changes common to ordinary activity, but lays stress on the aggra-

<sup>34</sup> *Murray v. Industrial Comm'n*, 87 Ariz. 190, 349 P.2d 627 (1960) (slipped on ice, back injury led to psychoneurotic conversion hysteria); *accord*, *Barr v. Builders, Inc.*, 179 Kan. 617, 296 P.2d 1106 (1956) (conversion hysteria, fell from window, striking back); *Hunnewell's Case*, 220 Mass. 351, 107 N.E. 934 (1915) (hysterical blindness following physical injury); *Hood v. Texas Indem. Ins. Co.*, 146 Tex. 522, 209 S.W.2d 345 (1948) (neurosis is a compensable disease).

<sup>35</sup> *Klimas v. Trans Caribbean Airways, Inc.*, 9 N.Y.2d 758 (N.Y. 1961), *reversing* 12 App. Div. 2d 561, 207 N.Y.S.2d 72 (3d Dep't 1960); (heart attack from emotional stresses and strains as head of airline department); *Miller v. Bingham County*, 79 Idaho 87, 310 P.2d 1089 (1957). 20 NACCA L.J. 43 (1957) (fright during auto collision led to cerebral hemorrhage); *Egan's Case*, 331 Mass. 11, 116 N.E.2d 844 (1954) (nervousness from being summoned to aid policeman forcibly to arrest three men, led to cerebral hemorrhage); *Charon's Case*, 321 Mass. 694, 75 N.E.2d 511 (1947) (fright from lightning near work-bench, precipitated paralysis); *Coleman v. Andrew Jergens Co.*, 65 N.J. Super. 592, 168 A.2d 265 (Essex County Ct. 1961) (heart attack from emotional strain); *O'Brien v. Ramsey* [1956] W.C. Rep. 86 (New South Wales) (secretary of industrial commission—worry, anxiety, mental overwork brought about severe hypertensive crisis); *Schwartz v. Hampton House Management Corp.*, 221 N.Y.S. 2d 286 (App. Div. 1961) (emotional strain caused ulcer and hemorrhage).

<sup>36</sup> *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960) (continually berated by foreman, feared lay off, suffered emotion collapse, compensable—a mental injury is not to be treated as different from a physical injury); *Bailey v. American General Ins. Co.*, 154 Tex. 430, 435, 279 S.W.2d 315, 318 (1955), 16 NACCA L.J. 67 (1955) (visual terror led to psychic trauma, doing functional harm not organic damage—this constituted "harm to the physical structure of the body"); *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 13 S.E.2d 291 (1941) (electric flash producing neurosis).

<sup>37</sup> *Skelly v. Sunshine Mining Co.*, 62 Idaho 192, 109 P.2d 622 (1941) (background of marital troubles and alcohol, no defense); *Hood v. Texas Indem. Ins. Co.*, 146 Tex. 522, 209 S.W.2d 345 (1948) (even though petitioner's unconscious desire for compensation is a contributing source of his neurosis); *Gerardo Malenilla v. Republic of the Philippines*, WCC Case No. 4, September 29, 1960 (Phil.).

<sup>38</sup> *Maggelet's Case*, 228 Mass. 57, 116 N.E. 972 (1917) ("neuritis or neurosis" of nerves from faulty posture of cigar maker over many years); *accord*, *Reardon's Case*, 275 Mass. 24, 175 N.E. 149 (1931) (Dupuytren's contracture from fifteen years work). *Contra*, *Marathon Paper Mills v. Huntington*, 203 Wis. 17, 233 N.W. 558 (1930) (hernia from twenty year of lifting is "industrial disease" here, though usual hernia is compensable as "injury"); *American Maize Prods. Co. v. Nichiporchik*, 108 Ind. App. 502, 29 N.E.2d 801 (1940) (riveter's helper sustained Dupuytren's contracture, court disagrees with *Reardon's Case, supra*).

<sup>39</sup> *Peil v. Bedford Gas & Edison Light Co.*, 325 Mass. 2239, 90 N.E.2d 555 (1950).

vation at the very end of the process caused by the work or working conditions—the terminal condition is the personal injury.

Currently the overwhelming weight of authority denies the need of a single event.<sup>40</sup> Repeated traumata over days, months, or longer periods may be the basis of a personal injury. Tennis elbow, tenosynovitis, Dupuytren's contracture, hernia and similar conditions are regarded as personal injuries resulting from repetitive trauma.<sup>41</sup>

##### (5) *Aggravation of Pre-existing Disease or Defect*

Employers take workmen "as is"<sup>42</sup> without any warranty as to any previous state of health, whether known or unknown. Hence it is no longer necessary to show that the injury was the sole cause of the disability, or that the work was the sole cause of the personal injury. Neither original causation nor direct causation is essential. It is sufficient if the work precipitated, aggravated or accelerated the condition, or if it was a contributing factor in the personal injury or the disability.<sup>43</sup> Thus paralysis due in part to a blow on the head and in part to an underlying syphilis is clearly compensable.<sup>44</sup> So, too, an aggravation, acceleration, or precipitation of Buerger's dis-

<sup>40</sup> *Ingalls Shipbuilding Corp. v. King*, 229 Miss. 871, 92 So. 2d 196 (1957) (cataracts due to excessive light over a substantial period—recurring minor trauma); *Maclanburg-Duncan Co. v. Edward*, 311 P.2d 250 (Okla. 1957) (progressive or cumulative rubbing and burning—traumatic occupational neuritis); *accord*, *Mill's Case*, 258 Mass. 475, 155 N.E. 423 (1927) (series of strains over a period of a few months, resulting in hernia); *Carter v. General Motors Corp.*, 361 Mich. 577, 106 N.W.2d 105 (1960) (need not come from single event or single physical or mental injury); *Webb v. New Mexico Publishing Co.*, 74 N.M. 279, 141 P.2d 333 (1943) (printer used soap for six months, was unusually susceptible—injury by continual traumas); *Shoren v. United States Rubber Co.*, 140 A.2d 768 (R.I. 1958) (gold ball "winder" injured muscles of hand—general breakdown of part of claimant's body due to constant use in performing work was a personal injury).

<sup>41</sup> *American Maize Prods. Co. v. Nichiporchik*, 108 Ind. App. 502, 29 N.E.2d 801 (1940) (was injury, not occupational disease, though over ten years of riveting work); *accord*, *Pullman Co. v. Industrial Acc. Comm'n*, 28 Cal. 2d 379, 170 P.2d 10 (1946); *Harrington's Case*, 285 Mass. 69, 188 N.E. 499 (1933) (series of strains and twists, which had cumulative effect not different from a single severe twist culminating in a hernia); *Bondar v. Simmons Co.*, 23 N.J. Super. 109, 92 A.2d 642 (App. Div. 1952), 11 NACCA L.J. 73 (1953) (bursitis of shoulder from five years of continuous pushing of lever is "continuous minimal traumata," compensated as occupational disease); *Di Maria v. Curtis Wright Corp.*, 23 N.J. Misc. 374, 44 A.2d 688 (Passaic County Ct. of C.P. 1945) (tenosynovitis, flexor tendons of both hands from eleven days vibration of roller sanding guns is "injury" and "by accident"); *Briggs v. Hope Windows*, 284 App. Div. 1077, 136 N.Y.S.2d 41 (3d Dep't 1954) (tenosynovitis); *Rogan v. Charles F. Noyes, Inc.*, 10 App. Div. 2d 765, 197 N.Y.S.2d 758 (3d Dep't 1960) (Dupuytren's contracture from constant pressure on palm of hand).

<sup>42</sup> *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 584, 83 N.W.2d 614, 616 (1957) (the employer "takes him 'as is,' [a]s it is sometimes phrased." Every worker just as he "brings with him to the job some strength, he brings some weaknesses. None is perfect"); *Marshall v. C. F. Mueller Co.*, 135 N.J.L. 75, 78, 50 A.2d 158, 160 (Sup. Ct. 1946) ("The employer takes his employees with their mental, emotional, glandular and other physical defects or disabilities"); *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 41 S.E.2d 592 (1947) (take employees "as is" with such strength as they then possess); *accord*, *Wilson v. Chatterton* [1946], 1 K.B. 860 (epileptics and sick men known or unknown, entitled to same protection of compensation act as healthy persons).

<sup>43</sup> *Gillette v. Harold, Inc.*, 257 Minn. 313, 101 N.W.2d 200 (1960) (improperly healed chip fracture aggravated and accelerated by ordinary walking on job as saleslady); *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945) (heat prostration hastened heart disease and contributed to death eight months later); *Czepial v. Krohne Roofing Co.*, 93 So. 2d 84 (Ga. 1957) (roofer inhaled fumes and dust, accelerated tuberculosis—denial of award reversed); *Mad den's Case*, 222 Mass. 487, 111 N.E. 379 (1916).

<sup>44</sup> *Crowley's Case*, 223 Mass. 288, 111 N.E. 786 (1916); *Davis v. Artley Constr. Co.*, 154 Fla. 481, 18 So. 2d 255 (1944), 16 NACCA L.J. 423 (1955) (employee who had syphilis suffered a cerebral hemorrhage from overheating work); *Tomas Samonte v. Philippine Iron Mines, Inc.* Case No. R 4597. April 11, 1961 (Phil.).

ease,<sup>45</sup> heart disease,<sup>46</sup> cancer,<sup>47</sup> or any other disease is as compensable as if the work-injury or work-environment directly "caused" the disease. In short, a precipitation, acceleration or aggravation of a disease is a "personal injury." Despite attempts to distinguish heart cases from other cases, heart diseases are almost uniformly held compensable where the work (straining or lifting) or the work stimuli (argument or upsetting sight) plays a part in precipitating, accelerating or aggravating the heart disease.<sup>48</sup>

The great majority of states now have second-injury<sup>49</sup> or similar funds to help disabled persons obtain jobs and to bear part of the compensation when a workman with a congenital defect or physical handicap sustains an injury which causes more extended disability than to a healthy worker.

## B. BY ACCIDENT

### (1) Definitions

"By accident" ordinarily connotes something, sudden, unusual or unexpected—an unlooked-for mishap or an untoward event which is not expected or designed.<sup>50</sup>

On the basis of this general concept, some early courts, steeped in common-law reasoning, denied awards for injuries clearly caused by the employment, but which were not caused by a single or specific event identifiable in time and place. Thus the Court of Appeals in New York denied an award on the ground of "not accidental" when a girl's finger became red, swollen and gangrenous from the con-

<sup>45</sup> *Paul v. Preston Theatres Corp.*, 63 Idaho 594, 124 P.2d 562 (1942) (Buerger's disease—predisposition or susceptibility no bar).

<sup>46</sup> *Mississippi Shipping Co. v. Henderson*, 231 F.2d 457 (5th Cir. 1956) (heart attack at work, eight months later died on personal errand on street—connected, award affirmed); *Peterson v. Safeway Stores*, 158 Kan. 271, 146 P.2d 657 (1944) (coronary thrombosis from ordinary lifting); *McMurray's Case*, 331 Mass. 29, 116 N.E.2d 847 (1954) (registry inspector suffer fatal heart attack from emotional stress); *In re Brown*, 123 Me. 424, 123 Atl. 421 (194) (shoveling snow, sudden dilation of heart). For further cases and discussion, see Petkun, *Problems Arising in a Heart Disease Case*, in NEW ENGLAND NACCA BAR ASSOCIATION, WINTER SEMINAR, DECEMBER 1959, at 151 (1960). See also note 48 *infra*.

<sup>47</sup> *Elford v. State Industrial Acc. Comm'n.*, 141 Ore. 284, 17 P.2d 568 (1932) (lifting sacks caused rupture of abdominal cancerous growth, involving spleen, liver and suprarenal glands); *Utah Fuel Co. v. Industrial Comm'n.*, 102 Utah 26, 126 P.2d 1070 (1942) (bruise of testicle). See, for unusual cancer case, *Luczek's Case*, 335 Mass. 675, 141 N.E.2d 526 (1957), 20 NACCA L.J. 65 (1957) (causal connection between compensable hernia and death from non-industrial stomach cancer, warranted by evidence of hernia operation so depleted physical reserve as to hasten death). For further cases and discussion of cancer cases, see Locke, *Problems Arising in the Trial of a Cancer Case*, in NEW ENGLAND NACCA BAR ASSOCIATION, WINTER SEMINAR, DECEMBER 1959, at 133 (1960).

<sup>48</sup> *Laclede Steele Co. v. Industrial Comm'n.*, 6 Ill. 2d 296, 128 N.E.2d 718 (1955) (coronary occlusion, ordinary strain); *Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 148, 285 P.2d 605 (1955), *repudiating* *Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 26 P.2d 1017 (1933); *Donlan's Case*, 317 Mass. 291, 58 N.E.2d 4 (1944) (coronary occlusion from moving heavy truck); *Golob v. Buckingham Hotel*, 244 Minn. 301, 69 N.W.2d 636 (1955) (coronary thrombosis, moving forty to forty-five clumsy chairs); *Rathbun v. Tabor Tank Lines*, 129 Mont. 121, 233 P.2d 966 (1955), 16 NACCA L.J. 81 (1955). See also note 46 *supra*.

<sup>49</sup> SHARKEY, U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 577, SECOND-INJURY FUNDS 146 (1932). See Gradwohl, *Nebraska Workmen's Compensation for Aggravation of Pre-existing Infirmities by Exertion or Strain*, 41 NEB. L. REV. 101 (1961).

<sup>50</sup> *Fenton v. Thorley* [1903], A.C. 443; *accord*, *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W.2d 1 (1946).

tinuous dipping of the hand in a poisonous photographic solution (500 to 800 times daily for about one week),<sup>51</sup> but held that an infection received while embalming a corpse was "by accident"<sup>52</sup> and was therefore compensable.

Decisions merely based on definitions can thus lead to injustice and error.

### (2) *Assault by Design*

Reasoning that injuries "by design" could not be "by accident," early employers and insurers sought to infuse in the compensation law a no-liability theory where the assailant admitted he deliberately struck and injured the worker because of sudden or spontaneous anger.

But even from the earliest days, with a few exceptions, the courts have looked at the result from the point of view of the victim<sup>53</sup>—and from his point of view, the injury was unexpected, sudden, an unlooked for mishap, and hence was "by accident."

### (3) *Unexpected Result Versus Unexpected Cause*

Suppose an ordinary or usual strain produces an unusual result such as a ruptured disc, heart attack, back strain or hernia. Is the resulting injury by accident?

The early courts fell into serious error. They reasoned that the injury must be by "an accident." That is, it must follow an accidental cause such as slipping, an unusual twisting, or an unexpected striking.<sup>54</sup> In short, there had to be both (1) a personal injury, and (2) "an accident" in the technical sense, one which caused the personal injury. The result was that men laboring on hard jobs, as a direct result of which they sustained ruptured discs, back strains and the like—the very kind of injuries most likely to occur on the jobs—received nothing by way of compensation. Industry destroyed them and charity took over the load.

<sup>51</sup> *Jeffreys v. Charles H. Sager Co.*, 198 App. Div. 446, 191 N.Y. Supp. 354 (3d Dep't 1921); affirmed 233 N.Y.S. 35, 135 N.E. 907 (1922).

<sup>52</sup> *Connelly v. Hunt Furniture Co.*, 240 N.Y. 83, 147 N.E. 366 (1925) (turned "trifling scratch into a deadly wound," is injured by accident).

<sup>53</sup> *Trim Joint Dist. School v. Kelly* [1914], A.C. 667 (reform school boys deliberately and with design ambushed and killed the disciplinarian master with brooms—case must be decided not from the boy's viewpoint, but from that of victim—as to him, it was by accident); *accord*, *McLaughlin v. Thompson, Boland & Lee, Inc.*, 72 Ga. App. 564, 24 S.E.2d 562 (1945); *Hagger v. Wortz Biscuit Co.*, 210 Ark. 818, 196 S.W.2d 1 (1946); *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946) (even though willful act of employer, accident from workmen's point of view); *Batangas Transportation Co. v. Josefina Vda. de Rivera, et al.*, G.R. (Phil.) No. L-7658, May 8, 1956.

<sup>54</sup> *Nichols v. Central Crate & Box Co.*, 340 Mich. 232, 65 N.W.2d 706 (1954), *overruled* by *Shippard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957), and criticized in 15 NACCA L.J. 54 (1955); *Pierce v. Phelps Dodge Corp.*, 42 Ariz. 436, 26 P.2d 1017 (1933), *overruled* by *In re Mitchell*, 61 Ariz. 436, 150 P.2d 385 (1944).

It has been the experience of mankind that the worker who daily lifts hundreds of loads of beef, brick or mortar, sometimes weighing over one hundred pounds per load, may someday become the victim of a resulting back or other injury. Medical science has demonstrated that men's backs were not intended to be used constantly for heavy labor in the erect position. However, without proof of a slip or an unusual twist—and most injured workers truthfully admitted they were doing their usual work in the usual way when the back or heart gave way—many of the early administrators and courts denied all claims.

The parade away from this type of reasoning has been recent but rapid. By the overwhelming weight of authority today, either an unexpected cause or an unexpected result is sufficient to establish the injury as caused "by accident."<sup>55</sup> This is well established even though the cause was an ordinary strain or exertion while doing the routine or usual work.<sup>56</sup> "By accident" was used in the popular sense, and the average worker would consider a sudden back strain or heart attack or other injury following lifting as caused "by accident." Court after court reversed itself without the need of legislation, holding that since the restrictive rule was court-made, a later court could and should broaden it.<sup>57</sup> Many courts pointed out that since these words were taken from the English Act, English decisions were of weight; and these decisions regarded the result as caused "by accident" in the popular sense of those words.<sup>58</sup>

<sup>55</sup> *Olson v. State Industrial Acc. Comm'n.* 352 P.2d 1096 (Ore. 1960) (heart attack from usual exertion); *Massey v. United States Steel Corp.*, 264 Ala. 227, 86 So. 2d 375 (1955); *Phelps Dodge Corp. v. Cabarga*, 79 Ariz. 148, 285 P.2d 605 (1955); *Czepial v. Krohne Roofing Co.*, 93 So. 2d 84 (Fla. 1957) (cumulative effect of fumes on tuberculosis as accident); *General Motors Corp. v. Hall*, 93 Ga. App. 181, 91 S.E.2d 57 (1956); *Laclede Steel Co. v. Industrial Comm'n.*, 6 Ill. 2d 296, 128 N.E.2d 718 (1955) (coronary occlusion from ordinary strain and exertion); *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957), 20 NACCA L.J. 32 (1957) (back injury pulling at trays); *Golob v. Buckingham Hotel*, 244 Minn. 301, 69 N.W.2d 636 (1955) (coronary thrombosis from moving chairs); *Ingalls Shipbuilding Corp. v. King*, 229 Miss. 871, 92 So. 2d 196 (1957) (cumulative effect on welder's eyes as accident); *Rathbun v. Tabre Tank Lines*, 129 Mont. 121, 283 P.2d 966 (1955), 16 NACCA L.J. 81 (1955); *Ciuba v. Irvington Varnish & Insulator Co.*, 27 N.J. 127, 141 A.2d 761 (1958) (diseased heart, usual work a contributing cause); *Teal v. Potash Co. of America*, 60 N.M. 409, 292 P.2d 99 (1956); *Macklanburg-Duncan Co. v. Edwards*, 311 P.2d 250 (Okla. 1957) (neuritis from years of routine work—injury may be progressive or cumulative in its inception). For list of cases 1948-1955 see 19 NACCA L.J. 38 (1957) reviewing the leading case of *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956) (aggravated back injury from usual loading work).

<sup>56</sup> *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945) (physical breakdown as accident); *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n.*, 29 Cal. 2d 492, 175 P.2d 823 (1948) (usual strain causing collapse sufficient); *Edwards v. Piedmont Publishing Co.*, 227 N.C. 184, 41 S.E.2d 592 (1947) (ruptured disc from ordinary twist—excellent review of entire question); *Walter v. Hagianis*, 97 N.H. 314, 87 A.2d 154 (1952) (waitress aggravated pelvic diseases by usual work).

<sup>57</sup> *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 604, 83 N.W.2d 614, 626 (1957) ("But has become of *stare decisis* . . . Error is thus to be quietly interred. . . . Wisdom, we agree, should never be rejected merely because it comes late."); *Ciuba v. Irvington Varnish & Insulator Co.*, 27 N.J. 127, 138, 141 A.2d 761, 766 (1958) ("*Seiken v. Todd Dry Deck, Inc.*, 2 N.J. 469, 67 A.2d 131 [1949] is accordingly overruled.");

<sup>58</sup> *Laclede Steel Co. v. Industrial Comm'n.*, 6 Ill. 2d 296, 128 N.E.2d 718 (1955), citing *Hughes v. Clover, Clayton & Co.* [1909], 2 K.B. 798 (C.A.), *aff'd* [1910], A.C. 242; *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956) (controversy and litigation would have been reduced if the liberal English precedents had been followed consistently, citing, among others, *Fenton v. J. Thorley & Co.* [1905] A.C. 443).

In a few states<sup>59</sup> the legislature omitted or dropped the words "by accident." Hence an injury in these states never needed an unusual<sup>60</sup> cause—the resulting injury was a "personal injury" and therefore compensable.

### C. ARISING OUT OF

Proving that an employee received a "personal injury" and that it was "by accident" does not settle the question. The worker must in addition prove that it "arose out of and in the course of the employment."

Arising out of—words to bedevil the injured worker! Some early judges gave lip-service to the doctrine that it was their duty to construe the act liberally—to protect the rights of workers who no longer could sue at common law and obtain a jury trial—and then used their ingenuity to deny recovery.<sup>61</sup>

As far back as 1916 Lord Wrenbury said:

The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute.<sup>62</sup>

The United States Supreme Court has called this phrase "deceptively simple and litigiously prolific."<sup>63</sup>

#### (1) Definitions

Steeped in the common law some early judges attempted to decide cases by creating a definition and then applying the definition to the facts. The definition stated that for a personal injury to "arise out of" the employment, it had to arise out of a risk "peculiar to the employment" and "not common to the neighborhood."<sup>64</sup> In

<sup>59</sup> California, Iowa, Massachusetts, Michigan, Minnesota, Rhode Island, and Texas; Oregon removed words "caused by violent or external means," by amendment in 1957. *Olson v. State Industrial Acc. Comm'n*, 352 P.2d 1096 (Ore. 1960).

<sup>60</sup> See *Almquist v. Shenandoah Nurseries*, 218 Iowa 724, 254 N.W. 35 (1934) (perforated ulcer from heavy exertion); *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm'n*, 29 Cal. 2d 492, 175 P.2d 823 (1946) (usual strain sufficient); *Dolan's Case*, 317 Mass. 291, 58 N.E.2d 4 (1944) (coronary occlusion from moving heavy truck). For a summary of the statutory provisions of the fifty states, see Gradwohl, *Nebraska Workmen's Compensation for Aggravation of Pre-existing Infirmities by Exertion or Strain*, 41 NEB. L. REV. 101 (1961).

<sup>61</sup> See *Bischoff v. American Car & Foundry Co.*, 190 Mich. 229, 157 N.W. 34 (1916) (hand crushed when machinery started); *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935) (frozen while clearing debris at four A.M.—award reversed).

<sup>62</sup> *Herbert v. Samuel Fox & Co.* [1916], 1 A.C. 405, 419 (disobedience as affecting "out of" employment).

<sup>63</sup> *Cardillo v. Liberty Mut. Ins. Co.*, 380 U.S. 469, 479 (1947): "The statutory phrase 'arising out of and in the course of employment,' which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific."

<sup>64</sup> *McNicol's Case*, 215 Mass. 467, 102 N.E. 697 (1913). *Contra*, *Martin v. Plaut*, 293 N.Y. 617, 59 N.E.2d 429 (1944) (accidents said not due to risk inherent in employment, but to ordinary risks).

1923 the United States Supreme Court ignored this definition and announced that "out of" could be sufficiently proved by showing that there was a "causal connection between the injury and the business . . . a connection substantially contributory though it need not be the sole proximate cause," and that "no exact formula can be laid down which will automatically solve every case."<sup>65</sup>

Finally in 1940, the late, very able Judge Lummus announced the present prevailing test in *Caswell's Case*:<sup>66</sup>

The only other requirement is that the injury be one 'arising out of' his employment. It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment. . . .

Since that decision court after court<sup>67</sup> has adopted this test, and early errors have been erased. This can be seen from the following discussion.

## (2) Street Risks

Inasmuch as injuries on the street were "common to the neighborhood" and were not "peculiar to the employment," early courts denied liability for street accidents.<sup>68</sup> Thus an indoor worker who was struck by an automobile while he was going on an errand for his employer was denied recovery.<sup>69</sup> Anybody could be hit by a car or slip on the sidewalk! It was not "peculiar to" his employment but was "common to the neighborhood."

Today all such accidents are clearly incidents of the employment—a risk to which the work subjected the employee, whether constantly or occasionally on the street in connection with his work—and are compensable as "arising out of" the employment.<sup>70</sup> The fact that "others may be exposed to like risks does not change the character of the risk to which the applicant was exposed."<sup>71</sup>

<sup>65</sup> *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 423-24 (1923).

<sup>66</sup> *Caswell's Case*, 305 Mass. 500, 502, 26 N.E.2d 329, 340 (1940) (landmark case declaring rule of *McNicol's Case*, note 64 *supra*, outmoded); *Baran's Case*, 336 Mass. 342, 145 N.E.2d 726 (1957) (reaffirmed *Caswell's Case*, thereby reversing old case). See note 6 *supra*.

<sup>67</sup> *Goodyear Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 398, 158 P.2d 511 (1945) (adopting *Caswell's Case*, and repudiating the narrow language of *McNicol's Case*, notes 64 and 65 *supra*); *Dravo Corp. v. Strosnicker*, 43 Del. 256, 45 A.2d 442 (1945); *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946). For additional cases, see Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L.J. 15, 45 n.85 (1949); *Trinidad de los Reyes Vda. de Santiago v. Angela S. Reyes*, G.R. (Phil.) No. L 12115, Feb. 29, 1960.

<sup>68</sup> *Donahue's Case*, 226 Mass. 595, 116 N.E. 226 (1917).

<sup>69</sup> *Cotarullo's Case*, 258 Mass. 521, 155 N.E. 425 (1927). But changed by the legislature by Mass. Stat. 1927 c. 309, sec. 3 (1932) (now MASS. GEN. LAWS ANN. c. 152, sec. 26 [1958]). For Massachusetts history, finally allowing recovery for street risks, see Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 4 NACCA L.J. 19, 41 n.238 (1949).

<sup>70</sup> *Kennedy v. Thompson Lumber Co.*, 223 Minn. 277, 26 N.W.2d 4:9 (1947) (shop steward fell crossing street to a telephone to prevent a strike—excellent discussion of street risks in (dangerous public intersection); *Katz v. A. Kadans & Co.*, 232 N.Y. 420, 134 N.E. 330 (1922); *Dennis v. White & Co.*, 115 L.T.R. (n.s.) 774 (H.L. 1917) (immaterial whether nature of employment involves continuous or only occasional exposure to dangers of the street).

<sup>71</sup> *Schroeder & Daly Co. v. Industrial Comm'n*, 169 Wis. 567, 570, 173 N.W. 323, 329 (1919).

Street risks encompass both ordinary and unusual<sup>72</sup> risks or injuries. Thus, when a taxi driver on the street, who was ordered by a police officer to get help, became so frightened that he developed speech paralysis, he was held entitled to compensation as a result of a "street risk."<sup>73</sup>

### (3) *Acts of God, Positional and Locality Risks*

Hurricane, lightning, frost, unbearable heat, and other so-called "Acts of God" continue to injure workers. The early courts normally denied recovery by stating that the injury was not peculiar to the employment and was common to the neighborhood.<sup>74</sup> In short, God alone was responsible as the proximate and primary cause; the relationship of the work to the injury was too incidental and too remote to be the basis of liability.<sup>75</sup>

Later courts sought a way out—and some found it. If there was something about the work which attracted lightning or made it more likely that lightning would strike this particular worker, he collected by way of an "increased risk" exception.<sup>76</sup> This exception also applied to other Acts of God—for example, a worker in a deep hole, because of the nature of the work, may be subjected to greater heat exposure than ordinary citizens receive,<sup>77</sup> or a worker at the waterfront may be subjected to greater cold.<sup>78</sup> If an Act of God combined with an act or instrumentality of the employer<sup>79</sup> to injure the employee—"joint tortfeasors" so-to-speak—an exception occurred and there was liability! Hence where a hurricane collapsed a roof and the employer's bricks broke the worker's hip, joint liability existed; but the only party amenable to process was the insurer who was held liable for workmen's compensation.<sup>80</sup>

However, old errors die hard. Most courts still make awards by way of "exceptions" such as taking judicial notice<sup>81</sup> of "increased

<sup>72</sup> *Katz v. A. Kadans & Co.*, 232 N.Y. 420, 134 N.E. 330 (1922) (attack by lunatic on a chauffeur in a crowded street).

<sup>73</sup> *Egan's Case*, 331 Mass. 11, 116 N.E.2d 844 (1954).

<sup>74</sup> *Robinson's Case*, 292 Mass. 543, 198 N.E. 760 (1935) (worker froze foot clearing square of debris at four A.M.); *Warner v. Couchman* [1911], 1 K.B. 351 (C.A.), *aff'd* [1912], A.C. 35 (journeyman baker had right hand frostbitten while driving rounds—no recovery).

<sup>75</sup> *Kelly v. Kerry County Council*, 1 B.W.C.C. 194 (1908) (street cleaner hit by bolt on roadway—no recovery).

<sup>76</sup> *Andrew v. Failsworth Industrial So'y* [1904], 2 K.B. 32 (C.A.) (bricklayer on a 23-foot-high scaffold hit by lightning and killed outright—increased risk).

<sup>77</sup> *Zucchi's Case*, 310 Mass. 130, 37 N.E.2d 514 (1941) (hotter in ditch or perfooting hole than on surface, hence more danger of sunstroke or heatstroke); *accord*, *Virgil Graham Constr. Co. v. Nelson*, 322 P.2d 651 (Okla. 1958) (digging ditch in 110-degree temperature—award sustained).

<sup>78</sup> *Ferrara's Case*, 269 Mass. 243, 169 N.E. 137 (1929) (frostbite).

<sup>79</sup> *Brooker v. Thomas Borthwick & Sons* (Australasia), [1933] A.C. 669 (P.C.) (N.Z.) (wall fell on employee during earthquake). "But if he is injured by contact physically with some part of the place where he works, he at once associates the accident with his employment and nothing further need be considered." *Id.* at 677.

<sup>80</sup> *Caswell's Case*, 305 Mass. 500, 26 N.E.2d 328 (1940) (hurricane caused walls to collapse on a machine worker); *accord*, *Travelers Ins. Co. v. Randall*, 264 F.2d 1 (5th Cir. 1959) (carpenter on schoolhouse job—wind of tornadic intensity blew off roof of temporary wooden building on work site and debris struck claimant—award affirmed).

<sup>81</sup> *Bauer's Case*, 314 Mass. 4, 49 N.E.2d 118 (1943) (judicial notice, without expert, of increased risk of lightning while wet and in building on a hill); *Truck Ins. Exch. v. Industrial*

risks" due to the employment, many of which in fact are hardly increased. A growing and influential minority of the courts have had the courage to make awards simply on the ground that the Act of God injury arose out of the nature, conditions, obligations or incidents of the employment. They have discarded the common-to-the-public method of denying compensation and substituted the actual risk test. The sole question is whether the employment in fact exposed the employee to the risk.<sup>82</sup>

It should be enough that the work put the employee at the very spot that lightning, wind, frost or heat struck him. The work-spot turned out to be a position of risk. The positional and local risks have been almost universally accepted for other types of injuries—a slate blown by the wind hits a worker while bent over;<sup>83</sup> a stray arrow aimed at a tree strikes a worker in his employer's yard;<sup>84</sup> an employee at his machine is assaulted by a worker suddenly going insane,<sup>85</sup> or a tree rotted at the base falls on a messenger passing

Acc. Comm'n, 77 Cal. App. 2d 461, 175 P.2d 884 (2d Dist. 1946) (wet roof, common knowledge that danger increased, requires no supporting expert testimony); *Faulkner v. Yellow Transit Freight Lines*, 187 Kan. 667, 359 P.2d 833 (1961) (tornado, more hazardous to wait in filling station); *Taler v. To'e*, 181 Kan. 616, 313 P.2d 290 (1957) (heatstroke from trimming trees for two days in 98-degree temperature—greater danger than if he had not been working at all); *Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 624 (1959) (wet clothing and nail apron increased risk of injury by lightning); *Consolidated Pipe Line Co. v. Mahon*, 152 Okla. 72, 3 P.2d 844 (1931) (in dilapidated house); *Stokely Foods v. Industrial Comm'n*, 264 Wis. 102, 58 N.W.2d 285 (1953) (increased danger of lightning while in high cab of truck, with no trees or objects around).

<sup>82</sup> *Hughes v. Trustees of St. Patrick's Cathedral*, 245 N.Y. 201, 202-03, 156 N.E. 666 (1927) (section boss suffered heat prostration while working in a cemetery—"Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."); accord, *Harvey v. Caddo De Sotto Cotton Oil Co.*, 199 La. 720, 731, 6 So. 2d 747, 751 (1942) (cyclone, cotton-seed mill collapsed—"We prefer to place our decision on what we believe to be a sound footing, that is—that the deceased, by reason of his employment, was required to be in a building which fell upon him; that his death was due to the fact that his employment necessitated that he be at the place where the accident occurred . . ."); *Pacific Indem. Co. v. Industrial Acc. Comm'n*, 86 Cal. App. 2d 726, 728, 195 P.2d 919, 920 (2d Dist. 1948) (explosion on neighboring property and employer's window hit employee—"In order to receive an award he needs show merely that his work brought him within the range of danger by requiring his presence in the precincts of his employer's premises at the time the peril struck."—the positional risk theory). See also *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945) (heat prostration); *Aetna Life Ins. Co. v. Industrial Comm'n*, 81 Colo. 233, 254 Pac. 995 (1927) (lightning); *McKinney v. Reynolds & Manley Lumber Co.*, 79 Ga. App. 826, 54 S.E.2d 471 (1949), 4 NACCA L.J. 91 (1949) (laborer killed by lightning in lumber yard—no proof of increased hazard needed for lightning cases and for heat prostration—denial of award reversed—court took judicial notice that the position of employee especially exposed him to the risk of injury and thus supplied the causal relation); *Central Lumber Co. v. Wood*, 284 S.W.2d 688 (Ky. 1955) (heat exhaustion—normal heat of day); *Eagle River Bldg. & Supply Co. v. Peck*, 199 Wis. 192, 196, 225 N.W. 690, 691 (1929) (frozen foot by old man loading bolts into a sleigh in sub-zero weather—"it makes no difference that the exposure was common to all out-of-door employments in that locality in that kind of weather. . . . It was a hazard of the industry.") Note that the increased risk theory "is a relic of the common-law theory of liability based on fault, the very theory which the compensation laws attempted to abolish." See Horowitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L.J. 15, 51 (1949); Nathanson, *Statutory Interpretation and Mr. Justice Rutledge*, 25 IND. L.J. 462, 468-73 (1950). See also Malone, *The Mississippi Workmen's Compensation Act in Prospect*, 20 Miss. L.J. 137, 143 (1949). See views of author in 4 NACCA L.J. 91 (1949).

<sup>83</sup> *Anderson & Co. v. Adamson*, 50 SCOT. L. REV. 855 (1913) (this Scotch case gained added prominence when cited ten years later with approval in *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 [1923]).

<sup>84</sup> *Gargiulo v. Gargiulo*, 12 N.J. 607, 97 A.2d 593 (1953), 12 NACCA L.J. 72 (1953) (foreseeability not the test—the employee would not have been in the line of fire but for his employment). See also 1 LARSON WORKMEN'S COMPENSATION LAW, SECS. 10.10-13 (1952) (stray bullets).

<sup>85</sup> *Howard v. Harwood's Restaurant Co.*, 25 N.J. 72, 135 A.2d 161 (1957) (assault by insane co-employee); *Zimmerman v. Elizabeth City Freezer Locker*, 244 N.C. 623, 94 S.E.2d 813 (1956), 19 NACCA L.J. 58 (1957). See also *Asneda v. Haraguchi*, 37 Hawaii 556 (1947), 1 NACCA L.J. 11 (1948) (painter at lunch assaulted by crazed parolee—follows *Thom v. Sinclair*, [1917] A.C. 127).

on a motor-bike.<sup>86</sup> All of these cases are held compensable, with no stronger work-tie than the fact that the work placed him in the position of danger—and the injury took place while at that work-spot. Larson, in his comprehensive treatise, calls these “positional and neutral risks.”<sup>87</sup> Yet many modern courts regularly affirm awards for the above “neutral” risks, but deny awards for Acts of God—the most “neutral” of risks—occurring at the very spot the work places the worker. It should be noted also, that in most cases, had the employee been at home he would not have received the injury.

Narrow common-law theories are difficult to destroy. Compensation cases are “sui generis,”<sup>88</sup> but not when Acts of God are involved! Once again old tort concepts return in disguised dress to haunt injured workers.<sup>89</sup> It remains for additional courageous courts to reverse themselves and, following the weight of reason, to protect the victim of nature’s destructive forces when the injury occurs at a work-place.

#### (4) *Work-assaults and Aggressors*

Even innocent victims of work-assaults were denied protection in the early days.<sup>90</sup> Typically, a judge would state: men were hired to work, not to batter each other! A fortiori, if the innocent victim had no compensation protection, the aggressor<sup>91</sup> was even less entitled to consideration—and so the early judges ruled.

Hindsight is better than foresight. Time has shown that throwing men of different types or nationalities together begets quarrels, and quarrels lead to assaults, and assaults create injuries.<sup>92</sup> The later courts properly began to distinguish between work-assaults<sup>93</sup>

<sup>86</sup> *Lawrence v. Matthews* [1929], 1 K.B. 1 (during a gale—the position of the cyclist at the moment supplied the causal nexus). England affirmed the locality risk doctrine in *Powell v. Great Western Ry.* [1940] 1 All E.R. 87 (C.A.) (1939) (Loy shot air gun, hitting engineer in locomotive—arose out of his employment, because he was at that place).

<sup>87</sup> 1 LARSON, *WORKMEN'S COMPENSATION LAW* sec. 10 (1952).

<sup>88</sup> See note 5 *supra*.

<sup>89</sup> Just as they used to do in aggressor-assault cases. See cases in note 101 *infra*. For tort concepts wrongly inserted into workmen's compensation, see notes 97, 111, 126 and 384 *infra*.

<sup>90</sup> *Jacquemin v. Turner & Seymour Mfg. Co.*, 92 Conn. 382, 103 Atl. 115 (1918) (fight over ladle by fellow employees, “engaged in their own quarrels,” employer not on notice). *Urak v. Morris & Co.*, 107 Neb. 411, 136 N.W. 345 (1922) (assault with shovel, argument as to whether claimant was a member of the union—award reversed, was a “purely personal affair”). For a list of early denials in assault cases, see Horowitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 326-27 (1946).

<sup>91</sup> No relief for aggressors in work-assaults: *Pierce v. Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb. 321, 156 N.W. 509 (1916); *Stillwagon v. Callan Bros.*, 183 App. Div. 141, 170 N.Y. Supp. 677 (3d Dep't 1918) (fight over unloading cars; award reversed as decedent was aggressor—“He was not employed as a fighter; his work was driving the truck . . .”); *Milne v. Sanders*, 143 Tenn. 602, 228 S.W. 702 (1921).

<sup>92</sup> *Hartford Acc. & Indem. Co. v. Cardillo*, 112 F.2d 11, 17 (D.C. Cir.), *cert. denied*, 210 (argument over who was going to crank truck—“Among Negro common laborers, quarrels and fights must be expected to result in some instances from the manner and method of performing the work assigned them.”).

<sup>93</sup> *Hanson v. Robitsek-Schneider Co.*, 209 Minn. 596, 297 N.W. 19 (1941) (outstanding decision—new standard is that assaults are compensable unless the reasons for the assaults are shown to be personal—the evidence showed that the attack was apparently for purposes of robbery by some unknown person, in a crime-infested district); *Hegler v. Cannon Mills Co.*, 224 N.C. 669, 31 S.E.2d 918 (1944) (though assault may have resulted from anger or revenge, “still it was rooted in and grew out of the employment”).

and personal-assaults<sup>94</sup> which had no relation to the work. Admittedly, if the assault arose from a personal quarrel unrelated to the employment or its environment, the resulting injury did not arise out of the employment. This is now conceded universally.

But where the assault was rooted in the work or was due to the work-environment, whether the attacker was a co-employee, employer or stranger, the innocent<sup>95</sup> victim finally obtained workmen's compensation protection. The assault "arose out of" the employment—it was a work risk.

Later on, participants<sup>96</sup> who fell short of being termed "aggressors" in work-assaults were placed within the orbit of the workmen's compensation acts.

But suppose the participant was also the aggressor in a work-assault. Should the protection of workmen's compensation extend to an injury arising out of a quarrel rooted in the work if the man injured is the one who started the quarrel?

Certain things are basic in workmen's compensation: (1) negligence, contributory negligence, assumption of risk and the fellow-servant rule—all of the common-law rules—do not apply to workmen's compensation cases,<sup>97</sup> and courts cannot create defenses which the workmen's compensation legislation itself does not create.<sup>98</sup> No compensation act creates the defense of "aggressor" or "no compensation for assault."<sup>99</sup> The only defenses usually found in the acts are serious and willful misconduct, intoxication and deliberate self-

<sup>94</sup> *Schlener v. American News Co.*, 240 N.Y. 622, 148 N.E. 732 (1925) (per curiam) (trouble arose over a private loan); *Elrod v. Union Bleachery*, 204 S.C. 481, 30 S.E.2d 73 (1944) (assaulted for trying to "date" his wife the previous night); *Rothfarb v. Camp Awanee*, 116 Vt. 172, 71 A.2d 569 (1950) (second bout later was personal).

<sup>95</sup> *Smith v. Stepney Corp.*, 22 B.W.C.C. 451 (1929) (subway lavatory attendant assaulted by stranger, a drunken sailor); *Correia v. McCormick*, 51 R.I. 301, 154 Atl. 276 (1931) (claimant refused to punch driver's card and was assaulted—co-employee); *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950), 6 NACCA L.J. 168 (1950) (employer—but in such case employee can elect to sue in tort); accord, *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930) (if a mere tool or agent is liable in an action for damages, the principal should be likewise); *Stewart v. McLellan's Stores Co.*, 194 S.C. 50, 9 S.E.2d 35 (1940), and *Lavin v. Goldberg Building Material Corp.*, 274 App. Div. 690, 87 N.Y.S.2d 90 (3d Dep't 1949), 3 NACCA L.J. 137 (1949) (even corporation liable in tort).

<sup>96</sup> *Kaiser Co. v. Industrial Acc. Comm'n*, 65 Cal. App. 2d 218, 150 P.2d 562 (1944) (early cases out of harmony where employee intercedes to suppress a quarrel between employees); *Mutual Implement & Hardware Ins. Co. v. Pittman*, 214 Miss. 823, 59 So. 2d 547 (1952) (malicious assault by co-employee—close contact at work as creating risk of willful assault—prior completed horseplay no bar—here claimant threw pebble at one who then broke claimant's skull with shovel—liberal construction urged); *Myszkowski v. Wilson & Co.*, 155 Neb. 714, 53 N.W.2d (1952) (claimant tried to run down co-employee, who grabbed meat paddle and broke claimant's arm).

<sup>97</sup> *Hanson v. Robishek-Schneider Co.*, 209 Minn. 596, 598, 297 N.W. 19, 21 (1941) ("[C]are must be exercised lest long judicial habit in tort cases allows judicial thought in compensation cases to be too much influenced by a discarded or modified factor of decision."); Stark (compensation acts intended to abolish common-law rules of fault, contributory negligence, and the like). See also list of cases in Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 *ILL. L. REV.* 311, 312 n.2 (1946). See also *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957) (hard to get rid of tort concepts). See also note 384 *infra*.

<sup>98</sup> *Newell v. Moreau*, 94 N.H. 439, 55 A.2d 476 (1947); *Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69 (1949).

<sup>99</sup> *Newell v. Moreau*, *supra* note 98, and cases in note 101 *infra*.

inflicted injuries.<sup>100</sup> To twist the calling of names which is followed by flying fists into serious and willful misconduct is without legal foundation. To say that he who strikes the first blow can never collect in a workmen's compensation case is to bring back the narrow rules of the common law in disguised garb.

Hence modern courts now almost universally hold that injuries resulting from work-assaults, even to an aggressor,<sup>101</sup> are compensable as "arising out of" the employment. The argument that the aggressor steps aside<sup>102</sup> from his employment in such a quarrel adds a new defense not found in workmen's compensation acts; it is judicial fiat, and has no proper place in assaults arising out of the work or work environment. Fortunately that defense is rapidly disappearing.

### (5) *Horseplay and Larking*

The early courts could see no possible relation between horseplay (larking in England) and work. Even the innocent victim got no relief.<sup>103</sup> It remained for the late Mr. Justice Cardozo, while on the highest court in New York, to make the first exception—the innocent victim.<sup>104</sup> He rationalized that, because work brings men together and leads to fun and frolic, injuries received during such horseplay—at least to the innocent victim who is at work minding his own business—are a risk of and hence "arise out of" the employ-

<sup>100</sup> *Myszkowski v. Wilson & Co.*, 155 Neb. 714, 53 N.W.2d 203 (1952) (not wilful negligence here); *Johnson v. Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954) (aggressor struck on head by fellow worker wielding pick—denial of award reversed, citing list of recent cases). See 15 NACCA L.J. 29 (1955) for a review of this case and the subject. See also cases in note 101 *infra*.  
<sup>101</sup> *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957), 21 NACCA L.J. 164 (1958). See *Kable v. United States*, 169 F.2d 90, 93-94 (2d Cir. 1948) (dictum); *Johnson v. Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954); *State Compensation Ins. Fund v. Industrial Acc. Comm'n*, 38 Cal. 2d 659, 242 P.2d 311 (1952), 9 NACCA L.J. 64 (1952) (reversing old cases); *Blanchard's Case*, 335 Mass. 175, 188 N.E.2d 762 (1956) (fighting with tools as weapons following a quarrel over possession of employer's spreader—who struck first blow held immaterial); *Dillon's Case*, 324 Mass. 102, 85 N.E.2d 69 (1949); *Stewart v. Chrysler Corp.*, 350 Mich. 596, 87 N.W. 2d 117 (1957) (affirmed by equally divided court) (who is aggressor is question of fact); *Petro v. Martin Baking Co.*, 239 Minn. 307, 58 N.W.2d 731 (1953); *Brookhaven Steam Laundry v. Watts*, 214 Miss. 569, 56 So. 2d 381 (1951) (dictum) (citing *Dillon's Case, supra*); *Myszkowski v. Wilson & Co.*, 155 Neb. 714, 53 N.W.2d 203 (1952) (dictum); *Newell v. Moreau*, 94 N.H. 489, 55 A.2d 476 (1947), 2 NACCA L.J. 26 (1948); *Commissioner of Taxation & Fin. v. Bronx Hospital*, 276 App. Div. 708, 97 N.Y.S.2d 120 (3d Dep't 1950); *Rothfarb v. Camp Awanee*, 116 Vt. 172, 71 A.2d 569 (1950) (dictum); *Moreu v. Industrial Comm'n of Puerto Rico*, 73 P.R.A. 14 (1952) (dictum), 15 NACCA L.J. 41 (1955); *Landry v. Gilger Drilling Co.*, 92 So. 2d 482 (La. App. 1957) ("aggressor doctrine" no bar); *accord, Velotta v. Liberty Mut. Ins. Co.*, 132 So. 2d 51 (La. 1961). For a review of the subject see 15 NACCA L.J. 29 (1955). See also Small, *Effect of Workmen's Compensation on Tort Concepts*, 11 NACCA L.J. 19, 26-30 (1958); Note, 32 Neb. L. Rev. 128 (1953).

<sup>102</sup> *Vollmer v. City of Milwaukee*, 254 Wis. 162, 35 N.W.2d 304 (1948) (Dean Roscoe Pound to the contrary: aggressor short of wilful misconduct "ought not to bar an injured workman," 14 NACCA L.J. 47, 64 [1954]); *cf. Armour & Co. v. Industrial Comm'n*, 397 Ill. 433, 74 N.E.2d 704 (1947) (claimant stepped entirely out of scope of employment when he took foreman's part in argument with fellow employee and was injured—aggressor). *Contra*, cases note 101 *supra*, refusing to create the new defense of "steps aside," also borrowed from tort law, and unknown to workmen's compensation statutes.

<sup>103</sup> *Armitage v. Lancashire & Yorkshire Ry.* [1902], 2 K.B. 178 (two boys larking, third innocent boy hit in eye by piece of iron—no recovery). See list of cases in Horowitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 315-17 nn.6-12 (1946).

<sup>104</sup> *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920); *Allsep v. Daniel Constr. Co.*, 216 S.C. 268, 57 S.E.2d 427 (1950), 5 NACCA L.J. 71 (1950) (great weight compensates innocent victim).

ment. It took California's highest court thirty years to reverse itself on this issue.<sup>105</sup>

The case for the innocent victim<sup>106</sup> needs no further justification. Courts grant relief.

The case for the non-instigating participant<sup>107</sup> has also obtained acceptance. Where the injured party is a participant but did not start the horseplay, whether that type of horseplay is known<sup>108</sup> or unknown<sup>109</sup> to the employer, most courts will uphold a finding that the horseplay and resulting injury arose out of the employment.

The case of the aggressor, the instigating participant who started the unfortunate horseplay, is now treated in the same manner as the aggressor in the malicious assault cases.<sup>110</sup> The same rules apply to sportive assaults (horseplay or larking) as apply to malicious assaults. Yet some courts cannot forget their dislike for the man with "moral" fault even though fault plays no part in workmen's compensation cases.<sup>111</sup>

<sup>105</sup> *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 26 Cal. 2d 286, 153 P.2d 9 (1945) (waitress lost eye when struck by hard roll thrown by waiter).

<sup>106</sup> *American Mut. Liab. Ins. Co. v. Benford*, 77 Ga. Ann. 83, 47 S.E.2d 673 (1948); *Tabor v. Midland Flour Milling Co.*, 237 Mo. App. 392, 168 S.W.2d 458 (1943). See also list of cases in Horowitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L.J. 15, 57 n.126 (1949). See also notes 104 and 105 *supra*.

<sup>107</sup> *Crilly v. Ballou*, 353 Mich. 303, 91 N.W.2d 493 (1958), 22 NACCA L.J. 175 (1958) (both participants and non-participants in horseplay are covered—throwing shingle nails, hurt own eyes); *Joe N. Miles & Sons v. Myatt*, 215 Miss. 589, 61 So. 2d 390 (1952), 11 NACCA L.J. 79 (1953) (non-aggressive participant collects); *Maltais v. Equitable Life Assur.*, 93 N.H. 237, 48 A.2d 837 (1944) (used air hose, fatal injury—participant protected—if considered instigator, contributory fault no bar in workmen's compensation case—not serious and wilful misconduct here); *Burns v. Merritt Eng'r Co.*, 302 N.Y. 131, 96 N.E.2d 739 (1951), 7 NACCA L.J. 56 (1951) (participated in the prank, though not instigator).

<sup>108</sup> *Industrial Comm'n v. McCarthy*, 295 N.Y. 443, 63 N.E.2d 434 (1946) (employer acquiescence); *Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85, 80 N.E.2d 749 (1948) (custom of the employment); *Johnson v. Loew's, Inc.*, 7 App. Div. 2d 795, 180 N.Y.S.2d 826 (3d Dep't 1958) (messenger during enforced illness struck in eye by paper clip he was attempting to shoot out of window with rubber band. Note, however, that even in New York, horseplay is now covered even though the prank was not usual or foreseeable.) See *Burns v. Merritt Eng'r Co.*, 302 N.Y. 131, 96 N.E.2d 739 (1951), 7 NACCA L.J. 56 (1951) (drank poison put in bottle labelled "gin"—participant though not instigator).

<sup>109</sup> *Crilly v. Ballou*, 353 Mich. 303, 91 N.W.2d 493 (1958), 22 NACCA L.J. 175 (1958) (knowledge of the employer or existence of a custom of fooling as pegs on which to hang compensation are improper criteria and are rejected); *Secor v. Penn Serv. Garage*, 19 N.J. 315, 117 A.2d 12 (1955), 17 NACCA L.J. 85 (1956).

<sup>110</sup> *Newell v. Moreu*, 94 N.H. 439, 55 A.2d 476 (1947) (aggressors—instigators—in sportive assaults belong in same category as aggressors in malicious assaults); accord, *Crilly v. Ballou*, 353 Mich. 303, 91 N.W.2d 493 (1958); *Secor v. Penn Serv. Garage*, 19 N.J. 315, 117 A.2d 12 (1955); *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957). *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (The analysis applied to the "aggressor assault" case is applicable to the "horseplay participant," so long as not wilful misconduct or wilful intent to injure); *Burns v. Merritt Eng'r Co.*, 302 N.Y. 131, 96 N.E.2d 739 (1951), 7 NACCA L.J. 56 (1951) (drank poison, offered as gin); *Commissioner of Taxation & Fin. v. Bronx Hosp.*, 276 App. Div. 708, 97 N.Y.S.2d 120 (3d Dep't 1950).

<sup>111</sup> *Hartford Acc. & Indem. Co. v. Cardillo*, 112 F.2d 11, 16 n.17 (D.C. Cir. 1940) ("Natural repulsion toward rewarding intentional misconduct . . . [malicious assaults are the basic reason for denying award to aggressors, but it] ignores the fact that one purpose of the statute is sustenance of the misbehaving employee's family during his disability and their dependence is not the less because the misconduct is his rather than another's"); see note 92 *supra*. *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (playful fault revives fellow-servant rule which has no place in compensation statutes—flipped raincoat over roof of truck's cab and caused sharp turn—instigator fell off—will not read in defenses—misconduct here not serious enough to be a bar). *Eagle-Picher Co. v. McGuire*, 307 P.2d 145 (Okla. 1957) (not abandonment of employment); *Ransom v. H. G. Hill Co.*, 205 Tenn. 377, 326 S.W.2d 659 (1959) (the argument that horseplay is a deviation from work was rejected when the horseplay took place during a lull or non-work period, as there was "nothing from which employee could deviate"); *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957) (courts have difficult time eliminating tort concepts).

Nevertheless, the current weight of authority and reason places work-assaults and work-environmental horseplay in the same category and allows aggressors in both to recover.<sup>112</sup> After all, horseplay is a "sportive" or "mischievous" assault of a playful nature and deserves no different or certainly no harsher treatment than malicious assaults. Employees take with them their natural bent for larking, whether alone<sup>113</sup> or in groups,<sup>114</sup> and their playful nature overflows in myriad fashions; but so long as what they do falls short of willful misconduct or deliberate self-destruction, courts are not justified in creating a new defense labelled "instigator" or "aggressor." In short, horseplay is a risk incidental to employment;<sup>115</sup> who is to blame for the risk, while important in tort cases, has no relevancy in workmen's compensation cases.

#### (6) *Incidents of Work*

No one denies that an injury which results from the main work for which the employee is hired is compensable. But suppose the injury "arises out of" something secondary or incidental to his work, such as going to the toilet, eating, or getting fresh air.

These acts of personal ministrations<sup>116</sup> are universally recognized as compensable incidents of the employment. Getting fresh air,<sup>117</sup>

<sup>112</sup> *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960); *Crilly v. Ballou*, 353 Mich. 303, 91 N.W.2d 493 (1958) (boys threw shingles at each other, despite employer's warnings); *McKenzie v. Brikite Mfg. Co.*, 34 N.J. 1, 166 A.2d 753 (1961) ("aggressor" caused fellow-employer to turn suddenly, hit by hot asphalt scraps); *Engie-Picher Co. v. McGuire*, 307 P.2d 146 (Okla. 1957) (instigator injured—impulsive act not an abandonment of employment, merely an incident of the day's work involuntary in character); *Stark v. Industrial Acc. Comm'n*, 103 Ore. 80, 204 Pac. 151 (1922) (air hose in rectum, causing peritonitis and death—compensable); *Ransom v. H. G. Hill Co.*, 205 Tenn. 377, 326 S.W.2d 659 (1959) (truck driver playfully grabbed another employee by the britches, fell to ground, while killing time on the job—horseplay stemmed from work-connected idleness, nothing from which he could deviate—two other cases contra not followed, as current trend to be liberal and workmen's compensation law "was made for benefit of injured workman"); *Williams v. Navy Dep't*, 1 U.S. Employees' App. Bd. Dec. 80 (1948), 1 NACCA L.J. 9, 105 (1948), 15 NACCA L.J. 89 (1955) (waiting in line to get pay initiated horseplay). See also *Tilly v. Department of Labor & Indus.*, 52 Wash. 2d 148, 324 P.2d 432 (1958) (made remark, face involuntarily held and washed, precipitating breaking of sorta—compensable); *Hall v. Carnegie Institute of Technology*, 170 Pa. Super. 459, 87 A.2d 87 (1952) (horseplay not a substantial deviation from employment). See also cases cited in notes 110 and 111 *supra*, and notes 113-15 *infra*.

<sup>113</sup> *Boyd v. Florida Mattress Factory, Inc.*, 128 So. 2d 881, 883 (Fla. 1961) (without rhyme or reason, threw a firecracker under dock, blinded eye—such "insignificant antics, not to be magnified into a constructive abandonment of the employment"—denial of award reversed); *Hayes Freight Lines v. Burns*, 290 S.W.2d 836 (Ky. 1956) (horseplay with firecracker, participant lost eye; question of fact whether horseplay part and parcel of employment); *Shapaka v. State Comp. Comm'r*, 119 S.E.2d 821 (W. Va. 1961) (on way to water cooler, attempted spontaneous full somersault—landed on back—injured).

<sup>114</sup> See notes 110-12 *supra*.

<sup>115</sup> *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (character and nature of the incident arose out of employment). See cases in notes 112-13 *supra*. *Riesenfeld, Trends in Workmen's Compensation*, 42 CALIF. L. REV. 531, 551 (1954) "The reversal of the previously adamant attitude is especially noticeable in the so-called 'horseplay' and 'assault' cases. The courts have become increasingly inclined to consider horseplay as a risk incidental to the employment . . . even where he was the participant . . ." See Note, 28 NEB. L. REV. 130 (1949); *La Mallorca Taxi v. Roman Guanlao, et al.*, G.R. (Phil.) No. L-8618, Jan. 30, 1957.

<sup>116</sup> See list of cases in Horowitz, *The Litigious Phrase: "Arising out of" Employment*, 3 NACCA L.J. 15, 60-63 (1949).

<sup>117</sup> *Von Ette's Case*, 228 Mass. 56, 111 N.E. 696 (1916); *Moschinger v. Henry Heide, Inc.*, 256 App. Div. 1019, 10 N.Y.S.2d 406 (3d Dep't 1939).

smoking,<sup>118</sup> resting,<sup>119</sup> eating food or ice cream,<sup>120</sup> quenching thirst, whether by water, soft drinks, coffee, beer or wine,<sup>121</sup> taking a bath or shower away from home, whether or not provided by the employer,<sup>122</sup> using a telephone<sup>123</sup> or a toilet<sup>124</sup> and washing and pressing working clothes<sup>125</sup> have been upheld as compensable "incidents" of the employment.

Similarly, the employer can make other things "incidents" of employment by contract, custom or otherwise.<sup>126</sup> Hence supplying transportation,<sup>127</sup> providing recreation such as allowing sports to be played on the premises<sup>128</sup> or subsidizing softball, bowling, or other

<sup>118</sup> *Natco Corp. v. Mallory*, 262 Ala. 595, 80 So. 2d 274 (1955) (retrieving package of cigarettes, arm caught in revolving gear, slight deviation no bar); *Tinaman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947) (purchasing smoking tobacco); *Puffin v. General Elec. Co.*, 132 Conn. 279, 43 A.2d 746 (1945) (includes setting one's self accidentally on fire—sweater ignited by spark, in smoking room); *Columbia Cas. Co. v. Parham*, 69 Ga. App. 258, 25 S.E.2d 147 (1943) (includes injury attempting to throw away cigarette while on elevator); *Dzikowsky v. Superior Steel Co.*, 259 Pa. 578, 103 Atl. 351 (1918) (oil-soaked apron caught fire); *Mack v. Branch No. 12, Etc.*, 207 S.C. 258, 35 S.E.2d 838 (1945); *McLaughlin v. Anderson*, 4 B.W.C.C. 376 (1911) (fell under wagon wheels trying to recover pipe).

<sup>119</sup> *Sullivan's Case*, 241 Mass. 9, 134 N.E. 406 (1922) (fell through glass window in rest room); *Kubera's Case*, 320 Mass. 419, 69 N.E.2d 673 (1946) (resting on door step of laundry when injured); *Spencer v. Chesapeake Paperboard Co.*, 186 Md. 522, 47 A.2d 385 (1946) (sleeping as part of resting).

<sup>120</sup> *DeStefano v. Alpha Lunch Co.*, 308 Mass. 38, 30 N.E.2d 827 (1941) (food); *Sebek v. Cleveland Graphite Bronze Co.*, 148 Ohio 698, 76 N.E.2d 892 (1947) (ptomaine poisoning from food in plant cafeteria); *Vilter Mfg. Co. v. Jahncke*, 192 Wis. 362, 212 N.W. 641 (1927) ("eating ice cream" like "drink of water").

<sup>121</sup> *Osterbrink's Case*, 229 Mass. 407, 118 N.E. 657 (1918) (mistook poison for water); *Wells v. Morris*, 33 Ala. App. 497, 35 So. 2d 54 (1948), 3 NACCA L.J. 102 (1949) (making coffee, explosion—injuries compensable); *Goodyear Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 398, 158 P.2d 511 (1945) (bottle of cola burst); *Elliott v. Industrial Acc. Comm'n*, 21 Cal. 2d 281, 181 P.2d 521 (1942) (poison mistaken for wine needed for indisposition); *St. Alexandre v. Texas Co.*, 28 So. 2d 385 (La. App. 1946) (cut hand on cola bottle); *Martin v. J. Lovibond & Sons*, [1914] 2 K.B. 227 (draymen in street all day, knocked down after getting beer in public house—no definite interval for meals); *Davidson v. Mould*, 69 Commw. L.R. 96 (Austl. 1944) (opened cola bottle on employer's advice, blinded eye).

<sup>122</sup> *Miller v. F. A. Bartlett Tree Expert Co.*, 3 N.Y.2d 654, 148 N.E.2d 296, 171 N.Y.S.2d 77 (1958) (conference on tree surgery ended, felt "pretty grubby" after digging moss—returned to hotel, slipped in bathtub taking shower—compensable). *Divelbiss v. Industrial Comm'n*, 140 Colo. 452, 344 P.2d 1084 (1959) (showering after work—facilities furnished by employer—compensable). *overruling Industrial Comm'n v. Rocky Mountain Fuel Co.*, 107 Colo. 226, 110 P.2d 654 (1941) (as "out of harmony with the present trend of cases"); cases discussed in Note, 32 ROCKY MOUNTAIN L. REV. 257 (1960).

<sup>123</sup> *Cox's Case*, 225 Mass. 220, 114 N.E. 281 (1916) (went to answer telephone); *Holland-St. Louis Sugar Co. v. Shraluka*, 64 Ind. App. 545, 116 N.E. 330 (1917) (answering telephone of unknown location, slipped on stairway).

<sup>124</sup> *Haskin's Case*, 261 Mass. 436, 158 N.E. 845 (1927) (used bridge over river as toilet, drowned—no toilets in vicinity); *Sachleben v. Gjellefald Constr. Co.*, 228 Iowa 152, 290 N.W. 48 (1940) (sudden need for moving bowels, hid between trains which then moved—compensable); *Zabriskie v. Erie R.R.*, 86 N.J.L. 266, 92 Atl. 385 (Ct. Err. & App. 1914) (crossing street to employer's building containing the toilets).

<sup>125</sup> *Sylvia's Case*, 298 Mass. 27, 9 N.E.2d 412 (1937).

<sup>126</sup> *Donovan's Case*, 217 Mass. 76, 104 N.E. 431 (1914) (transportation is contractual incident); *Stony-Brady, Inc. v. Heim*, 152 Fla. 710, 12 So. 2d 888 (1943) ("or otherwise"—restaurant manager volunteered to remove "crick" in waitress's neck, injured her spinal column—arose out of employment); *DeSautel v. North Dakota Workmen's Comp. Bureau*, 75 N.D. 405, 28 N.W.2d 378 (1947) (custom, conduct of parties, may create new incidents); *Portee v. South Carolina State Hosp.*, 234 S.C. 50, 106 S.E.2d 670 (1959), 23 NACCA L.J. 167 (1959) (co-worker at hospital administers penicillin to hospital attendant—dies of shock—incident of employment, despite negligence and disobedience of rules).

<sup>127</sup> See note 126 *supra*. For discussion of exceptions to going and coming rule, see notes 204-10 *infra*.

<sup>128</sup> *University of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953), 12 NACCA L.J. 79 (1953) (spring football practice held incident of student's employment); *Geary v. Anaconda Mining Co.*, 120 Mont. 485, 188 P.2d 185 (1947) (handball during lunch); *Tocci v. Tessler & Weiss, Inc.*, 23 N.J. 582, 147 A.2d 783 (1959), 23 NACCA L.J. 147 (1959) (hurt during customary lunch-hour softball game); *Brown v. United Servs. for Air*, 273 App. Div. 932, 78 N.Y.S.2d 37 (8d Dep't 1948), *aff'd*, 298 N.Y. 901, 84 N.E.2d 810 (1949) (volleyball on premises during lunch hour); *Clancy v. Department of Pub. Health* [1959], W.C.R. 49 (New South Wales) (compensation awarded to a male nurse at a mental hospital injured in after-hours soccer games on the hospital field—patients were encouraged to watch); *Schneider, Compensability of Injuries During Employer-Sponsored Recreation*, 2 NACCA L.J. 62 (1948).

teams to compete with rivals,<sup>129</sup> whether day or night, may be considered "incidents" of the employment; and injuries during such transportation or play have been held to "arise out of" the employment and thus are compensable.

Any reasonable incident of the employment, properly proved, may be the basis of compensation liability; it is not limited to personnel administrations or employee games. Christmas parties and outings,<sup>130</sup> and the use of hotel rooms<sup>131</sup> have been held to be compensable incidents of the employment. But the link to the work must be established by evidence and not by surmise.

#### (7) *Slight Deviation and Curiosity as Incidents of Work*

At common law the defenses of deviation and curiosity may have had some validity. Using narrow common-law reasoning, many early courts denied workers compensation recovery on mere proof that the minor deviation<sup>132</sup> play some part in the injury, or that curiosity<sup>133</sup> was one of the factors causing the injury.

Modern courts no longer follow these rules. Slight deviation is not a defense under most decisions.<sup>134</sup> Thus a slight deviation

<sup>129</sup> *Turner v. Willard*, 154 F. Supp. 352 (S.D.N.Y. 1956) (bowling league captain injured on trip to see bowling league president during working hours—no deviation or abandonment of employment—workmen's compensation not confined by common-law concepts of employment); *Jewell Tea Co. v. Industrial Comm'n*, 6 Ill. 2d 304, 128 N.E.2d 699 (1955) (intra-company baseball league, injured sliding into third base—esprit de corp among employees as benefit to employer); *Complitano v. Steel & Alloy Tank Co.*, 34 N.J. 300, 168 A.2d 809 (1961) (softball after hours, employer paid for uniforms, denial of compensation reversed); *Tedesco v. General Elec. Co.*, 305 N.Y. 544, 114 N.E.2d 33 (1953), 13 NACCA L.J. 65 (1954) (despite incorporation of teams, ball game subsidized by employer—denial of compensation reversed); *Ott v. Industrial Comm'n*, 88 Ohio App. 13, 82 N.E.2d 137 (1948) (heart attack during baseball game sponsored by employer—compensable).

<sup>130</sup> *Noble v. Zimmerman*, 237 Ind. 556, 146 N.E.2d 828 (1957), 21 NACCA L.J. 176 (1956) (recreational outing to encourage attendance at business meeting, racing-dive in lake near employer's cottage, fractured cervical vertebra without contacting anything—compensable); *Moore's Case*, 330 Mass. 1, 110 N.E.2d 764 (1953), 12 NACCA L.J. 77 (1953) (dancing at annual Christmas party—fractured coccyx "jitterbugging"—blanket denial of compensation reversed, remanded); *Graves v. Central Elec. Power Co-op*, 306 S.W.2d 500 (Mo. 1957), 21 NACCA L.J. 177 (1958) (employee drowned in attempt to rescue own son at company-sponsored picnic—stand-by duty concurrently—compensable); *Torres v. Triangle Handbag Mfg. Co.*, 13 App. Div. 559, 211 N.Y.S.2d 992 (3d Dep't 1961) (drinking at boss's Christmas party, jealous, stabbed co-employee—compensable).

<sup>131</sup> *Wiseman v. Industrial Acc. Comm'n*, 46 Cal. 2d 570, 297 P.2d 649 (1956) (commercial traveler at hotel, asphyxiated in fire—immaterial that he had overnight guest (female) for an immoral or unlawful purpose—shelter was an incident of his employment). See also cases cited note 321 *infra*.

<sup>132</sup> *Horton's Case*, 275 Mass. 572, 176 N.E. 648 (1931) (deviated from toilet route to pick up a newspaper) (This early case would probably not be followed today in Massachusetts—author). *Covutra*, *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947) (refusing to follow early Massachusetts and Indiana "slight deviation" cases, as they were against the modern trend).

<sup>133</sup> *Maronofsky's Case*, 234 Mass. 343, 125 N.E. 565 (1920). But see *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 (D. Md. 1946) (refused to follow *Maronofsky's Case*, *supra*).

<sup>134</sup> *Natco Corp. v. Mallory*, 262 Ala. 595, 80 So. 2d 274 (1955) (retrieving package of cigarettes, arm caught in revolving gear, slight deviation no bar); *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947); *Western Pipe & Steel Co. v. Industrial Acc. Comm'n*, 49 Cal. App. 2d 108, 121 P.2d 35 (1st Div. 1942); *Bernier v. Greenville Mills*, 93 N.H. 165, 37 A.2d 5 (1944); *Secor v. Penn Serv. Garage*, 19 N.J. 315, 117 A.2d 12 (1955), *affirming* 35 N.J. Super. 59, 113 A.2d 177 (Super. Ct. 1955) (garage attendant momentarily and impulsively deviated from work to strike match, perhaps in mock bravado—gasoline-soaked clothes ignited—akin to curiosity and horseplay cases—compensable); *Miller v. C. F. Mueller Co.*, 132 N.J.L. 540, 41 A.2d 402 (Sup. Ct. 1945) (deviated to help fellow worker on a machine); *Frank v. Allen*, 270 App. Div. 960, 61 N.Y.S.2d 728 (3d Dep't 1946); *Wickham v. Glenside Woolen Mills*, 252 N.Y. 11, 168 N.E. 446 (1929); *Corlett v. Lancashire Ry.*, 11 B.W.C.C. 293, 18 N.C.C.A. 1043 (1918).

to get a chew of tobacco,<sup>135</sup> or to ask a fellow worker the time<sup>136</sup> or to throw away or retrieve cigarettes<sup>137</sup> is harmless; and awards are upheld even when the injury occurred during the deviation.

Deviations for traveling employees have caused judicial upheavals.<sup>138</sup> Most courts will award compensation where the deviation is cured by a return to the main or permissible route,<sup>139</sup> or where the employee, after the personal trip is over but before the main business route is regained, is proceeding in the direction of his business destination.<sup>140</sup> Minor or insubstantial route deviation is usually no defense.<sup>141</sup> A deviation by the driver of a vehicle is not to be charged against passengers,<sup>142</sup> whether the driver is a superior or a fellow-employee.

The subject of curiosity is closely akin to that of slight deviation, and to some extent to horseplay. A slight deviation to get a cigarette or to take time out from work for various temporary purposes is not a bar to compensation. By the same token a minor deviation induced by curiosity is no bar.

<sup>135</sup> *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947) (crossing street to purchase smoking tobacco, hit by automobile); *Western Pipe & Steel Co. v. Industrial Acc. Comm'n*, 49 Cal. App. 2d 108, 121 P.2d 35 (1st Div. 1942) (slight deviation to get cigarettes during lunch hour).

<sup>136</sup> *Corlett v. Lancashire Ry.*, 11 B.W.C.C. 293, 18 N.C.C.A. 1043 (1913).

<sup>137</sup> *Natco Corp. v. Mallory*, 262 Ala. 595, 80 So. 2d 274 (1955); *Columbia Gas. Co. v. Parham*, 69 Ga. App. 258, 25 S.E.2d 147 (1943) (caught arm in elevator while throwing away his cigarette—employment at least "a contributing cause").

<sup>138</sup> 1 LARSON, *WORKMEN'S COMPENSATION*, sec. 19 (1960) (deviations, with multiple diagrams, to try to explain the varying court decisions).

<sup>139</sup> *Ohmen v. Adams Bros.*, 109 Conn. 378, 146 Atl. 825 (1929) (voted, then regained main highway between his home and work); *Allison v. Brown & Horsch Insulation Co.*, 98 N.H. 434, 102 A.2d 493 (1954) (cured by the return to the usually traveled route); *Neville v. Arthur Anderson Co.*, 284 App. Div. 994, 135 N.Y.S.2d 349 (3d Dep't 1954) (personal side trip completed).

<sup>140</sup> *London Guar. & Acc. Co. v. Herndon*, 81 Ga. App. 178, 181, 58 S.E.2d 510, 512 (1950) ("[H]e again resumed the duties of his employment."); *accord*, *Federal Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n*, 94 Cal. App. 251, 270 Pac. 992 (2d Div. 1928) (personal business over, he headed for business destination by alternate direct route—employee had broad latitude as to hours of work); *Stratton v. Interstate Fruit Co.*, 47 S.D. 452, 199 N.W. 117 (1924) (though "he may have deviated to some extent from the strict line of duty,"—driving employer's truck, danger of being struck by a streetcar was "incident to such employment"). *Contra*, *Public Serv. Co. v. Industrial Comm'n*, 395 Ill. 238, 69 N.E.2d 875 (1946) (killed on railroad crossing, headed for storage garage, but after deviating to own home—compensation denied); *Warren v. Globe Indem. Co.*, 217 La. 142, 46 So. 2d 66 (1950) (back in business direction, but also taking girl companion home); *Luke v. St. Paul Mercury Indem. Co.*, 140 Neb. 557, 300 N.W. 577 (1941) (Y.M.C.A. general secretary attended brother's funeral in Montana and headed for conference in Colorado—denied, despite employer's permission to attend funeral).

The *contra* cases are unusually harsh—and unless proof establishes that the new road created an increased risk, in violation of orders, the injury should be held to "arise out of" the employment as a risk of driving, without technical discussions of serious versus slight deviations. See *Spradling v. International Shoe Co.*, 364 Mo. 938, 270 S.W.2d 28 (1954), 15 NACCA L.J. 77 (1955) (salesman headed for Springfield fifteen or twenty miles outside of his territory to pick up wife—never reached her as killed in automobile collision ten miles from Springfield. His death here was not the result of an "added peril"—considered "slight deviation" in choice of routes as not to affect the applicability of the Workmen's Compensation Law).

<sup>141</sup> *Spradling v. International Shoe Co.*, 364 Mo. 938, 270 S.W.2d 28 (1954), 15 NACCA L.J. 77 (1955); *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947); *Western Pipe Co. v. Industrial Acc. Comm'n*, 49 Cal. App. 2d 108, 121 P.2d 35 (1942) (running across street to buy food, in the course of a delivery trip); *Martin v. J. Lovibond & Sons* (1914), 2 K.B. 227 (leaving delivery conveyance to have a glass of beer at two o'clock in the afternoon).

<sup>142</sup> *Allison v. Brown & Horsch Insulation Co.*, 98 N.H. 434, 102 A.2d 493 (1954) (employees were not drivers and need not protest a deviation by a superior; also deviation here cured by return to usual traveled route); *Soden v. Public Serv. Transp. Co.*, 4 N.J. Misc. 817, 134 Atl. 560 (Sup. Ct. 1926), *aff'd by equally divided court*, 103 N.J.L., 713 137 Atl. 437 (Ct. Err. & App. 1927) ("passive occupants of car," driver a fellow employee, deviated to visit scene of an accident); *Texas Employers Ins. Ass'n v. Chitwood*, 199 S.W.2d 806 (Tex. Civ. App. 1946) (need not protest against deviation).

Employees are not only careless, awkward and full of frailties; but they bring with them to their jobs their prankishness, and their bad habits as well as their good ones. They smoke, drink sodas, chat and waste time. They also have a bent for putting parts of their anatomy in contact with machines, openings, and temporarily closed spots. But employees are not mere automatons and cannot be held to definite patterns like a machine.<sup>143</sup> The workmen's compensation acts were intended to protect them for any accident reasonably related to the employment.

Hence most modern courts protect workers against their own follies where they fall short of willful misconduct or deliberate self injury. The great weight of authority currently holds that injuries received during slight deviations to satisfy curiosity are compensable<sup>144</sup> no matter what form the curiosity may take, so long as it is what reasonably may occur to workers on the job in question and it is impulsive, thoughtless, or momentary. Thus awards have been allowed where the curiosity has taken the form of sticking one's head in an opening,<sup>145</sup> finger-testing a revolving blade<sup>146</sup> or opening a glove compartment and accidentally exploding a bomb.<sup>147</sup> But a deliberate, extensive excursion resulting in substantial abandonment of the employee's work may result in the denial of an award.<sup>148</sup>

#### (8) *Violation of Rules or Laws*

The attempt to deny compensation because the employee was going faster than the speed limit when he was injured (violation of law),<sup>149</sup> or because the employee was injured while carrying stones

<sup>143</sup> "Human beings, unlike machines, do not run in grooves . . ." Horovitz, *The Litigious Phrase: "Arising out of" Employment*, 4 NACCA L.J. 19 (1949). *Conyers v. Krey Packing Co.*, 194 S.W.2d 749, 752 (Mo. Ct. App. 1946) ("An employee is not to be regarded as an automaton . . .").

<sup>144</sup> *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 (D. Md. 1946); *Bernier v. Greenville Mills*, 93 N.H. 165, 87 A.2d 5 (1944); *Franck v. Allen*, 270 App. Div. 960, 61 N.Y.S.2d 728 (3d Dep't 1946); *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 61 S.E.2d 654 (1950). See also *Boyd v. Florida Mattress Factory, Inc.*, 128 So. 2d 881 (Fla. 1961) (without rhyme or reason, threw firecracker under dock, blinded eye—such "insignificant antics should not be magnified into a constructive abandonment of employment"—denial of award reversed). *Derby v. International Salt Co.*, 233 App. Div. 15, 251 N.Y. Supp. 531 (3d Dep't 1931) (out of curiosity picked up a little box on floor—dynamite cartridges). "It seems to be generally accepted today that employees are likely to explore during their spare time, and this may be fairly regarded as a part of the daily routine of work . . ." MALONE, ACCIDENTS PROMOTED BY EMPLOYEES'S CURIOSITY, in LOUISIANA WORKMEN'S COMPENSATION 217 (1951).

<sup>145</sup> *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 (D. Md. 1946).

<sup>146</sup> *Bernier v. Greenville Mills*, 93 N.H. 165, 87 A.2d 5 (1944).

<sup>147</sup> *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 61 S.E.2d 654 (1950); accord, *Franck v. Allen*, 270 App. Div. 960, 61 N.Y.S.2d 728 (3d Dep't 1946) (found dynamite cap sweeping floor, picked up nail and prodded, cap exploded).

<sup>148</sup> *Simon v. Standard Oil Co.*, 150 Neb. 799, 36 N.W.2d 102 (1949) (after his own work finished, went from his wash room to the paint room, where new exhaust fan had been installed, thirty feet away, considered serious deviation—strong dissent by Carter, J.); accord, *Robertson v. Express Container Corp.*, 18 N.J. 342, 99 A.2d 649 (1953) (deliberate excursion to roof ladder, fell through glass section—three dissents); "[A]ccount ought to be taken of the ordinary habits and modes of conduct of workers in the intervals of inactivity in the course and place of their daily tasks." Pound, 13 NACCA L.J. 61 (1954).

<sup>149</sup> *Day v. Gold Star Dairy*, 307 Mich. 383, 12 N.W.2d 5 (1943) (truck driver going uphill at forty-seven miles per hour on wrong side of road, hit by oncoming automobile—award stands, though found guilty in criminal court).

by tractor after his employer had told him to use his hands (violation of an order or rule),<sup>150</sup> has failed to impress the courts.

As long as the worker is doing what he is hired to do, the fact that he uses the wrong method<sup>151</sup> or violates some law<sup>152</sup> will not deprive him of his compensation rights. The only defenses given by most acts are "serious and wilful misconduct," deliberate self injury and "intoxication"; short of these, the court will not read "violation of rules" and "violation of laws" into the acts.<sup>153</sup> In fact, most of these violations result from mere negligence<sup>154</sup> or thoughtlessness,<sup>155</sup> neither of which are defenses.

### (9) *Suicide*

Originally the cases required the dependents of a suicide to prove that the suicide was due to (1) an uncontrollable impulse, or alternatively, (2) a delirium so strong that the deceased did not realize that he was ending his life.<sup>156</sup> His insane "choice" to die was regarded as voluntary and wilful, and breaking the chain of causation.<sup>157</sup> This requirement was erroneously imported from tort law<sup>158</sup>

<sup>150</sup> Ricci v. Katz, 267 App. Div. 923, 46 N.Y.S.2d 781, 782 (3d Dep't 1944) "The use of the tractor was but an incident in the principal job of removing and carting away the stones. Claimant performed his work in a forbidden manner, rather than performing work which had been forbidden."

<sup>151</sup> Blair & Co. v. Chilton, 8 B.W.C.C. 324 (1915) (told to use safe platform and not to sit while turning wheel—workman acting within sphere of employment, though doing work in wrong way); Dravo Corp. v. Strosnider 43 Del. 256, 45 A.2d 542 (1945) (over 400 rules printed, violated one about riding on truck he was pushing—dead letter paper rule no bar); Prentice v. Twin City Wholesale Grocery, 292 Minn. 455, 278 N.W. 895 (1938) (forbidden to ride on conveyor, yet did so to facilitate his work, injured hand—doing one's work in wrong manner not a bar); Oklahoma Ry. v. Cannon, 198 Okla. 65, 176 P.2d 482 (1946) (violation as to manner of performing work i.e., safety regulations, not fatal).

<sup>152</sup> Philbrick Ambulance Serv. v. Buff, 73 So. 2d 273 (Fla. 1954) (ambulance driver went through red light at thirty miles per hour, in violation of law); Wiseman v. Industrial Acc. Comm'n, 46 Cal. 2d 570, 297 P.2d 649 (1956) (fire in hotel, female unlawfully with employee [bank official]—the risk of fire was in no way increased); Webb v. Johnson, 195 Md. 587, 599, 74 A.2d 7, 12 (1950) (private pilot had no license to take passengers, but did so, killed—compensable. "There appears to be nothing in the compensation statutes to bar an employee from recovery because he violates a statute."); Chaffee v. Effron, 1 App. Div. 2d 197, 149 N.Y.S.2d 115 (3d Dep't 1956) (drove employer's car around curve at illegal speed, over center line, killed in collision with a truck—compensable); M & K Corp. v. Industrial Comm'n, 112 Utah 488, 189 P.2d 132 (1948) (a leading case—father was killed when unlicensed son [violation of law] drove truck—no bar, went only to the manner of doing the work); Filteways v. Industrial Comm'n, 249 Wis. 496, 24 N.W.2d 900 (1946) (illegal "buzzing").

<sup>153</sup> Vaz's Case, 174 N.E.2d 360 (Mass. 1961) (employee, stuck in elevator, climbed out of window and was hurt—rule against using elevator was not enforced—not quasi criminal, so not serious and wilful misconduct); Carey v. Bryan & Rollins, 49 Del. 387, 117 A.2d 240 (1955) (sixty-five mile speed and lighting cigarette, ran into pole—not even "wilful failure" to perform a duty required by statute), 17 NACCA L.J. 63 (1956); Newell v. Moreau, 94 N.H. 439, 55 A.2d 476 (1947).

<sup>154</sup> Corrina v. De Barbier, 247 N.Y. 357, 160 N.E. 397 (1928) (fell asleep on wagon on ferry in disobedience of orders; mere negligence and no bar to recovery); Shute's Case, 290 Mass. 393, 195 N.E. 354 (1935) (distributing circulars in seventeen degrees below zero weather—failed to wear mittens, froze hands—mere negligence, no bar); Chaffee v. Effron, 1 App. Div. 2d 197, 149 N.Y.S.2d 115 (3d Dep't 1956) (excessive speed around curve—mere negligence).

<sup>155</sup> Thompson v. State Compensation Comm'r, 133 W. Va. 95, 54 S.E.2d 13 (1949) (act done impulsively and spontaneously); Nazario Pantoja v. Nemesio Villaluz, R03 WC. Case No. 670, September 30, 1960 (Phil.).

<sup>156</sup> Sponatski's Case, 220 Mass. 526, 108 N.E. 466 (1915) (molten lead in eye, uncontrollable impulse, jumped through window, did not realize the nature of his act).

<sup>157</sup> Ruschetti's Case, 299 Mass. 425, 13 N.E.2d 34 (1938) (chain of causation is broken by the voluntary though insane choice of the injured person to die—the employee's arm was amputated, very painful, hanged self); Barber v. Industrial Comm'n, 241 Wis. 462, 466, 6 N.W.2d 199, 202 (1942) (Fowler, J. dissenting) (no break in the causal chain, refused to accept "any species of fine-spun reasoning").

<sup>158</sup> Sponatski's Case, 220 Mass. 526, 530, 108 N.E. 466, 467 (1915) expressly stated: "This decision rests upon the rule established in Daniels v. New York, N.H. & H.R. Co., 183 Mass. 393, 67 N.E. 424 (1903)." (a tort case).

and read into workmen's compensation statutes in the days when courts brought back fault in disguised garb.<sup>159</sup> The Massachusetts rule, based on the tort law, was finally changed by statute.<sup>160</sup> The current weight of authority has now dropped the second requirement—that the deceased be unaware that he is ending his life.<sup>161</sup> But the slight weight of authority, but not of reason, still requires some proof, albeit weak, of uncontrollable impulse.<sup>162</sup> However, an impressive and growing minority require only that the injury lead to mental derangement or insanity, and that the mental derangement or insanity lead to the suicide.<sup>163</sup>

The common-law theory that suicide, being a crime breaks the chain of causation, no longer appeals to the courts.<sup>164</sup> The overwhelming weight of authority holds that suicide following mental derangement or insanity is not wilful self-destruction; hence it is not barred by the usual compensation statute which makes exceptions for wilful intent to injure one's self or another person.<sup>165</sup>

The time has now come for strong courts to declare forthrightly that tort theories no longer control workmen's compensation suicide

<sup>159</sup> See the cases cited in notes 6, 97, 111 *supra* and 384 *infra*.

<sup>160</sup> MASS. STAT. 1937, c. 370, sec. 2 (now MASS. GEN. LAWS ANN. c. 152, sec. 26A [(1958)]).  
<sup>161</sup> *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) (aware he was causing death, yet compensable); *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949), 5 NACCA L.J. 74 (1950); *Anderson v. Armour & Co.*, 257 Minn. 281, 289, 101 N.W.2d 435, 440 (1960). 25 NACCA L.J. 206 (1960) (psychotic depression amounting to insanity from automobile accident at work—claimant physically unharmed, but threw pedestrian 80 feet, finally irresistible impulse to kill self. Compensable though "one may commit an act knowing it was wrong and with full realization of its consequences, yet the act may be the result of insanity rather than the individual's own conscious act."); *Pushkarowitz v. A. & M. Kramer*, 275 App. Div. 875, 88 N.Y.S.2d 885 (3d Dep't 1949) (no discussion of the issue of knowing the nature of the act). See also the English cases in note 163 *infra*.

<sup>162</sup> *Wilder v. Russell Library Co.*, 107 Conn. 56, 139 Atl. 644 (1927) (librarian, overworked, became insane and committed suicide—"an act for which she was not morally responsible, and which was due to uncontrollable impulse"); *Anderson v. Armour & Co.*, 257 Minn. 281, 101 N.W.2d 435 (1960); (irresistible impulse); *Lupfer v. Baldwin Locomotive Works*, 269 Pa. 275, 112 Atl. 458 (1921) (suicide due to uncontrollable impulse); *Karlen v. Department of Labor & Indus.*, 41 Wash. 2d 301, 249 P.2d 364 (1952) (found "uncontrollable impulse"); *Gatterdam v. Department of Labor & Indus.*, 185 Wash. 628, 56 P.2d 693 (1936) (uncontrollable impulse or delirium, all having origin in foot injury).

<sup>163</sup> *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), 8 NACCA L.J. 46 (1951) (although Deputy Commissioner below mentioned "uncontrollable impulse," Circuit Judge Borah nowhere in his opinion relies on that finding); *Burnight v. Industrial Acc. Comm'n*, 181 Cal. App. 2d 816 (Dist. Ct. App. 1960) (breakdown because of pressures of work, slashed wrists—irresistible impulse unnecessary, the sensible and humane view granting compensation when the mental injury deprives the deceased of normal judgment and overwhelms him with the belief that death is his only escape); *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949) (the injury directly led to the mental disturbance which in turn directly led to the suicide); *Stapleton v. Keenan, Gifford & Lunn Apartment House Co.*, 265 N.Y. 523, 193 N.E. 305 (1934) (awake all night before, because of pain from infected hand; committed suicide by hanging while temporarily insane); *Delinowska v. National Biscuit Co.*, 248 N.Y. 93, 161 N.E. 431 (1928) (injury caused brain derangement which led to suicide—enough—compensable); *McIntosh v. E. F. Hauserman Co.*, 12 App. Div. 2d 406, 211 N.Y.S.2d 482 (3d Dep't 1961) (fractured skull, seizures, depression, shot self—"insidious breakdown of this man's mental and physical capacities"); *Pushkarowitz v. A. & M. Kramer*, 275 App. Div. 875, 88 N.Y.S.2d 885 (3d Dep't 1949), *aff'd*, 300 N.Y. 637, 90 N.E.2d 494 (1950) (eye injury, depressive psychosis, suicide by drinking poison); *Marriott v. Maltby Colliery*, 13 B.W.C.C. 353 (1920) (miner's severely injured hand caused insanity, and suicide, by cutting own throat); *Dixon v. Sutton, etc. Colliery*, 23 B.W.C.C. 135 (1930) (miner depressed by nystagmas, found in canal two and one-half miles from home—mental derangement is as competent as insanity *en nomine* to cause death to be result of accident). See also page 128, NACCA L.J. 310.

<sup>164</sup> *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464 (Fla. 1949) (fell from roof, excruciating pain, swallowed poison (potash and lye)—suicide is intervening act but not intervening cause—compensable). Cases in note 163 *supra* do not subscribe to breaking of the chain of causation by the suicide. *Barber v. Industrial Comm'n*, 241 Wis. 462, 6 N.W.2d 199 (1942).

<sup>165</sup> *Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) (choice to kill self not voluntary, and not within exception of wilful intent to kill self); *Whitehead v. Keene Roofing*

cases; all that is required is reasonable proof that the injury led to the mental derangement which in turn led to the suicide, without requiring proof of an uncontrollable impulse.

### (10) *Slips and Falls*

From the outset courts have allowed awards where the employee slipped on the floor, whether the cause was a defective floor, a slippery floor or a negligent act on the part of the employee himself.<sup>166</sup>

Similarly, a fall from any height—as from a staging<sup>167</sup> onto the level floor—has been held to “arise out of” the employment, no matter what the cause of the fall later proved to be. Even if the cause was a non-industrial fit of dizziness, heart attack or any other idiopathic disease,<sup>168</sup> the courts reasoned that the injury for which compensation was claimed was one resulting both from the fall from an elevated position and from contact with the level floor. The claim was for the fractured skull, broken bone, burns or whatever contact-injury occurred, and was not for the idiopathic disease. The causal relation to the work was found both in the increased risk of being on a height and in the contact with the employer's floor.

Likewise, if the employee fell while standing on the level floor but hit his head on a box<sup>169</sup> or a raised object on the floor, the resulting injury “arose out of” his employment. Falling on the employer's

Co., 43 So. 2d 464 (Fla. 1949); Olson v. F. I. Crane Lumber Co., 107 N.W.2d 223 (Minn. 1961) (work-connected heart attack, depressed, led to mental illness, imagined that people were after him, committed suicide by strangulation); Anderson v. Armour & Co., 257 Minn. 281, 101 N.W.2d 435 (1960) (not intentionally self-inflicted, as irresistible or uncontrollable impulse—not wilful self-destruction); Prentiss Truck & Tractor Co. v. Spencer, 228 Miss. 66, 87 So. 2d 272 (1956) (did not have the mental capacity to determine the consequences of his act—not voluntary or wilful—back injury, depression, suicide); Burnett v. Industrial Comm'n, 87 Ohio App. 441, 93 N.E.2d 41 (1949) (jury said involuntary act—shot himself); Karlen v. Department of Labor & Indus., 41 Wash. 2d 301, 249 P.2d 364 (1952) (not a “deliberate voluntary intent to take his own life”).

<sup>166</sup> Caccamo's Case, 316 Mass. 358, 55 N.E.2d 614 (1944) (slipped on water or oil, striking head on truck); Employers Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n, 41 Cal. 2d 676, 680, 263 P.2d 4, 7 (1953) (“The injury would be compensable whether the cause of the fall was a slippery or defective floor, or was due to nothing more than his innate awkwardness or even carelessness.”); Morgan v. B. Colliery Co., 15 B.W.C.C. 52 (1922) (slipped on floor, with unusual result: choked on nut he was eating).

<sup>167</sup> Gonier v. Chase Co., 97 Conn. 46, 115 Atl. 677 (1921) (painter fell from a staging due to idiopathic condition (fainting spell), but died from a fractured skull—award upheld); Rockford Hotel Co. v. Industrial Comm'n, 300 Ill. 87, 132 N.E. 759 (1921) (fell into pit, did not die from the pre-existing idiopathic conditions but from the burns he received after falling in the pit); Watson v. Grimm, 200 Md. 461, 90 A.2d 180 (1952) (idiopathic dizziness, fell from running board of a truck, run over—compensable as “contributed” to by one factor of the employment); Zarsa v. Aluminum Co. of America, 270 App. Div. 966, 62 N.Y.S.2d 75 (3d Dep't 1946) (fatal fall from platform about seven feet above ground).

<sup>168</sup> Used in the sense of non-industrial, in no way related to the employment—technically like a “primary disease.” WEBSTER'S NEW COLLEGIATE DICTIONARY (1955). See excellent discussion of this subject in National Auto. & Cas. Ins. Co. v. Industrial Acc. Comm'n, 75 Cal. App. 2d 577, 171 P.2d 594 (Dist. Ct. App. 1946) (fell to floor, hit sawhorse at end of bench—overwhelming weight of authority where worker hits something on way down—“contributed to by some factor peculiar to the employment”).

<sup>169</sup> Varao's Case, 316 Mass. 363, 55 N.E.2d 451 (1944) (dizzy spell, fell on iron motor box); Garcia v. Texas Indem. Ins. Co., 146 Tex. 413, 209 S.W.2d 333 (1948) (a leading case reviewing cases nation-wide—here fall was against a post with sharp edges, considered a special hazard); accord, citing Varao's Case, supra, Tapp v. Tapp, 192 Tenn. 1, 236 S.W.2d 977 (1951) (“blacked out,” auto ran into ditch—reasonable doubts must be resolved in favor of the worker—here work was “contributory cause”—employers take employees “as is”—employment exposed him to this hazard), 7 NACCA L.J. 70 (1951).

stairway<sup>170</sup> or into the employer's machinery, hot stove or pit<sup>171</sup> has long been considered a risk of the employment and hence compensable, even if the cause of the fall had nothing to do with the work. Where the cause is not related to the work—such as a heart attack, dizzy spell or epileptic seizure—it is usually called an idiopathic or non-industrial cause.

If the cause of the fall is unknown—an unexplained fall on the level floor or elsewhere at work—the overwhelming weight of authority allows recovery.<sup>172</sup> "Unexplained" falls usually lead to a "presumption" of work-connection.

However, a sizeable number of judges have distinguished the "increased risk" and "unexplained" fall cases from those where a standing employee, for a known or admittedly non-industrial reason, falls on a hard floor and fractures his skull. Even though he asks compensation solely for the new injury and not for any aggravation of the idiopathic disease, they deny recovery.<sup>173</sup> These judges reason that they must stop the payment of compensation somewhere, and the level floor seems to be that spot. And this is so even though the particular factory is one of the very few in the state which has an iron floor or a concrete floor—a decidedly increased risk!<sup>174</sup>

<sup>170</sup> *Ousick's Case*, 260 Mass. 421, 157 N.E. 596 (1927) (epilepsy on stairway, led to fractured skull).

<sup>171</sup> *Rockford Hotel Co. v. Industrial Comm'n*, 300 Ill. 87, 132 N.E. 759 (1921) (epilepsy, fell into pit and was burned to death); *Stasel v. American Radiator & Standard San. Corp.*, 278 S.W.2d 721 (Ky. 1955) (epilepsy, fell on hot stove causing burns on arms and hands—employment a "contributing cause"); *Dow's Case*, 281 Mass. 348, 121 N.E. 19 (1918) (non-industrial heart attack, fell into machine, neck severed, compensable).

<sup>172</sup> *Upton v. Great Cent. Ry* [1924], A.C. 302 (fell on railway platform which was not slippery or defective—cause of fall was completely unknown). Lord Atkinson said: "Here the accident was caused by the performance of an act the deceased was employed to perform—namely, to traverse the platform . . . [H]aving been done in the course of the employment of the deceased, and the accident having been caused by the doing of it even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased." *Id.* at 315; *New Amsterdam Cas. Co. v. Hoage*, 62 F.2d 468 (D.C. Cir. 1932) (unexplained fall while crossing the street—employment placed him in the position where the accident occurred); *Burton-Shields Co. v. Steele*, 119 Ind. App. 216, 83 N.E.2d 623 (1949) (fall on concrete floor, cause of fall unknown, found in pool of blood—the "cause of the fall may be disregarded"); *De Vine v. Dave Steel Co.*, 227 N.C. 684, 44 S.E.2d 77 (1947) (found with fractured skull on cement platform where he had been lowering a flag—cause of fall unknown. An inference was permissible that the cause of the fall was industrial); *Robbins v. Bossong Hosiery Mills*, 220 N.C. 246, 17 S.E.2d 20 (1941) (completely unexplained fall—as no affirmative evidence that it arose from a cause independent of the employment, and admittedly it was "in the course of" the employment, an award would be sustained). New York has repeatedly upheld unexplained-fall awards. *E.g.*, *Martin v. Plaut*, 298 N.Y. 617, 59 N.E.2d 429 (1944); *Andrews v. L. & S. Amusement Corp.*, 253 N.Y. 97, 170 N.E. 506 (1930); *Salvacion Pelayo v. Visayan Stevedore Trans. Co.*, W.C. Case No. 3116, March 8, 1961 (Phil.).

<sup>173</sup> *Cinmino's Case*, 251 Mass. 158, 146 N.E. 245 (1925) (despite floor of rough cement rather than of wood); *accord*, citing this Massachusetts case; *Riley v. Oxford Paper Co.*, 149 Me. 418, 103 A.2d 111 (1954); *Dustin v. Lewis*, 99 N.H. 404, 112 A.2d 54 (1955). The majority in New Jersey followed the early 1925 Massachusetts case and others stemming therefrom: *Henderson v. Celanese Corp.*, 16 N.J. 208, 103 A.2d 267 (1954) (epileptic fit, fell on concrete floor, cerebral concussion). See excellent dissent in court below, 80 N.J. Super. 353, 104 A.2d 720 (App. Div. 1954).

<sup>174</sup> Even Professor Larson who prefers the theory of non-liability for falls on ordinary level floors, is willing to concede an exception for concrete floors: "This distinction between concrete floors and other surfaces, while it approaches the vanishing point, is not altogether without substance. A dish which, dropped on the kitchen linoleum, might survive, would not have a chance on the concrete floor of a factory." 1 LARSON, WORKMEN'S COMPENSATION LAW, sec. 12.14, at 165 (1952). He agrees, also, that unexplained falls to level floors are and should be compensable on the "but for" theory. "In appraising the extent to which the courts are willing to accept this general 'but for' theory, then, it is significant to note that most courts confronted with the unexplained-fall problem have seen fit to award compensation. . . . [T]here is surprisingly little contra authority." *Id.* at sec. 10.31, at 97. Massachusetts used to be *contra*, but now changed by statutory presumption, MASS. GEN. LAWS ANN. c. 152, sec. 7A (1958).

Fortunately, the modern weight of reason and the current weight of authority permits awards for injuries from falls onto level floors, due to non-industrial disease or unexplained causes.<sup>175</sup> These courts do not distinguish between falls onto the level floor and falls onto boxes two inches above the floor or into machinery—all falls are compensable where the injury results from contact with the floor or other objects.<sup>176</sup>

It should be noted that it is decidedly unfair to the worker to deny him an award when he admits the cause of his fall was non-industrial but to give him an award when he does not know the cause of his fall. In both instances his claim is solely for the injury caused by the contact with the level floor.

#### (11) *Causal Relation and Need of Medical Testimony*

One of the misunderstandings between doctors and courts relates to causal relation<sup>177</sup> (hence "out of") between work or working conditions and diseases of obscure origin. The medical profession takes the attitude that, if they as doctors do not know the "cause" of a specific disease, the courts cannot uphold awards made by workmen's compensation administrators.

The answer is two fold: (1) The precipitation, aggravation or acceleration<sup>178</sup> of a disease by an injury at work, or by the work

<sup>175</sup> *Employers Mut. Liab. Ins. Co. v. Industrial Acc. Comm'n*, 41 Cal. 2d 676, 263 P.2d 4 (1953) (idiopathic seizure, fell on concrete floor, head injury—compensable. Modern trend recognized); *Savage v. St. Aeden's Church*, 122 Conn. 343, 189 Atl. 599 (1937) (no difference for floor falls—turns out that there was hazard from the fact that the accident happened—painter found on floor; it would make no difference if cause of fall was fainting spell or heart attack); *Protectu Awning Shutter Co. v. Cline*, 154 Fla. 80, 16 So. 2d 342 (1944) (fell on concrete floor due to idiopathic heart disease, fractured skull. Excellent discussion of purposes of compensation act. and the desire to spread the cost to consumers—if deceased had fallen onto a piece of machinery, an award would hardly be questioned; the fact that he chanced to fall on the floor and lost his life should not preclude an award); *American Mut. Liab. Ins. Co. v. King*, 88 Ga. App. 176, 76 S.E.2d 81 (1953) ("blacked out"—court said no difference between falling on the floor or against machines—even if exertion did not produce the stroke—found in puddle of blood on floor in water-house, diod of subarachnoid hemorrhage); *A. C. Lawrence Leather Co. v. Barnhill*, 249 Ky. 437, 61 S.W.2d 1 (1933) (dizzy, fell on premises near driveway, broke leg—compensable); *Pollock v. Studebaker Corp.*, 97 N.E.2d 631 (Ind. App. 1961) (contrary view "not favored by a majority of recent cases"—but superceded in *Pollock v. Studebaker Corp.*, 230 Ind. 622, 105 N.E.2d 513 (1952)—as a question of fact, as industrial board had found against the worker—dissent said it was a question of law, and decision below was correct on law); *Burroughs Adding Macn. Co. v. Dehn*, 110 Ind. App. 483, 39 N.E.2d 499 (1942) (on public street on duty—had he been sitting on a chair at home when the attack occurred he probably would not have been injured); *Barlau v. Minneapolis-Moline Power Implement Co.*, 214 Minn. 564, 9 N.W.2d 6 (1943); *American Gen. Ins. Co. v. Barrett*, 300 S.W.2d 358 (Tex. Civ. App. 1957) ("blacked out" fell on hard pavement of gravel and shell, fractured skull—fall on hard surface, was a hazard to which he was exposed by the employment); *General Ins. Corp. v. Wickersham*, 235 S.W.2d 215 (Tex. Civ. App. 1951); *Wilson v. Chatterton* [1946], 1 K.B. 360 (C.A.) (a leading case, overruling an earlier *contra* case, *Lander v. British United Shoe Mach. Co.*, 26 B.W.C.C. 411 (1933) as "bad law"); *Wright & Greig, Ltd. v. McKendry*, 11 B.W.C.C. 402 (1918) (in fit, fell on concrete floor of store—not risk common to humanity, but was specially connected with the worker's employment, as he had to work on a hard floor).

<sup>176</sup> See cases in notes 172 and 175 *supra*.

<sup>177</sup> *Murray v. Industrial Comm'n*, 87 Ariz. 190, 199, 349 P.2d 627, 633 (1960) ("The difference in the medical and legal concept of cause results from the obvious differences in the basic problems and exigencies of the two professions in relation to causation."); See *Small, Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 81 TEXAS L. REV. 630 (1953); see also CURRAN, LAW AND MEDICINE, 27-118 (1960).

<sup>178</sup> *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945) (hastened heart disease); *Davis v. Bibb Mfg. Co.*, 75 Ga. App. 515, 43 S.E.2d 780 (1947) (aggravation, acceleration, lighting up, sufficient); *Madden's Case*, 222 Mass. 487, 111 N.E. 379 (1916) (acceleration of heart disease); see also cases in note 43 *supra*.

itself, is as compensable as original causation of the disease. Medical etiology, or knowledge of what germ or virus was medically responsible, does not interest an appellate court. (2) The question before the appellate court is not whether, on the evidence below, the judges would have found causal relation, or whether in fact the disease of obscure origin originated in the work or work-injury. Courts do not decide the truth or falsity of medical questions.<sup>179</sup> They decide only whether, on the evidence before the administrator, it was "rationally possible" or a "reasonable conclusion" for him to decide that there was such causal connection, precipitation, aggravation or acceleration.<sup>180</sup> On appeal, meager or slight evidence is sufficient.<sup>181</sup>

On this reasoning the modern courts properly have upheld awards involving cancer,<sup>182</sup> heart disease,<sup>183</sup> multiple sclerosis,<sup>184</sup> meningitis,<sup>185</sup> encephalitis,<sup>186</sup> leukemia,<sup>187</sup> traumatic epilepsy<sup>188</sup> and arthritis.<sup>189</sup>

On the same reasoning, courts have upheld the denial of awards based on medical evidence that seemed to contradict common sense. In a case where the medical experts testified that even breaking the ribs did not hasten the rupture of duodenal ulcers, the court re-

<sup>179</sup> *Murphy's Case*, 328 Mass. 301, 103 N.E.2d 267 (1952) (it is not for the court to determine whether the opinion of the doctor is medically sound—its probative value is for the fact-finding tribunal to decide—doctor testified industrial coronary thrombosis hastened a non-industrial cancer—occurred before it otherwise would have); *accord*, *Russell v. Literman*, 71 R.I. 448, 46 A.2d 858 (1946) (courts on appeal will not consult various medical works to see if hearing tribunal reached right medical result); *Boyd v. Young*, 193 Tenn. 272, 246 S.W.2d 10 (1951) (cancer in neck—not expected to resolve conflicts which the medical profession itself has been unable to resolve).

<sup>180</sup> *Chisholm's Case*, 238 Mass. 412, 131 N.E. 161 (1921) (enough if decision is rationally possible under the law); *Travelers Ins. Co. v. Donovan*, 125 F. Supp. 261 (D.D.C. 1954) (reasonable conclusion that tuberculosis was contracted in area with a comparatively high incidence rate—and tort (common law) principles for causal relationship different from workmen's compensation); *Dean Pound agrees*; 15 NACCA L.J. 73 (1955).

<sup>181</sup> *Chmielowski's Case*, 301 Mass. 379, 17 N.E.2d 165 (1938) ("meagre" evidence was enough—stands on most favorable medical testimony); *Southern Stevedoring Co. v. Voris*, 218 F.2d 250 (5th Cir. 1955) (evidence "barely sufficient," "close," yet sustained—relation of blow to delayed paralysis; court recognized that able doctors on both sides often biased "in favor of their employers").

<sup>182</sup> *Boyd v. Young*, 193 Tenn. 272, 246 S.W.2d 10 (1951) (cancer, lifting box, sharp pain in base of neck, hospitalized, cancer later found in neck); see review in 10 NACCA L.J. 60 (1952) and list of recent cancer cases. For cancer cases, see *Locke, Problems Arising in the Trial of a Cancer Case*, in NEW ENGLAND NACCA BAR ASSOCIATION, WINTER SEMINAR, DECEMBER 1959, at 138 (1960).

<sup>183</sup> *Madden's Case*, 222 Mass. 487, 111 N.E. 379 (1916); *Harding Glass Co. v. Albertson*, 208 Ark. 866, 187 S.W.2d 961 (1945) (heat prostration hastened heart disease and contributed to death eight months later); see *Petkun, Problems Arising in a Heart Disease Case*, in NEW ENGLAND NACCA BAR ASSOCIATION, WINTER SEMINAR, DECEMBER 1959, at 159 (1960); *Pacific Lines Inc. v. Celeca Villanueva Vda. de Feliciano, et al.* G.R. (Phil.) No. L-13793, May 30, 1960.

<sup>184</sup> *Mechanics Universal Joint Div. v. Industrial Comm'n*, 21 Ill. 2d 535, 173 N.E.2d 479 (1961) (multiple sclerosis, compensable, though there is limited medical knowledge of this disease); *Stella v. Mancuso*, 7 App. Div. 2d 673, 179 N.Y.S.2d 169 (3d Dep't 1958) (multiple sclerosis precipitated by trauma).

<sup>185</sup> *Gilham v. Department of Labor & Indus.*, 14 Wash. 2d 359, 123 P.2d 645 (1942) (meningitis related to a fall).

<sup>186</sup> *Hazlik v. Interstate Power Co.*, 67 S.D. 128, 289 N.W. 589 (1940) (encephalitis after unusual exertion, exposure and exhaustion helping to restore company's service).

<sup>187</sup> *In re Crowley*, 130 Me. 1, 153 Atl. 184 (1931) (carbon monoxide poisoning leading to leukemia).

<sup>188</sup> *White v. Louisiana W. Ry.*, 18 La. App. 544, 135 So. 255 (1931) (epilepsy); *Sisinando Diaz v. Cebu Portland Cement, BWC-Case No. 186*, August 28, 1961 (Phil.).

<sup>189</sup> *Sporeic v. Swift & Co.*, 149 Neb. 246, 30 N.W.2d 291 (1948) (traumatic arthritis); *Enkel v. Northwest Airlines*, 221 Minn. 532, 22 N.W.2d 635 (1946) (long list of cases of aggravation or acceleration of arthritic conditions given).

marked that though as laymen they thought otherwise, the blame for error if there was error, was on the medical profession and not on the judiciary.<sup>190</sup>

The early courts required medical evidence to support awards which involved medical questions. Today the overwhelming majority of courts continue to uphold awards even in cases where there is not a single shred of medical evidence, or where the favorable medical evidence is weak but where the sequence of events is convincing.<sup>191</sup> So, too, courts affirm awards where common sense, experience or knowledge point to a relationship which justifies the administrator's award—for example, death as the termination of serious injuries, or aggravation of a hernia from lifting and straining.<sup>192</sup> Thus, where there was a blow to a female employee's breast and the breast was subsequently removed and neither side offered medical evidence, the administrator concluded that there was causal relation. The "sequence of events" was convincing and the appellate court upheld the award. The court stated that although medical evidence would have been helpful the conclusion of causal relation was justified.<sup>193</sup>

<sup>190</sup> *Landry v. Phoenix Util. Co.*, 14 La. App. 334, 124 So. 623 (1929) (blame for error on medical profession); *Lynch v. La Rue*, 193 Tenn. 101, 278 S.W.2d 85 (1955) where trial judge dismissed, on inferences unfavorable to worker, reviewing court will not disturb dismissal).

<sup>191</sup> *Heinzl v. Jones & Laughlin Steel Corp.*, 157 Pa. Super. 454, 43 A.2d 635 (1945) (even in the entire absence of medical opinion); *Crescent Wharf & Warehouse Co. v. Cyr*, 200 F.2d 633 (9th Cir. 1952) (Where three insurance doctors reported no relationship, but five fellow employees testified to heavy work, with a collapse while tugging on a rope and brought to hospital in extremis, award below upheld—mere absence of favorable medical evidence not a bar); *Industrial Comm'n v. Havens*, 136 Colo. 111, 314 P.2d 698 (1957) (death from coronary occlusion—had worked four hours unloading beams—not obliged to establish causal relation between the accident and resulting death by expert medical testimony—concurring opinion emphasized "sequence of events"); *Industrial Comm'n v. Corwin Hosp.*, 126 Colo. 358, 250 P.2d 135 (1952) (Polio—higher incidence among nurses as evidence, affirmed—compensation act highly remedial, liberal construction); *General Motors Corp. v. Freeman*, 164 A.2d 686 (Del. 1960) (detached retina, smoke and foreign substance in eyes, rubbing—medical testimony "one of possible causes," plus sequence of events award affirmed); *Stralovich v. Sunshine Mining Co.*, 68 Idaho 524, 201 P.2d 106 (1948) (miliary tuberculosis and silicosis, though the only doctor who testified said no relationship); *Luzerne-Graham Mining Corp. v. Tanner*, 314 Ky. 875, 238 S.W.2d 842 (1951) (multiple fractures, bled from mouth, hospitalized twenty-one days—four months later suddenly hemorrhaged from the mouth and died—award upheld despite a complete absence of medical evidence as to the cause of the hemorrhaging—despite testimony of defendant's doctor that without a post-mortem he could not know the cause of the bleeding); *Walters v. Smith*, 222 Md. 62, 158 A.2d 619 (1960) (industrial automobile accident, lost ability to talk, add or subtract—sequence of events, plus proof of possible causal relation, might amount to proof of probable relation in the absence of evidence of any other equally probable cause); *Clark v. Village of Hemingford*, 147 Neb. 1044, 26 N.W.2d 15 (1947) (expert testimony not required in all cases); *Bohan v. Lord & Keenan, Inc.*, 98 N.H. 144, 95 A.2d 786 (1953) (Even if the doctor's theory is novel, unpopular and iconoclastic—the weight is for the trier of facts); *Woodson v. Kendall Mills*, 213 S.C. 395, 49 S.E.2d 597 (1948) (insurance doctor surmised it was due to an obscure infection); *Cline v. Department of Labor & Indus.*, 50 Wash. 2d 614, 313 P.2d 687 (1957) (A general practitioner and a lung expert may be believed in preference to two insurance company specialists).

<sup>192</sup> *Miami Coal Co. v. Luce*, 76 Ind. App. 245, 249, 131 N.E. 824, 826 (1921) (Coal mine explosion, landed in hospital, skull, both ankles and legs fractured, deep shock, vomiting, delirious, died in hospital—despite coroner's report he died from intestinal obstruction and from causes independent of the injuries received!—"Indeed, if it were not for the saving grace of what we call common sense, justice would be defeated in almost every case where opinion evidence is admitted."); *Gianfriddo's Case*, 319 Mass. 566, 66 N.E.2d 710 (1946) (backstrain—inference sustainable, apart from disputed medical testimony); *Harrington's Case*, 135 Mass. 69, 138 N.E. 499 (1933) (hernia—no medical testimony needed); *Schinderle v. Ford Motor Co.*, 316 Mich. 337, 25 N.W.2d 586 (1947) (It is common knowledge that a sudden jar or jerk may cause great pains to an arthritic person); See also cases in note 191 *supra*.

<sup>193</sup> *Valente v. Bourne Mill*, 77 R.I. 274, 75 A.2d 191 (1950) (see review in 6 NACCA L.J. 41—the only fair inference that rationally and naturally arises from the uncontradicted testimony is that of causal connection—employee made prima facie case—medical evidence, though highly desirable, is not always essential—sequence of events here establishes the causal connection); Note, 13 NEB. L. BULL. 350 (1939).

Even where medical evidence is offered by either side it may be disbelieved, in whole or in part. And the majority of courts no longer pay homage to the magic words "probable" as opposed to "possible."<sup>194</sup> If reading the record as a whole leads the appellate court to feel that the conclusions reached below are rationally possible on the evidence or on the inferences from the evidence, the award will be affirmed.<sup>195</sup>

### (12) *Appeals and Liberal Trends*

The unending stream of appeals—principally by insurers since most employees cannot afford to appeal—on the ground that injuries do not "arise out of" the employment, will never abate so long as some courts will inject antiquated common-law rules into a law which intended once and for all to eliminate and to reject the narrow rules of the common law as they relate to work injuries.

A few states<sup>196</sup> omitted the use of the words "out of"; but that did not solve the problem as their courts properly read into the statute an equivalent requirement of some degree of "causal relation" between the injury and the employment. Otherwise a sick worker, dying from cancer or from injuries received when he was hit by an auto while away from work, could drag himself to work and if he died in the factory, his death would occur "in the course of" the work, although not "out of" it. To say that "in the course of" the employment is sufficient would be to make the employer an insurer; it would be health and accident insurance in the guise of workmen's compensation.

But where any reasonable relation to the employment exists, or where the work or work environment is a contributing cause, the court is justified in upholding the award as arising "out of" the employment.<sup>197</sup> The acts severely limit the amounts that em-

<sup>194</sup> *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110 (1959)—jury decided tuberculosis was aggravated by fall and washing by waves—courts are not free to reweigh evidence, medical or non-medical—"The matter does not turn on the use of a particular form of words by the physicians in giving their testimony," ("could," "might possibly," "probably"). "The talismanic phrase is no longer king in the area of medical causation." Lambert, 25 NACCA L.J. 284 (1960). *Hines v. Industrial Acc. Bd.*, 358 P.2d 447 (Mont. 1960) (Polio—"possible" plus lay testimony as to garbage, sewers, and so forth—award proper); *Gaffney v. Industrial Acc. Bd.*, 129 Mont. 394, 287 P.2d 256 (1955) (Parkinson's disease, doctor repeatedly used "possibly," hesitant to express positive opinion—the short-comings of medical science should not be visited on victims of industrial accidents).

<sup>195</sup> *Duggan's Case*, 315 Mass. 355, 53 N.E.2d 90 (1944) (reading testimony as a whole, amounted to a probability, though "may" used in part); *Hiber v. City of St. Paul*, 219 Minn. 87, 16 N.W.2d 873 (1944) (it is the intrinsic quality of the conclusion that matters, not the label or characterization—take "testimony as a whole"). See also cases in notes 191-94 *supra*.

<sup>196</sup> North Dakota, Pennsylvania, Texas and Washington. Cf. also Wisconsin and Utah; see *HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 154 (1944), for discussion and cases in these states. See also note 200 *infra*.

<sup>197</sup> *Harding Glass Co. v. Albertson*, 208 Ark. 366, 187 S.W.2d 961 (1945) (connection substantially contributory though it need not be the sole or proximate cause); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923) (contributory); *Wells v. Morris*, 33 Ala. App. 497, 35 So. 2d 54 (1948), 3 NACCA L.J. 102 (1948) (enough if employment a "contributing cause"); *Gaffney v. Industrial Acc. Bd.*, 129 Mont. 394, 287 P.2d 256 (1955) (Parkinson's disease, fall rupturing muscle and striking head as contributing cause—doubts to be resolved in employee's favor).

ployees or dependents can receive, with the intention that recoveries be spread over a larger number of workers. The rule of liberal and broad construction is therefore especially justified to effectuate the humane purposes for which these acts were enacted. Hence board or administrative commission awards based on a liberal construction of the words "out of" are upheld whenever rationally possible.<sup>198</sup>

In short, the current trend is to get away from the earlier narrow and strict decisions and to follow the more recent liberal views.<sup>199</sup>

#### D. IN THE COURSE OF

Most states require proof of both "out of" as well as "in the course of" the employment.<sup>200</sup>

##### (1) Definitions

No definition has yet been invented to solve all the cases involving the words "in the course of." The early courts believed that an injury "befalls a man 'in the course of' his employment, if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."<sup>201</sup>

"In the course of" is sometimes referred to as "during" the employment. Certainly if an employee worked from nine to twelve and from one to five, these hours were "in the course of the employment." But what about the dinner hour? What about the man rushing to or from work and falling on the sidewalk just outside the factory's front door?

<sup>198</sup> *Shute's Case*, 290 Mass. 393, 195 N.E. 354 (1935) (rationally possible); *F.W. Woolworth Co. v. Industrial Acc. Comm'n*, 17 Cal. 2d 634, 111 P.2d 313 (1941) (unless inferences wholly unreasonable); *Industrial Comm'n v. Corwin Hosp.*, 126 Colo. 358, 250 P.2d 135 (1952) (nurse stricken with polio, higher incidence among nurses—compensation acts highly remedial, liberal construction); *American Mut. Liab. Ins. Co. v. Gunter*, 74 Ga. App. 500, 40 S.E.2d 394 (1949) (compensation acts severely limit the recoveries, so spread recoveries to unfortunate employees to alleviate human suffering); *Minns' Case*, 286 Mass. 459, 190 N.E. 843 (1934) (Evidence extremely slender, but not utterly insufficient to support the finding of the board).

<sup>199</sup> *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573, 576 (1947) ("[W]e quote these statements to show the present tendency toward a liberal application of the term 'arising out of and in the course of the employment.'"); accord, *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Bethlehem Steel Co. v. Parker*, 64 F. Supp. 615 (D. M. 1946); *Goodveer Aircraft Corp. v. Industrial Comm'n*, 62 Ariz. 398, 158 P.2d 511 (1945); *Simmons Nat'l Bank v. Brown*, 210 Ark. 311, 195 S.W.2d 539 (1946); *Smith v. University of Idaho*, 67 Idaho 22, 170 P.2d 404 (1946) (in borderline cases, resolve in favor of compensation); *Kubera's Case*, 320 Mass. 419, 69 N.E.2d 678 (1946) (follows the recent trend); *Sheppard v. Michigan Nat'l Bank*, 348 Mich. 577, 83 N.W.2d 614 (1957); *Line v. Bradbury*, 49 N.M. 4, 154 P.2d 1000 (1945) (*res gestae*). See also the assault and aggressor cases *supra* note 101, especially *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957). See also cases in note 240 *infra*.

<sup>200</sup> *Dravo Corp. v. Strosnider*, 43 Del. 256, 45 A.2d 542 (1945) (both "out of" and "in the course of" must be shown to exist); *Stark v. State Industrial Acc. Comm'n*, 103 Ore. 80, 204 Pac. 151 (1922) (both "out of" and "in the course of" must be proved—if either are missing—no recovery). A few states have dropped or never used the words "out of." "In the course of" alone is supposedly sufficient. (North Dakota, Pennsylvania, Texas, Utah and Washington—but each has read in the need of some nexus, or link with the employment). See Horowitz, *Current Trends in Basic Principles of Workmen's Compensation*, 20 Rocky Mt. L. Rev. 117, 149 n.501 (1948). Victoria, Australia, now reads "out of" or "in the course of," with resulting wide liberalization of its law (12 U. Toronto L.J. 126 [1957]). See also note 196 *supra*.

<sup>201</sup> *Moore v. Manchester* [1910], A.C. 489 (fell from ladder on quay, returning from shore leave).

(2) *Going and Coming Rule*

The question here is limited to whether the injuries are "in the course of" and not whether they are "out of" the employment. Street risks, whether the employee was walking or driving, and all similar questions deal with the risk of injury, *i.e.*, "out of" the employment. "In the course of" deals mainly with the element of time and space, or "time, place and circumstances."<sup>202</sup> Thus, if the injury occurred fifteen minutes before or after working hours and within fifteen feet of the employer's premises while on the sidewalk or public road, the question whether it was "in the course of" the employment is raised clearly and indisputably.

The early courts, looking for a simple rule, invented the so-called "coming and going rule"—injuries received when enroute to or from work are not compensable.<sup>203</sup> Originally, at least one of the worker's feet had to be planted on the employer's premises before "in the course of" took effect!

But like all narrow rules read into workmen's compensation acts, many exceptions to the rule properly began to develop. Injuries are currently held to be compensable under the many exceptions if: (1) the employee is enroute to or from work in a vehicle owned, supplied, used or arranged by the employer whether in a company<sup>204</sup> or private conveyance<sup>205</sup> or "car pool" sanctioned by the employer;<sup>206</sup> (2) the employee is subject to call at all hours or at the moment of injury;<sup>207</sup> (3) the employee is traveling for the em-

<sup>202</sup> *Giracelli v. Franklin Cleaners & Dryers, Inc.*, 132 N.J.L. 590, 42 A.2d 3, 5 (Sup. Ct. 1945) (raped by customer, "The time when, the place where the happening occurred, and the attending circumstances . . . demonstrate that the petitioner was acting in the course of her employment."). See also *In re Jensen*, 63 Wyo. 88, 178 P.2d 897 (1947).

<sup>203</sup> *Judson Mfg. Co. v. Industrial Acc. Comm'n*, 181 Cal. 300, 184 Pac. 1 (1919) (the rule that there is no right to compensation when the injured employee is merely going to and from work, was a "sweeping dictum," not applicable when compelled to cross railroad tracks intimately associated with company's plant; but the rule is still followed in 1954—*Sylvan v. Sylvan Bros.*, 225 S.C. 429, 82 S.E.2d 794 (1954), 14 NACCA L.J. 36 [1954]) (slipped on ice en route to store—not within any exception); *Afable v. Singer Sewing Machine*, 59 Phil. 39 (1933).

<sup>204</sup> *Owens v. Southeast Ark. Transp. Co.*, 216 Ark. 950, 228 S.W.2d 646 (1950) (free transportation on own buses, injured trying to catch bus); *Radermacher v. St. Paul City Ry.*, 214 Minn. 427, 8 N.W.2d 466 (1943) (pass on street railway is transportation, and includes waiting as passenger at stop when hit by runaway automobile); *Micieli v. Erie R.R.*, 131 N.J.L. 427, 37 A.2d 123 (Ct. Err. & App. 1944) (transportation on pass, despite provisions thereon).

<sup>205</sup> *Donovan's Case*, 217 Mass. 76, 104 N.E. 431 (1914); *Hunter v. Summerville*, 205 Ark. 463, 169 S.W.2d 579 (1943) (subcontractor's trucks); *Povia Bros. Farms v. Velez*, 74 So. 2d 103 (Fla. 1954) (run over while crossing to board employer's truck); *Bailey v. Santee River Hardwood Co.*, 205 S.C. 483, 32 S.E.2d 365 (1944).

<sup>206</sup> Carpools covered: *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947) (employer allowed fifteen minutes pay, as part of wages, to take care of travel time—so carpool transportation partly paid for by employer); *Puett v. Bahnson*, 231 N.C. 711, 58 S.E.2d 633 (1950) (carpool, employer paid fixed amount for living expenses, plus traveling expenses); *Helmerich & Payne, Inc. v. Gabbard*, 333 P.2d 964 (Okla. 1959) (five member carpool—also hauling water container for employer); *Livingston v. State Industrial Acc. Comm'n*, 200 Ore. 468, 266 P.2d 684 (1954), reviewed in 13 NACCA L.J. 27 (1954)—two workers in private car, ran off road, one drowned—exception for paid travel time, compensable—a leading case; *Texas Employer's Ins. Ass'n v. Inge*, 146 Tex. 347, 208 S.W.2d 867 (1948) (seven cents per mile paid by employer on a carpool basis).

<sup>207</sup> *Souza's Case*, 316 Mass. 332, 55 N.E.2d 611 (1944) (traveling boat repair man subject to call, burned to death while sleeping in a public boarding house); *Employers' Liab. Assur. Corp. v. Industrial Acc. Comm'n*, 37 Cal. App. 2d 567, 99 P.2d 1089 (1st Dist. 1940) (cook, subject to call, fell from stool while fixing hem of dress; different from employees "who work set hours"); *Bowen v. Keen*, 154 Fla. 161, 17 So. 2d 706 (1944) (subject to call).

ployer; <sup>208</sup> (4) the employer pays in part <sup>209</sup> or in whole <sup>210</sup> for the employee's time involved in going to and from home; (5) the employee is on a special mission for the employer; <sup>211</sup> (6) the employee is on the way home to do further work at home, even though he is on a fixed salary; <sup>212</sup> or (7) the employee is required to bring his automobile to his place of business for use there.<sup>213</sup> At least a dozen more exceptions have been recognized by the courts. In fact the exceptions are so numerous that they have swallowed the rule.<sup>214</sup> Modern courts are ignoring this court-made rule and properly judging each case on its own facts and merits.<sup>215</sup>

The rule has been a source of injustice to injured workers for many years. It has put upon them the burden of proving an exception to this narrow court-made rule. It should be abandoned in favor of deciding liberally in each case whether the journey and injury in question arose "in the course of" the employment. The rule has been abandoned in many foreign countries, and workers are protected while going to and from work as if they were on paid time.<sup>216</sup> Today, because of speeding automobiles, the journey to and from work may be the most dangerous part of the employment.

<sup>208</sup> *Railway Express Agency v. Shuttleworth*, 61 Ga. App. 644, 7 S.E.2d 195 (1940) (traveling salesman incurs risk, by reason of his employment, necessary and incident to the requirements of such employment) (protected in hotel fire); *Olson Drilling Co. v. Industrial Acc. Comm'n.*, 386 Ill. 402, 54 N.E.2d 452 (1944) (enroute by automobile to office with report); *Locke v. Steele County*, 223 Minn. 464, 27 N.W.2d 285 (1947) (includes short daily walk to get the mail).

<sup>209</sup> *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Livingston v. State Industrial Acc. Comm'n.*, 200 Ore. 463, 266 P.2d 684 (1954) (employer paid for fifteen minutes of the travel time).

<sup>210</sup> *Western Pipe & Steel Co. v. Industrial Acc. Comm'n.*, 49 Cal. App. 2d 108, 121 P.2d 35 (1st Dist. 1942) (exception where the employee's compensation covers the time involved in going to and from his work) (getting cigarettes during a paid lunch hour).

<sup>211</sup> *Thurston Chem. Co. v. Casteel*, 285 P.2d 403 (Okla. 1955) (killed on railway crossing en route to the plant on a special mission—deceased's compensation commenced when he left his home en route to the plant); *Voehl v. Indemnity Ins. Co.*, 283 U.S. 162 (1933) (special duty of clearing debris on Sunday); *Keely v. Metropolitan Edison Co.*, 157 Pa. Super. 63, 41 A.2d 420 (1945) (within exception, special duty); *Liberty Mut. Ins. Co. v. Nelson*, 142 Tex. 370, 178 S.W.2d 514 (1944) (trip to get materials).

<sup>212</sup> *Proctor v. Hoage*, 81 F.2d 555 (D.C. Cir. 1935) (struck by auto on way home to finish work there as ordered by employer); *Cahill's Case*, 295 Mass. 538, 4 N.E.2d 332 (1936) (insurance adjuster injured in own yard coming home to do more work).

<sup>213</sup> *Davis v. Bjorenson*, 229 Iowa 7, 293 N.W. 829 (1940) (auto became an instrumentality of the business so collision on the way compensable).

<sup>214</sup> 1 LARSON, *WORKMEN'S COMPENSATION LAW*, sec. 15.11 (1952) (adds many more exceptions, supported by decisions nationwide). "Manifestly the numerous exceptions have now swallowed the rule . . ." 14 NACCA L.J. 36, 41 (1954). In discussing *Pribyl v. Standard Elec. Co.*, 246 Iowa 333, 67 N.W.2d 438 (1954) (union contract provided mileage where employee used his own car, held exception to going and coming rule), Pound states: "If one had to classify this case under one of the accepted exceptions to the 'going and coming rule' it would not be difficult to do so. . . . It is time the 'going and coming rule' and the endless distinctions for getting around it, which have grown out of it and darken counsel in plain cases, was given up." 15 NACCA L.J. 86-87 (1955). See also 16 NACCA L.J. 112 (1955); and notes 234 and 236 *infra* (exceptions where assaulted on the way home, as result of argument started on premises).

<sup>215</sup> *Brousseau v. Blackstone Mills*, 100 N.H. 493, 130 A.2d 543 (1957) (going and coming rule not necessary or particularly useful) (citing with approval the present author's attack on the rule in 14 NACCA L.J. 36 (1954), where he urges its abolition, and each case be decided on its own merits, i.e., whether it arose out of and in the course of the employment); *accord*, *Ince v. Chester Westfall Drilling Co.*, 346 P.2d 346 (Okla. 1959) (need not put case on special mission exception—was "in the course of" and was beneficial to employer); 1 LARSON, *WORKMEN'S COMPENSATION LAW*, sec. 15.11 (1952) ("an artificial" rule). Dean Pound states: "There is a great opportunity for some courageous judge to reconsider the going and coming rule in view of the modes of thought of today." 14 NACCA L.J. 400 (1954). "The going and coming rule is a blot upon the liberal and beneficent bent for workmen's compensation legislation." Assistant Editor-in-Chief Page, 25 NACCA L.J. 211 (1960).

<sup>216</sup> *E.g.*, Israel, France, Germany, Victoria (New South Wales). In Israel, Justice Zvi Berinson stated: "[A]part from certain exceptional cases, the time of the journey to and from home to the place of work is regarded as working time." BERINSON, *Social and Labor Legislation*.

The protection of workmen's compensation should be afforded during such journeys.

### (3) *Twenty-four Hour Daily Protection*

Employee subject to call twenty-four hours a day are considered "in the course of" employment at all times.<sup>217</sup> To make an award only when the employee is working gives him no greater protection than the worker with set hours whose remainder of the day is his own.

Some states have recognized a kindred principle—continuity of employment. Thus, for example, an employee living on the premises may not actually be subject to call, but if he is burned by fire at night,<sup>218</sup> if he slipped while going to the bathroom on arising in the morning<sup>219</sup> or if he is a traveling salesman away from home or headquarters,<sup>220</sup> even though not subject to call, he is usually given an award on the theory of "continuity" of employment. Living on the premises usually throws a protecting mantle over the worker whenever he is properly on the premises.

On this principle traveling workers are protected when injured by fire while asleep during the night in hotels, whether the hotel is selected by themselves or by the employers.<sup>221</sup>

### (4) *Noon-hour Injuries*

Most courts have been liberal in protecting the workers during the noon hour. Thus an employee eating his lunch on the employer's premises, whether at lunch hour or any other reasonable time, is almost universally considered as "in the course of" his employment.<sup>222</sup>

LAWYER'S CONVENTION IN ISRAEL, 83 (1953). For a similar approach in other countries, see Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 532, 549 (1954) (France and Germany); 12 U. TORONTO L.J. L. REV. 532, 549 (1954) (France and Germany); 12 U. TORONTO L.J. 124 (1957) (Victoria) (course of employment covers "where the worker is travelling between his place of residence and his place of employment"). *Contra*: India. See Saurashtra Salt Mfg. Co. v. Bui Valo Raja et al., AIR 1958 50 501.

<sup>217</sup> Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944); Doyle's Case, 256 Mass. 290, 152 N.E. 340 (1926) (injury about midnight, going to toilet); Jefferson County Stone Co. v. Bettler, 304 Ky. 87, 199 S.W.2d 986 (1947) (subject to call); Martha Lumber, Inc. v. Romana Lagrante, et al., G.R. (Phil.) No. L-7599, June 27, 1956.

<sup>218</sup> Gilhotti v. Hoffman Catering Co., 246 N.Y. 279, 158 N.E. 621 (1927).

<sup>219</sup> Underhill v. Keener, 258 N.Y. 543, 180 N.E. 325 (1931) (going to bathroom).

<sup>220</sup> United States Fid. & Guar. Co. v. Skinner, 58 Ga. App. 859, 200 S.E. 493 (1938) (traveling salesman is in continuous employment—killed in automobile, compensable). See also note 237 *infra*.

<sup>221</sup> HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 114 (1944) (cases of traveling salesmen killed in lodging fires); Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944) (and cases cited); Standard Oil Co. v. Witt, 283 K. 327, 141 S.W.2d 271 (1940) (construction foreman died in hotel fire).

<sup>222</sup> DeStephano v. Alpha Lunch Co., 308 Mass. 38, 30 N.E.2d 827 (1941); Goodyear Aircraft Corp. v. Industrial Comm'n, 62 Ariz. 398, 158 P.2d 511 (1945); Nicholson v. Industrial Comm'n, 76 Ariz. 105, 259 P.2d 547 (1953) (lunching on the premises is within the course of the employment when customary and convenient for the employee; though dismissed about an hour earlier, he came from a distance, brought lunch and was killed when platform collapsed—not loitering, denial of award reversed); American Motors Corp. v. Industrial Comm'n, 1 Wis. 2d 261, 83 N.W.2d 714 (1957); Rowland v. Wright [1909], 1 K.B. 958 (teamster eating lunch in a stable was bitten by a stable cat); Leary v. S.S. "Deptford," 28 B.W.C.C. 285 (1935) (typhoid from food aboard ship); see Note, 31 NEB. L. REV. 500 (1952).

But mere proof of "in the course of" is not enough. The injury must also arise "out of" the employment. What the worker was doing at the moment of his noon-hour injury is still an essential matter to be determined before an award can be made. There must be a nexus or causal connection ("out of") as well as a time and place relationship ("in the course of") with the employment.

Noon-hour injuries have been held compensable where the employee was on his way out, or was taking a short nap awaiting the resumption of his machine work.<sup>223</sup> Also, recovery was allowed when a manager was shot while eating lunch by a disgruntled, recently fired employee.<sup>224</sup>

#### (5) *Post-employment Injuries*

Occasionally a case arises where a former employee, after being fired, laid off or having quit, returns to the place of former employment to receive his pay, retrieve his tools or for some other reasonable cause or legitimate purpose and he is then injured. The weight of authority holds that he is protected during the period that he is properly back on, or delays leaving, the employer's premises. The theory sustaining compensation is that the protection afforded by the phrase "in the course of" is revived for this period of time,<sup>225</sup> as an implied term of the contract.

#### (6) *Industrial Premises Rule*

The early cases protected an employee from the moment he was on and until he left the employer's premises.<sup>226</sup> But some early judges refused to allow compensation if the worker was injured within a few feet of the premises while he was on the public side-

<sup>223</sup> *White v. E. T. Slattery Co.*, 236 Mass. 28, 127 N.E. 597 (1920) (during noon hour on way out to buy personal theater tickets, injured in elevator—compensable). *Holmes' Case*, 267 Mass. 307, 166 N.E. 827 (1929); *American Motors Corp. v. Industrial Comm'n*, 1 Wis. 2d 261, 83 N.W.2d 714 (1957) (customary to stretch out on top of boxes after eating—started back to punch time clock and negligently fell off six foot high box—compensable, even if he may have added some increased hazard).

<sup>224</sup> *Cranney's Case*, 232 Mass. 149, 122 N.E. 266 (1919) (that murder resulted rather than a broken bone, is immaterial).

<sup>225</sup> *Parrott v. Industrial Comm'n*, 30 Ohio Op. 284, 60 N.E.2d 660 (Sup. Ct. 1945) (came back for pay six days later—cases cited). "By the great weight of authority, a workman, who, being unable to procure his pay when he severed his employment, is injured when he returns to the premises of his employment under the workmen's compensation laws." *Id.* at 286, 60 N.E.2d at 663; *Riley v. William Holland & Sons* [1911], 1 K.B. 1029 (an implied term of the contract—came back for wages two days later); *Nicholson v. Industrial Comm'n*, 76 Ariz. 105, 259 P.2d 547 (1953), 13 NACCA L.J. 63 (1954) (workmen were dismissed fifty minutes before noon for rest of day—while at lunch with fellow-employees twenty minutes after noon, eating with knowledge and consent of employer; eating platform collapsed and employees killed). Industrial Commission denied compensation on ground that relation of employer and employee had ended. The commission was reversed on the ground that employee has reasonable period after dismissal to wind up his affairs.

*Anderson v. Hotel Cataract*, 70 S.D. 376, 17 N.W.2d 913 (1945); *Smith v. G. E. Crane & Sons Pty.* [1952], W.C. REP. 96 (New South Wales) (after mix-up worker got his pay at night from foreman, and while returning home by direct route was fatally injured—was in course of his employment). See also 13 NACCA L.J. 13 (1954).

<sup>226</sup> *Latter's Case*, 238 Mass. 326, 130 N.E. 637 (1921) (near elevator); *Millman's Case*, 295 Mass. 451, 4 N.E.2d 331 (1936) (stray auto hit employee waiting after work on premises).

walk.<sup>227</sup> Also, relief was denied if the employee was injured on adjacent private property even if crossing this property was the only means of access to his employer's factory several feet away.<sup>228</sup> Yet nothing in the workmen's compensation acts compelled this conclusion. None of the acts spell out when "in the course of" begins or ends. It was judicial fiat based on the judge's personal concept of the meaning of the words "in the course of."

However, since these early decisions a series of cases in the United States Supreme Court<sup>229</sup> advised the state courts that they could legally (without violating the United States Constitution) extend their compensation acts to include: (1) a reasonable period of time before the work-hour began, and (2) a reasonable distance away from the work-place.

The result of the Supreme Court cases has been a nation-wide broadening of the meaning of "in the course of" the employment as it relates to work "premises." These words have been construed to include injuries received before or after work while: (1) on adjacent private or public property where there was a hazard such as a railroad track;<sup>230</sup> (2) in a parking lot;<sup>231</sup> (3) on a public highway between two of the employer's buildings;<sup>232</sup> (4) on adjacent public sidewalks within a short distance of the employer's prem-

<sup>227</sup> *Simpson v. Lee & Cady*, 294 Mich. 460, 293 N.W. 718 (1940) (no compensation where seventy-seven year old employee on way to work slipped on the ice as he was reaching for the door and never actually got his body within the premises); *Amento v. Bond Stores*, 274 App. Div. 863, 82 N.Y.S.2d 1 (3d Dep't 1948) (within three or four steps from the employer's door—no compensation).

<sup>228</sup> *Bell's Case*, 238 Mass. 46, 130 N.E. 67 (1921) (crossing private railroad tracks). In view of the recent, more liberal trend in Massachusetts, this case is of doubtful authority. *Contra*, *Procaccino v. E. Horton & Sons*, 95 Conn. 408, 111 Atl. 694 (1920) (earlier case) (crossing private property when killed by train). See also cases in Note 230, *infra*.

<sup>229</sup> *Bountiful Brick Co. v. Giles*, 276 U.S. 154 (1928) (adjacent private railroad tracks—not trespasser as to employer because irregular crossing sanctioned by superior); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418 (1923) (regular railroad crossing, about one hundred feet from the plant).

<sup>230</sup> *Associated Indem. Corp. v. Industrial Acc. Comm'n*, 18 Cal. 2d 40, 112 P.2d 615 (1941) (adjacent railroad tracks, employer control not needed); *Jaynes v. Potlatch Forests*, 75 Idaho 297, 271 P.2d 1016 (1945) (killed on railroad crossing, no difference between extended risks on public highways and private pathways); *Basinski v. Detroit Steel Corp.*, 2 N.J. Super. 39, 64 A.2d 459 (App. Div. 1949) (tripped on railroad switch before reaching the exit—employer's property criss-crossed with many railroad tracks).

<sup>231</sup> *Davis v. Devil Dog Mfg. Co.*, 249 N.C. 548, 107 S.E.2d 102 (1959) (parking lot cases discussed); *Roger's Case*, 318 Mass. 308, 61 N.E.2d 341 (1945); *Pickett v. Industrial Comm'n*, 98 Ohio App. 372, 129 N.E.2d 639 (1945) (injury during fight over parking space); *Pacific Indem. Co. v. Industrial Acc. Comm'n*, 28 Cal. 2d 329, 170 P.2d 18 (1946) (driving car halfway into a parking lot); *Hughes v. American Brass Co.*, 141 Conn. 231, 104 A.2d 896 (1945) (slipped on snow and ice, compensable); *Teague v. Boeing Airplane Co.*, 181 Kan. 434, 312 P.2d 220 (1957) (ice on smooth black-top parking lot); *E. I. duPont de Nemours & Co. v. Redding*, 194 Okla. 52, 147 P.2d 166 (1944); *Kowcun v. Bybee*, 182 Ore. 271, 186 P.2d 790 (1947); *Foster v. Edwin Penfold & Co.*, 27 B.W.C.C. 240 (1934) (parked on stranger's wharf with employer's permission and fell into river). *Contra*, *Bennett v. Vanderbilt Univ.*, 198 Tenn. 1, 277 S.W.2d 386 (1955). The *Bennett* case is criticized by Dean Pound in 16 NACCA L.J. 115 (1955). *Gonter v. L. A. Young Spring & Wire Corp.*, 327 Mich. 586, 42 N.W.2d 749 (1950). *But see* *Freiborg v. Chrysler Corp.*, 350 Mich. 104, 85 N.W.2d 145 (1957) (based on new amendment; distant parking lot considered part of "premises"). See also cases in note 232 *infra* and cases cited in *Riesenfeld, Forty Years of American Workmen's Compensation*, 7 NACCA L.J. 15, 38 n.113 (1951).

<sup>232</sup> *Kuharski v. Bristol Brass Corp.*, 132 Conn. 563, 46 A.2d 11 (1946) (building on both sides; not using the street as one of the general public but as incident of the employment); *McCrae v. Eastern Aircraft*, 137 N.J.L. 244, 69 A.2d 376 (Sup. Ct. 1942) (on public highway, crossing from plant to parking lot, thrown down by rushing fellow-employees—employer had placed traffic officer in the highway); *Swanson v. General Paint Co.*, 361 P.2d 842 (Okla. 1961) (crossing highway from parking lot to employer's building, hit by auto).

ises<sup>233</sup> (this result was often bolstered by the fact that the employer had some duty in connection with these sidewalks such as shoveling snow or hanging a sign over the sidewalk);<sup>234</sup> (5) at home if the employee is performing a duty for the employer (*e.g.*, a janitor-plumber repairing a blow torch at home, a bookkeeper removing a gun from a couch to do her work and an insurance company investigator preparing to type a report at home were held to be "in the course of" their employment),<sup>235</sup> and, (6) on a public street and assaulted after quitting time if it is an extension of a work quarrel which began within the work-place.<sup>236</sup>

Traveling workers, away from home and headquarters, are usually held to be in the course of employment at all hours, whether or not they are actually subject to call; it is a *fortiori* where the employer pays the traveling expenses. The "industrial premises" are wherever the work properly takes the employee; he is considered in continuous service. This is especially true when the employee is abroad.<sup>237</sup>

<sup>233</sup> *Bales v. Service Club No. 1*, 208 Ark. 692, 187 S.W.2d 321 (1945) (sidewalk so close to be considered part of premises—thirty-one feet from entrance to club); *Barnett v. Britling Cafeteria Co.*, 225 Ala. 462, 143 So. 813 (1932) (includes sidewalk just outside only entrance—sidewalk was to a limited degree a part of employer's premises); *Freire v. Matson Nav. Co.*, 19 Cal. 2d 8, 118 P.2d 809 (1941) (claimant, while still on public thoroughfare, was injured due to traffic congestion related to the employer's business—compensable as "in the course of" employment even though before work began; entitled to reasonable interval of time for entry on premises); *Flanagan v. Ward Leonard Elec. Co.*, 274 App. Div. 1081, 85 N.Y.S.2d 649 (3d Dep't 1949) (front door locked, making way to back door, slipped and fell on public sidewalk); *Nelson v. City of St. Paul*, 249 Minn. 53, 81 N.W.2d 272 (1957) (teacher, while still on public walk adjacent to school playground, struck by ball batted by pupil); *Nevada Industrial Comm'n v. Leonard*, 58 Nev. 16, 68 P.2d 576 (1937) (school teacher within fifteen feet of school land); *Philippine Fiber Processing Co., Inc. v. Fermina Ampil, G.R. (Phil.) No. L-8130*, June 30, 1956.

<sup>234</sup> *Louisville & Jefferson County Air Bd. v. Riddle*, 301 Ky. 100, 190 S.W.2d 1009 (1945) (employer's premises are extended to include obstacle lights on side of public road). See cases and discussion in Horowitz, *Current Trends in Basic Principles of Workmen's Compensation*, 20 *Rocky Mt. L. Rev.* 117, 155-57 (1948).

It should be noted that if the cause of the injury begins on the premises, the fact that the injury itself takes place on public sidewalks is no bar to compensation. Thus where a theater usher (assistant manager) ousts a disturber (patron) who as a result assaults him on a public sidewalk after work while he is on the way home, the injury is still in the course of the employment, as an exception to the coming and going rule. *Appleford v. Kimmel*, 297 Mich. 8, 296 N.W. 861 (1941). See also cases in note 236 *infra*.

<sup>235</sup> *Soares' Case*, 270 Mass. 3, 169 N.E. 414 (1930) (injury in kitchen); *Joe Ready's Shell Station & Cafe v. Ready*, 218 Miss. 80, 65 So. 2d 268 (1953) (doing bookkeeping at home, accidentally shot removing gun from couch); *Cahill's Case*, 295 Mass. 538, 4 N.E.2d 382 (1936) (injury in own yard).

<sup>236</sup> *Field v. Charmette Knitted Fabric Co.*, 245 N.Y. 139, 156 N.E. 642 (1927) (superintendent injured on sidewalk by continuation of work quarrel begun in mill; fell, fractured skull and died—was "in the course of"). "The quarrel outside the mill was merely a continuation or extension of the quarrel begun within. . . . Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one." *Id.* at 142, 156 N.E. at 643 (Cardozo, J.). *Zolkover v. Industrial Acc. Comm'n*, 13 Cal. 2d 584, 91 P.2d 106 (1939) (continuing scuffle in street); *Gardner v. Industrial Acc. Comm'n*, 73 Cal. App. 361, 166 P.2d 362 (4th Dist. 1946) (bartender attacked after quitting hour by disgruntled customer); *National Union Fire Ins. Co. v. Britton*, 289 F.2d 454 (D.C. Cir. 1691) (customer ejected by cook, later ambushed and killed cook as he left work), *affirming* 187 F. Supp. 359 (D.D.C. 1960), citing *Appleford v. Kimmel*, 297 Mich. 8, 296 N.W. 861 (1941). *Contra*, *Collier's Case*, 331 Mass. 374, 119 N.E.2d 191 (1954) (attack on waitress, by intoxicated customer who was previously refused service, was fifty-eight feet from work-door and a few minutes after work ended). The *Collier* case was severely criticized by Dean Pound as "very artificial and unsatisfactory. . . . The difference between 3 feet and 58 feet. . . cannot be controlling. . . ." 14 *NACCA L.J.* 73, 74-75 (1954). Noted with disapproval in 35 *BOSTON U. L. Rev.* 433 (1955); 16 *NACCA L.J.* 496 (1955) ("offensive at least to the humane social philosophy underlying the compensation statutes").

<sup>237</sup> *Lewis v. Knappen Tippets Abbott Eng'r Co.*, 304 N.Y. 461, 108 N.E.2d 609 (1952) (accepted invitation to go sightseeing, shot and killed by Arabs—on payroll and subject to call, away from home, no fixed hours), *affirming* 279 App. Div. 1107, 112 N.Y.S.2d 79 (3d Dep't 1952); *Turner v. Willard*, 154 F. Supp. 352 (S.D.N.Y. 1956) (injured in Okinawa while outside

An early court stated: "I think it is impossible to have an accident arising out of, which is not also in the course of the employment, but the converse of this is quite possible."<sup>238</sup> This would appear to be sound although a recent, ill-advised Massachusetts case<sup>239</sup> held to the contrary, thereby giving a jolt to the intent of the founders of workmen's compensation acts to give wide relief to injured workers. Nevertheless, the current trend continues to support a broad and liberal interpretation of the phrase "in the course of" employment.<sup>240</sup>

### E. OF THE EMPLOYMENT

Some compensation experts were of the impression that the word "of the employment" were used merely to complete the sentence—that one could not say that workers were to be compensated for a "personal injury by accident arising out of and in the course of"—of what? "Of the employment" made a good sentence ending.

#### (1) *Federal Relief Workers and Local Welfare Recipients*

The legislators who set up compensation acts little dreamed that the depression of 1929, with its subsequent relief work, and the later alphabetical federal-state projects, such as WPA and ERA, would make the words "of the employment" a source of prolific litigation. Is it employment for a recipient of city charity to chop wood for his grocery order? Are inmates of the Odd Fellows Home or Salvation Army hotels employed? Is it employment or charity exercise? If a laborer on the welfare rolls worked side by side with a regular city worker and a stone crushed both at the same time,

his construction area at employer's suggestion); *Walker v. Speeder Mach. Corp.*, 213 Iowa 1184, 240 N.W. 725 (1932) (travelling repairman in continuous employment); *Lepow v. Lepow Knitting Mills*, 288 N.Y. 877, 43 N.E.2d 450 (1942) (salesman sent to South Africa died from malaria even if contracted after working hours—risk of employment); see also *Miller v. F. A. Bartlett Tree Expert Co.*, 3 N.Y.2d 654, 143 N.E.2d 296, 171 N.Y.S.2d 77 (1958) (fell in hotel bathtub while getting ready for evening of annual conference).

<sup>238</sup> *M'Lauchlan v. Anderson*, 48 Scot. L. R. 349, 4 B.W.C.C. 376 (1911). See also *United States Fid. & Guar. Co. v. Barnes*, 182 Tenn. 400, 187 S.W.2d 610 (1945) (injury arising out of any employment almost necessarily occurs in the course of it); *accord*, *Dravo Corp. v. Stroenider*, 43 Del. 256, 45 A.2d 542 (1945) (negligence, contributory negligence, assumption of risk—not considered in workmen's compensation).

<sup>239</sup> *Collier's Case*, 331 Mass. 374, 119 N.E.2d 191 (1954). *Contra*, *National Union Fire Ins. Co. v. Britton*, 289 F.2d 454 (D.C. Cir. 1961) (cook at lunch counter forcibly ejected querulous customer who ambushed him as he left work and shot him dead), *affirming* 187 F. Supp. 359 (D.D.C. 1960). For other cases *contra*, see note 236 *supra*.

<sup>240</sup> *Employer's Liab. Assur. Corp. v. Industrial Acc. Comm'n*, 37 Cal. App. 2d 567, 99 P.2d 1089 (1st Dist. 1940) ("in the course of" is to be "construed liberally"); *accord*, *Hunter v. Summerville*, 205 Ark. 463, 169 S.W.2d 579 (1943) (liberal construction justified) (transportation case); *Nicholson v. Industrial Comm'n*, 205 Ariz. 463, 259 P.2d 547 (1953): "A liberal construction is not synonymous with a generous interpretation. To interpret liberally envisions an approach with an open and broad mind not circumscribed by strictures or predilection, whereas a generous interpretation suggests free-handedness—largess. It is not in the power of this court to 'give' but it definitely is its duty to interpret the law to insure what the law gives is not withheld." *Id.* at 466, 259 P.2d at 549; *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 160 P.2d 701 (1945) (to be liberally construed to effectuate its purposes); *Reynolds Metal Co. v. Glass*, 302 Ky. 622, 195 S.W.2d 280 (1946) (dependents lose right to sue, and get "extremely meagre" benefits—construe liberally in their favor); *Pelfrey v. Oconee County*, 207 S.C. 433, 36 S.E.2d 297 (1945); *American Mut. Liab. Ins. Co. v. Parker*, 144 Tex. 453, 191 S.W.2d 844 (1946); and cases cited note 199 *supra*.

is one the recipient of charity (non-compensable) and the other a wage-earner (compensable)? If convicts are put on the road to work, are they employed or can reasons be found to deny recovery?

In spite of the modern concept of the dignity of labor, some courts have placed state, county, and city welfare recipients<sup>241</sup> in the same class as outright "paupers." So also, recipients of help from private sources are receiving "charity" and therefore not employed. An example of this is an inmate of the Odd Fellows Home<sup>242</sup> who occasionally worked and received small sums for odd jobs. But a Salvation Army worker<sup>243</sup> or a hospital intern<sup>244</sup> is "employed" and not an object of charity or philanthropy. The city or town welfare-assisted worker is either "not employed" or is a "ward of the municipality." Some courts hold that because he is the object of statutory relief he is held to be beyond the scope of workmen's compensation relief.<sup>245</sup>

Fortunately the weight of authority for local welfare recipients is contra and the majority of courts recognize that the unfortunate victim of a work-accident is an employee, even though the state's, the county's, or the municipality's purpose in giving him work was to aid its citizens.<sup>246</sup> A pauper is still a human being with civil rights, and employable.

<sup>241</sup> Scordis' Case, 305 Mass. 94, 25 N.E.2d 226 (1940) (working on ash truck per welfare order, not employment but statutory relief); accord, Valvida v. City of Grand Rapids, 264 Mich. 204, 249 N.W. 826 (1933) (citizen needing public aid, working at public tasks and receiving scrip). *Contra*, Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939) (working on federally financed sewer project run by city, is employee) (leading case); Blake v. Department of Labor and Indus., 196 Wash. 681, 84 P.2d 365 (1938). See also note 246 *infra*.

<sup>242</sup> Seymour v. Odd Fellow's Home, 267 N.Y. 354, 196 N.E. 287 (1935) (inmate allowed "pin money" for odd jobs, mere gratuity and not employment).

<sup>243</sup> Hall v. Salvation Army, 236 App. Div. 199, 258 N.Y. Supp. 269 (3d Dep't 1932) (inmate worked receiving three dollars per week plus room and board; covered by workmen's compensation, total wage valued at thirteen dollars and fifty cents per week); accord, Schneider v. Salvation Army, 217 Minn. 488, 14 N.W.2d 467 (1944) (applicant for help received five dollars per week plus room and board).

<sup>244</sup> Bernstein v. Beth Israel Hospital, 236 N.Y. 268, 140 N.E. 694 (1923) (intern without cash wages is employee).

<sup>245</sup> See Scordis' Case, 305 Mass. 94, 25 N.E.2d 226 (1940).

<sup>246</sup> Industrial Comm'n v. McWhorter, 129 Ohio St. 40, 193 N.E. 620 (1934) (indigent worker performing labor for municipality for wages and groceries instead of receiving relief is an employee); Arnold v. State, 233 Iowa 1, 6 N.W.2d 118 (1942) (pay in groceries rather than cash immaterial, still employee under act); Hendershot v. City of Lincoln, 136 Neb. 606, 286 N.W. 909 (1939) (city sewer project with federal funds); Blake v. Department of Labor and Indus., 196 Wash. 681, 84 P.2d 365 (1938) (city and relief agency put worker on construction job; city gave room, board, and clothing, agency gave \$3.00 cash—was city employee and compensable). See also McLaughlin v. Autrim County Rd. Comm'n, 266 Mich. 78, 253 N.W. 221 (1934) (welfare recipient took job for county at twenty-five cents per hour—not poor relief); City of Waycross v. Hayes, 48 Ga. App. 317, 172 S.E. 756 (1934); Clark v. Workmen's Compensation Comm'n, 66 N.D. 17, 262 N.W. 249 (1935) (worker gave notes for amount of relief, then worked off payment of notes); Weber County-Ogden City Relief Comm'n v. Industrial Comm'n, 93 Utah 85, 71 P.2d 177 (1937). *Contra*, McBurney v. Industrial Acc. Comm'n, 220 Cal. 124, 30 P.2d 414 (1934) (receiving aid from public funds for "made work" on drainage); Oswait v. Lucas County, 222 Iowa 1099, 270 N.W. 847 (1937) (indigent put to work on county roads, not employee under the facts); Jackson v. North Carolina Emergency Relief Administration, 206 N.C. 274, 173 S.E. 580 (1934); State *ex rel.* State Bd. of Charities and Pub. Welfare v. Nevada Industrial Comm'n, 55 Nev. 343, 34 P.2d 408 (1934). See also Horovitz, *Modern Trends in Workmen's Compensation*, 21 IND. L.J. 473, 565-67 (1946).

Federal relief workers who are controlled by the state, city or county are usually granted compensation.<sup>247</sup> However, employees of the WPA, ERA or similar federal relief programs were sometimes denied benefits by the state court because they were federal and not state employees. The issue was the right to control the employee; thus he was referred to a federal compensation act.<sup>248</sup>

## (2) *Convicts*

Some courts have read into the acts a requirement that the employment be voluntary, and thereby they have denied awards to all prison inmates.<sup>249</sup> To deny an award against a private employer or state department which "borrows" the prisoner for regular outside-prison work is to insert into our compensation acts the intolerable continental law of civil death for all temporary convicts. There is no adequate reason for not insisting that outside employers insure convicts under the local workmen's compensation act. Even assuming that the convict cannot make a "contract"<sup>250</sup> with the prison authorities, contracting the prisoner out to a private or public employer raises a quite different question. Thus California properly permitted an award of compensation against its highway department which borrowed prisoners for work, even though the employment was not strictly voluntary.<sup>251</sup> And North Carolina, Maryland and Wisconsin by statute permit compensation for certain injuries to convicts.<sup>252</sup>

Reading in the word "voluntary" before the word "employment" in statutes using only the word "employment" is unjustifiable fiat. It is not read in for (1) taxpayers working out their road taxes

<sup>247</sup> *Doyle v. Commonwealth*, 153 Pa. Super. 611, 34 A.2d 812 (1943) (claimant working on WPA job remained employee of highway department); *Gates' Case*, 297 Mass. 178, 8 N.E.2d 12 (1937) (evidence that city retained right to control); *Commissioner of Taxation and Fin. v. School Dist. No. 16*, 252 App. Div. 714, 298 N.Y. Supp. 793 (3d Dep't 1937) (teamster on project started by CWA and continued under TERA and school board, compensated under state compensation act).

<sup>248</sup> *Donnelly's Case*, 304 Mass. 514, 24 N.E.2d 327 (1939) (evidence that claimant was under control of federal administrator and entitled to claim under federal statutes rather than state statutes). See *Horovitz, Current Trends in Basic Principles of Workmen's Compensation*, 20 *Rocky Mt. L. Rev.* 117, 172-73 n.605 (1947) (criticism of "informal" federal act "trials"); Note, 19 *NEB. L. BULL.* 130 (1949).

<sup>249</sup> *Greene's Case*, 280 Mass. 506, 182 N.E. 857 (1932) (case since fortified by statute: MASS. GEN. LAWS ANN. c. 152, sec. 74 [1958]); *Lawson v. Traveler's Ins. Co.*, 37 Ga. App. 85, 139 S.E. 96 (1927) (see cases cited); *Shain v. Idaho State Penitentiary*, 77 Idaho 292, 291 P.2d 870 (1955) (see suggestions, concurring opinion by Smith, J.). Cf. *Moats v. State*, 215 Md. 49, 186 A.2d 757 (1957) (inmate of state training school, not compensable).

<sup>250</sup> Some states do not require a "contract" of employment, e.g., a policeman is under the act in South Carolina as are all municipal employees except those elected: *Green v. City of Bennettsville*, 197 S.C. 318, 15 S.E.2d 334 (1940). See other cases of non-contracted employees, especially where only "appointment" is needed, in *HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 190-93* (1944). See also cases of implied contracts, *id.* at 208 n.92. See also *Fruitt v. Harker*, 328 Mo. 1200, 43 S.W.2d 769 (1931) (unnecessary to show an express contract between a father and his minor son).

<sup>251</sup> *California Highway Comm'n v. Industrial Acc. Comm'n*, 200 Cal. 44, 251 Pac. 808 (1926) (convict receiving seventy-five cents per day on road gang was an employee). *But see*, CAL. LAB. CODE, sec. 3352 (expressly excluding convict labor on state roads) (enacted in 1927).

<sup>252</sup> North Carolina passed a statute to make sure certain convicts have compensation rights. See N.C. GEN. STAT., secs. 97-13 (1958); also Maryland: MD. ANN. CODE, art. 101, sec. 35 (1957); and Wisconsin: WIS. STAT., sec. 56.21 (1959) (benefits available on parole as well as on discharge).

against their will<sup>253</sup> or for (2) persons impressed into service by policemen or sheriffs<sup>254</sup> brandishing a revolver under the citizen's nose—not really contractual free choice. However, such employment is properly considered as done under an "implied contract" when the impressed worker is injured.

### (3) *Illegal Employment of Adults and Minors*

A business which is prohibited completely, such as a house of prostitution or a speakeasy during prohibition,<sup>255</sup> taints the work connected with its operation. Where the employment is illegal *per se*, the workers performing illegal work normally have no remedy.

But where the general employment is legal, the fact that the employee may violate a law in obtaining or performing the employment is not a bar to compensation, especially where the injury has no direct relationship to the illegality. Hence, a street car conductor who lied in writing (a local criminal offense) about his former discharge elsewhere was not denied compensation when injured by an electric shock due to his employer's defective overhead trolley.<sup>256</sup> Nor was compensation denied to a waitress injured in a fire although she illegally received a percentage of the price of the liquor sold to customers.<sup>257</sup>

The business itself being legal, the illegal employment of minors does not deprive the minor or his dependents of their workmen's compensation rights. The fact that the law forbade the minor to do the work is not a defense to the employer or his insurer.<sup>258</sup>

By decision in some states, the minor legally or illegally employed can collect workmen's compensation and the parent may also

<sup>253</sup> *Town of Germantown v. Industrial Comm'n*, 178 Wis. 642, 190 N.W. 449 (1922) ("[H]is election to pay in labor implied a contract of service."). *But see*, *Board of Trustees v. State Industrial Comm'n*, 149 Okla. 23, 299 Pac. 155 (1931) (male citizen or his substitute not employee when performing statutory road duty).

<sup>254</sup> *Mitchell v. Industrial Comm'n*, 57 Ohio App. 319, 13 N.E.2d 736 (1936) (claimant ordered to assist sheriff in arrest, killed in accident after arrest—was deputized employee of county). *Tennis v. City of Sturgis*, 75 S.D. 17, 58 N.W.2d 301 (1953) (citizen asked by fire chief to help was employee); *cf. Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 164 N.E. 726 (1928) ("cabby" impressed into service by policeman; taxi company, not police department, liable for compensation); *Egan's Case*, 331 Mass. 11, 116 N.E.2d 844 (1954) (similar taxi driver case, but injury not direct).

<sup>255</sup> *Herbold v. Neff*, 200 App. Div. 244, 193 N.Y. Supp. 244 (3d Dep't 1922) (bartender during prohibition cut self on bottle; business illegal, no compensation); *accord*, *Swihura v. Horowitz*, 242 N.Y. 523, 152 N.E. 411 (1926) (beer deliveryman injured in illegal employment, claim dismissed).

<sup>256</sup> *See Kenny v. Union Ry.*, 166 App. Div. 497, 152 N.Y. Supp. 117 (3d Dep't 1915) (false statements did not contribute to cause of death); *accord*, *Long v. Big Horn Const. Co.*, 75 Wyo. 276, 295 P.2d 750 (1956) (seventy year old man lied about age, board refused award on grounds younger man could avoid injury—reversed and award ordered, contract voidable, not void).

<sup>257</sup> *Massachusetts Bonding & Ins. Co. v. Industrial Acc. Comm'n*, 19 Cal. App. 2d 583, 65 P.2d 1349 (1st Dist. 1937) (night club hostess).

<sup>258</sup> *Pierce's Case*, 267 Mass. 208, 166 N.E. 636 (1929) (killed in fireworks plant).

sue in tort if negligence is present.<sup>259</sup> As to the minor, his workmen's compensation rights are often held to be exclusive.<sup>260</sup> By statute in many states double and triple damages against the employer are allowed for the illegal employment of minors.<sup>261</sup>

#### (4) *Spouses*

Although most compensation acts are silent as to the employment of spouses, some deny compensation to a wife employed directly by the husband and vice versa. Although physically "in the employment" and actually drawing wages, a few courts, reasoning along old common-law lines, deny awards even if the insurer accepts premiums on her wages.<sup>262</sup> They argue that a wife cannot make a "contract" with her husband; husband and wife are one and he is the one.<sup>263</sup>

However, the better reasoned cases point out that while marriage may prohibit a valid contract between spouses for household work, it does not give the husband the right to compel his wife to work for him in his factory or shop; and when she does such work and he pays her wages, she is an employee by contract, either express or implied.

In an age where married women's statutes give women equality with men, it is a blot on the humanitarian purposes of workmen's

<sup>259</sup> *King v. Viscoloid Co.*, 219 Mass. 420, 106 N.E. 988 (1914); *Allen v. Trester*, 112 Neb. 515, 199 N.W. 841 (1924) (contrary provision in statute is unconstitutional); *Roxana Petroleum Co. v. Cope*, 132 Okla. 152, 269 Pac. 1084 (1928) (parent's rights not taken away by implication). *Contra*, *Wall v. Studebaker Corp.*, 219 Mich. 434, 189 N.W. 58 (1922); *Novack v. Montgomery Ward & Co.*, 158 Minn. 505, 198 N.W. 284 (1924) (statute puts minor in adult class). See discussion in HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 323-28 (1944). Note, 3 NEB. L. BULL. 297 (1925).

<sup>260</sup> *Slavinsky v. National Bottling Torah Co.*, 267 Mass. 319, 166 N.E. 821 (1929); *Allen v. Trester*, 112 Neb. 515, 199 N.W. 841 (1924); *Noreen v. Vogel & Bros.*, 213 N.Y. 317, 132 N.E. 102 (1927) (minor under sixteen gave wrong age, guardian sued for negligence, must take workmen's compensation). By statute some states give the minor the option to claim compensation or damages: KY. REV. STAT., sec. 342.170 (1960); ILL. REV. STAT. c. 148, sec. 143 (Smith-Hurd 1950); and N.J. REV. STAT., sec. 34:15-10 (1959). In Kansas, by decisions, the employee probably has his choice and common-law suit lies: *Lee v. Kansas City Pub. Serv. Co.*, 137 Kan. 759, 22 P.2d 942 (1933) (minor worked on dairy truck at night in violation of law). *Dressler v. Dressler*, 167 Kan. 749, 208 P.2d 271 (1949) (minor son lived at home, employed by parents without work permit—employer's failure to comply cannot be used as shield against minor).

Damage suits permitted, though compensation denied: *Widdoes v. Laub*, 33 Del. 4, 129 Atl. 344 (1925) (minor illegally employed has no rights under workmen's compensation act); *Knoxville News Co. v. Spitzer*, 152 Tenn. 617, 279 S.W. 1043 (1925) (even though minor lied about his age); *Wlock v. Fort Dummer Mills*, 98 Vt. 449, 129 Atl. 311 (1925) (contributory negligence is no defense in tort suit, workmen's compensation inapplicable). For further cases involving rights of minors employed illegally see HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS* 181, 315-16 (1944).

<sup>261</sup> Double compensation: *West's Case*, 313 Mass. 146, 46 N.E.2d 760 (1943) (by statute double compensation is provided for illegally employed minors—employer's ignorance of age is no defense). Treble damages: *Bloomer Brewery, Inc. v. Industrial Comm'n*, 239 Wis. 606, 2 N.W.2d 226 (1942) (though minor gave wrong age—so as not to emasculate one of the purposes of the child labor law).

<sup>262</sup> *Humphrey's Case*, 227 Mass. 166, 116 N.E. 412 (1917); reaffirmed in *Flaherty's Case*, 324 Mass. 755, 85 N.E.2d 831 (1949); *accord*, *Bendler v. Bendler*, 3 N.J. 161, 69 A.2d 302 (1949) (strong dissent). *Cf.* *Wilhelm v. Industrial Comm'n*, 399 Ill. 80, 77 N.E.2d 174 (1948). This case is based on an Illinois statute which reads: "Neither husband or wife shall be entitled to recover any compensation for any labor performed or services rendered to the other, whether in the management of property or otherwise." ILL. REV. STAT. c. 68, sec. 8 (Smith-Hurd 1959).

<sup>263</sup> *Foster v. Cooper*, 197 So. 117 (Fla. 1940) (she has no legal existence, husband and wife are one).

compensation to allow insurers to escape liability—especially when the wife's wages are figured in the premiums. Hence the majority of the states which have passed on this question and on related questions, have recognized the realities of modern business and marital relations and have awarded compensation where one spouse in fact works for the other.<sup>264</sup>

And regardless of the weight of authority, the weight of reason today favors compensation. Antiquated common-law principles have already done sufficient damage by appearing in disguised garb<sup>265</sup> elsewhere in workmen's compensation cases—they should not be extended to working spouses. Courts have repeatedly urged the use

<sup>264</sup> *Nesbit v. Nesbit*, 102 Pa. Super. 554, 157 Atl. 519 (1931); *Reid v. Reid*, 216 Iowa 882, 249 N.W. 387 (1933) (services in husband's shop are beyond scope of those demanded by marital relation and she may make contract for such work).

Where premiums were accepted, insurer is liable on estoppel: *McLain v. National Mut. Cas. Co.*, 23 So. 2d 680 (La. 1946) (husband working for wife collects). Where the wife was one of two partners, her spouse recovers: *Klemmens v. North Dakota Workmen's Compensation Bureau*, 54 N.D. 496, 209 N.W. 972 (1926). Michigan by statute in 1953 includes spouses who are regularly employed on a full-time basis of pay and hours, unless specifically excluded from the policy of compensation insurance. In Michigan even working partners may insure themselves. See *Gallie v. Detroit Auto Accessory Co.*, 224 Mich. 703, 195 N.W. 667 (1923) (constitutional for statute to include working members of a partnership when receiving "wages"). California permits husband-wife labor contracts: CAL. CIV. CODE sec. 158.

It has been pointed out that there are probably five or six million married women gainfully employed in the United States, and hundreds of thousands who are business proprietors and executives. "Of these, many work for or employ their husbands. It is anachronistic indeed to deprive the spouse of compensation protection when in every other respect the status is one of employment, merely on the strength of an obsolete rule left over from a time when the only services that could be affected by such a rule were domestic services which the spouse was bound in any case to perform by the obligations of the marriage relation.

"This general attitude disfavoring technical husband-wife contract disability appears to have widespread acceptance, and most courts will get around the disability if there is any possible legal ground on which to do so." 1 LARSON, WORKMEN'S COMPENSATION LAW 691 (1952).

Hence the use of estoppel and ruling that the partnership entity is different from the spouse who is one-half of the partnership entity. Even at common law, a woman run down by her own husband can collect from his employer whose truck did the damage! *Pittsley v. David*, 298 Mass. 562, 11 N.E.2d 461 (1937).

See also HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 201 (1944), adding: "[A] wife's compensation action against an insurance carrier is not a suit against her husband" any more than a suit against the husband's employer is a suit against the husband.

Note also that in North Carolina, by statute a woman can sue her own husband for negligence in auto cases: N.C. GEN. STAT. sec. 52-10 (1950). In allowing damages, the court stated in *King v. Gates*, 231 N.C. 537, 57 S.E.2d 765 (1950): "The legal disability of a married woman was originally based on a common-law fiction of the unity of husband and wife. Her legal existence during coverture was deemed incorporated in that of her husband, and neither could sue the other for a personal tort . . .

"But the fiction of the wife's merged existence has long since been explored. Both by statute and by judicial interpretation her disabilities have been removed . . . Nor does any principle of public policy in North Carolina now exempt her husband from civil liability for the injury and death of his wife proximately caused by his own negligence." *Id.* at 539-40, 57 S.E.2d at 767-68.

Even at common law, suits between husband and wife for negligence are increasingly allowed. *Leach v. Leach*, 227 Ark. 599, 300 S.W.2d 15 (1957). See discussion of this case and others by Prof. Lambert in 20 NACCA L.J. 329 (1957). And see Dean Pound's comment in 15 NACCA L.J. 384 (1955): "It is gratifying to see this remnant of the common-law disabilities of married women disappearing from the books." See also 35 CORNELL L.Q. 916-22 (1950); 50 COLUM. L. REV. 840-46 (1950); and 6 NACCA L.J. 241, 242 (1950).

Finally, even in Massachusetts where the spousal disability has its deepest roots, today a wife may sue her husband's employer for negligence even where her husband is the negligent servant. *Pittsley v. David*, 298 Mass. 562, 11 N.E.2d 461 (1937), previously cited in this note.

<sup>265</sup> Tort considerations are not applicable in workmen's compensation cases. *Baran's Case*, 336 Mass. 842, 145 N.E.2d 726 (1957) (hit by bullet, old case contra based on common-law reasoning reversed). "[C]are must be exercised lest long judicial habit in tort cases allow judicial thought in compensation cases to be too much influenced by a discarded or modified factor of decision." *Hanson v. Robitsek-Schneifer Co.*, 209 Minn. 596, 598, 297 N.W. 19, 21 (1941). *Martin v. Snuffy's Steak House*, 46 N.J. Super. 425, 134 A.2d 789 (App. Div. 1957) (court have a difficult time eliminating tort concepts). Negligence is no bar in a compensation case: *Portee v. South Carolina State Hosp.*, 234 S.C. 50, 106 S.E.2d 670 (1959) (penicillin administered negligently—died of shock). See also note 97 *supra*.

of common sense<sup>266</sup> instead of common law in connection with this new type of humanitarian, liberal legislation; and common sense indicates that when a woman actually works for her husband and draws wages, she is an employee. The income tax laws and similar laws apply to her wages wherever earned; a fortiori, workmen's compensation laws should protect her when she is injured while working for her spouse.

#### (5) *Minor Children*

The overwhelming weight of authority permits minor children, when actually working for their parents, to collect workmen's compensation.<sup>267</sup> The technical disability sometimes applied to the husband-wife cases is not carried over to their children. The courts hold that the act of a father or mother in employing the child creates at least a partial emancipation, removing to that extent any disability which might otherwise exist.<sup>268</sup> This is another illustration of the proper flexibility of workmen's compensation laws in discarding or overcoming narrow common-law concepts in favor of those supported by common sense.

#### F. INCAPACITY OR DISABILITY

It is not enough for a worker to prove that he received a "personal injury by accident arising out of and in the course of the employment." If he wishes to receive his weekly compensation, he has still another hurdle—proof of incapacity or disability.

Most states, apart from "schedule" or "specific" payments, require proof of disability or incapacity, before an award can be made for a compensable injury. The words "incapacity" and "disability" are usually interchangeable<sup>269</sup> and are used to denote the same thing—loss of wage-earning power, whether due to (1) actual physical disability, or (2) inability to obtain a job. The inability must

<sup>266</sup> *Schechter v. State Ins. Fund*, 6 NY.2d 506, 160 N.E.2d 901 (1959) (common-sense viewpoint of the average man). *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) (Minton, J., dissenting) (common-sense, everyday, realistic view). See also note 12 *supra*.

<sup>267</sup> *Cheney v. Department of Labor and Indus.*, 175 Wash. 60, 26 P.2d 393 (1933) (minors deemed emancipated by operation of law); *Van Sweden v. Van Sweden*, 250 Mich. 238, 230 N.W. 191 (1930) (agreement to pay wages—special or partial emancipation); *Denius v. North Dakota Workmen's Comp. Bureau*, 68 N.D. 506, 281 N.W. 361 (1938) (minors expressly under the act; fact that father was employer no defense, hiring son is a special or partial emancipation—no formality needed). But there must be a bona fide contract of hire, and not mere occasional services and payments that might be expected within a family: *Holt County v. Mullen*, 126 Neb. 102, 252 N.W. 799 (1934); *Caldwell v. Caldwell*, 55 So. 2d 258 (La. App. 1951).

<sup>268</sup> See note 267 *supra*. *Dressler v. Dressler*, 167 Kan. 749, 208 P.2d 271 (1949) (fifteen-year old son fell from ice truck—parents as employers paid him thirty dollars weekly and paid social security tax although son lived at home "free"—insurer did not even raise question of child not being employee of parents).

<sup>269</sup> *Kuhnle v. Department of Labor and Indus.*, 12 Wash. 2d 191, 120 P.2d 1003 (1942) (statute used words "permanent total disability" but the court rightfully speaks of "incapacity"); *Dameron v. Spartan Mills*, 211 S.C. 217, 44 S.E.2d 465 (1947) (the court properly uses the words "incapacity for work is total," interchangeably with "during such total disability").

be traceable, in part or in whole, to the injury or a combination<sup>270</sup> of physical disability and inability to obtain work.

While in most cases incapacity for work is due purely to physical disability, there can be incapacity in the form of a loss of wage-earning capacity after the physical disability has ceased—for example, after a crushing injury to the bones of the head and to one eye, the worker is physically able to work but no one wants the unsightly looking worker near them.<sup>271</sup> Hence disability awards without physical disability may be proper.

Most of the acts fail to define "disability" or "incapacity." The methods of awarding compensation for disability, and the types of disability benefits provided, vary from state to state.<sup>272</sup> The conclusion seems inescapable that there is no present possibility of creating uniformity out of the various ways of compensating various disabilities. The thought of scrapping all the acts and starting anew on this question is to indulge in useless speculation; and courts will have to do their best to determine the local legislative meaning—a meaning which often defies disentanglement.

But there are certain principles on the subject of disability which have a common thread throughout the compensation acts nationally and internationally. The following discussion is based on the decided cases over the last half-century.

### (1) *Total Incapacity*

All courts agree that if the disability is a physical one and wholly prevents an employee from working, temporary total incapacity payments are due; for example, the employee is considered totally incapacitated while in the hospital undergoing treatment or at home under the doctor's care. Thus the majority of courts hold that weekly total incapacity payments are due especially from an insurer, even though a liberal employer continues to give the absent employee the amount of his wages, and deducts the wages from his income

<sup>270</sup> Fennell's Case, 289 Mass. 89, 193 N.E. 885 (1935) (eye blinded but worked for years until factory moved—no one would hire him for over one year—was totally incapacitated); Sullivan's Case, 218 Mass. 141, 105 N.E. 463 (1914) (lost arm, was unable to market his remaining ability to work for six months—total disability awarded); Black Mountain Corp. v. McGill, 292 Ky. 512, 166 S.W.2d 815 (1942) (disability does not refer solely to physical disability; refers to loss of earning power and includes inability to secure work). In Ball v. William Hunt & Sons [1912], A.C. 496, Lord Atkinson stated that the words "incapacity for work" may mean physical inability to work so as to earn wages, or it may mean inability to obtain employment due to the belief of employers in the unfitness of the workman to perform work owing to the injury they perceived he has suffered. *Accord*, Plumlee v. Maryland Cas. Co., 184 Tenn. 497, 201 S.W.2d 664 (1947).

<sup>271</sup> Fennell's Case, 289 Mass. 89, 193 N.E. 885 (1935) (employee testified that after loss of eye, he did better work than before but that employers, seeing the eye, would not hire him for about a year—was totally incapacitated for that entire period—he might as well have been bed-ridden so far as earning wages were concerned).

<sup>272</sup> See U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS (Rev. 1960) (excellent tables and discussion on a nationwide basis).

taxes.<sup>273</sup> If a contract is to be implied to show that the wages are to cover the weekly compensation plus a "gift" of the excess, more than the mere continuance of "wages" should be shown.

Even where the injury has healed, if because of the effects of the injury no one will hire the employee, he continues to be temporarily totally disabled. For example, if a waitress is badly burned about the face, neck and arms, and the resulting scars are so horrible that no customer will let her wait on him, she is temporarily totally disabled. Until she can learn another trade and can get another job, she might as well be confined to her home even though she is physically able to work.<sup>274</sup> So, too, the disfiguring loss of an eye may delay the obtaining of a new job, and during the delay incapacity payments may be due.<sup>275</sup>

Total disability payments may be due where the disability is partly physical and partly due to the worker's inability to market his remaining capacity for work. The one-armed or other severely injured man may finally be ready physically to return to work, but for a time no one will hire a cripple. During that time payments for total incapacity may continue although the physical disability itself may be considered as only partial. The criterion is loss of earning power and that is not necessarily proportional to bodily function disability.<sup>276</sup>

Awards of continuing temporary total disability properly and exceptionally have been upheld for very serious injuries even during

<sup>273</sup> *Hathaway v. New Mexico State Police*, 57 N.M. 747, 263 P.2d 690 (1953), 13 NACCA L.J. 51 (1954) (continued payments of salary did not amount to a payment of compensation so as to suspend right to sue under compensation act—salary here like a gratuity or sentimental gesture); *McGhee v. Sinclair Ref. Co.*, 146 Kan. 653, 73 P.2d 39 (1937) (no agreement that "wages" were in lieu of compensation); *Modern Equip. Co. v. Industrial Comm'n*, 237 Wis. 517, 20 N.W.2d 121 (1945) (no compensation credit for paying full wages—wages are pure gift, though deductible expense); *Paramount Pictures v. Snow*, 213 Ark. 713, 212 S.W.2d 346 (1948); *Shaw's Case*, 247 Mass. 157, 141 N.E. 858 (1923) (part of wages during post-injury work was gift); *Middleton v. City of Watertown*, 70 S.D. 173, 16 N.W.2d 89 (1944).

Where an employer is a self-insurer and continues the full wage while employee is out of work, an inference may be made that part of it represents the weekly compensation payments due; *Mercury Aviation Co. v. Industrial Acc. Comm'n*, 186 Cal. 375, 199 Pac. 508 (1921). Where "wages" were reasonably intended to include "compensation" the credit is only for the part equal to the weekly compensation; *Elliot v. Gooch Feed Mill Co.*, 147 Neb. 612, 24 N.W.2d 561 (1946). *Creighton v. Continental Roll & Steel Foundry Co.*, 155 Pa. Super. 165, 38 A.2d 337 (1944) (credit indicated if no work done, but some work will rule out credit); *Hartford Acc. & Indem. Co. v. Hay*, 159 Tenn. 202, 17 S.W.2d 904 (1929) (employer gives occasional sums to the employee as needed—credit is denied, purely a gratuity).

<sup>274</sup> See *Fennell's Case*, 289 Mass. 89, 193 N.E. 885 (1935) (one eye blinded but worked for years; when factory moved, no employer would hire him—totally disabled for the sixty weeks he was unable to get employment on account of the unsightly eye). For an excellent definition of total disability, see *Lee v. Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433 (1950): "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* at 320, 41 N.W.2d at 436; Note, 18 NEB. L. BULL. 101 (1939).

<sup>275</sup> See *Fennell's Case*, 289 Mass. 89, 193 N.E. 885 (1935).

<sup>276</sup> *J. A. Foust Coal Co. v. Messer*, 195 Va. 762, 80 S.E.2d 533 (1954), 14 NACCA L.J. 182 (1955) (total wage loss by reason of partial physical incapacity—thirty-three and one-half per cent physical disability translated into one hundred per cent wage loss; total compensation due when unable to market his remaining capacity for work). *Schnatzmeyer v. Industrial Comm'n*, 77 Ariz. 266, 270 P.2d 794 (1954); *Czeplicki v. Fatmir Bearing Co.*, 137 Conn. 464, 78 A.2d 339 (1951); *Sullivan's Case*, 218 Mass. 141, 105 N.E. 463 (1914) (one armed man); *Castle v. City of Stillwater*, 235 Minn. 502, 51 N.W.2d 370 (1952), 10 NACCA L.J. 109 (1952) (perma-

periods when the seriously crippled worker was "paid" high wages.<sup>277</sup> In addition, a seriously injured worker has the benefit of the odd-lot or nondescript theory. If a worker is so maimed, crippled or injured as to make it obvious that he will not be employed in any well-known branch of the labor market because the capacities for work left to him fit him only for special uses, he may be considered an "odd-lot" or "non-descript" in the labor market.<sup>278</sup> If, then, the employer cannot show that a customer can be found who will take him—thus shifting the burden of proof to the employer—the workman is entitled to total incapacity payment.<sup>279</sup>

It should be noted that the word "incapacity" came from the English act; hence English cases are of weight thereon.<sup>280</sup>

## (2) *Partial Incapacity*

When the employee can do light work, and such work is available, even though it is not his usual calling, most courts hold that the administrator has the power to reduce the compensation from total to partial compensation.<sup>281</sup> And this is true even though the worker fails to take such work, the administrator of his own knowl-

nent total disability though doctors testified to only thirty per cent permanent loss of bodily function in a sixty-nine year old chief of police); *Rodriguez v. Micheal A. Scaturchio*, 42 N.J.Super. 341, 126 A.2d 378 (App. Div. 1956) (arm injury, coupled with meager education and inability to speak English—disability total and permanent); *Jordan v. Decorative Co.*, 230 N.Y. 522, 130 N.E. 634 (1921) (hernia, but cannot refuse a job without giving a reason and expect compensation); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925) (inability to do or secure work because of injury creates disability); see discussion of *Shaffer v. Midland Empire Packing Co.*, 127 Mont. 211, 259 P.2d 340 (1953) in 12 NACCA L.J. 55 (1953); see also cases in note 270 *supra*.

<sup>277</sup> *National Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2. 784 (1950) (paraplegic, due to spinal cord injury, took courses and worked sporadically but made \$5,500 in eleven years; total temporary then permanent continued). Insurance carrier may not ". . . take advantage of the fact that this most unfortunate young man who, persevering to the utmost, had at times, and under unusual circumstances, been able to obtain some employment, and work his undoing in the matter of compensation vouchsafed by statutory enactment." *Id.* at 226, 214 P.2d at 787. *Taber v. Tole*, 188 Kan. 312, 362 P.2d 17 (1961) (became teacher, but no physical change in back; permanent and total payments ordered despite earning \$3,900 a year). Increased wages is not the test, for he was still unable to perform the same work after the injury. New skills are no defense for permanent total award, though statute permitted review of awards.

*Cornett-Lewis Coal Co. v. Day*, 312 Ky. 221, 226 S.W.2d 951 (1950) (crooked leg, knee infected—given temporary total though part of period he actually worked in the mine); *Texas Indem. Ins. Co. v. Bonner*, 228 S.W.2d 348 (Tex. Civ. App. 1950) (disc injury. did some work, getting old pay at regular job—total disability upheld); *accord*, *Great Am. Indem. Co. v. Segal*, 229 F.2d 845 (5th Cir. 1956); see also additional cases in notes 302 and 317 *infra*; *General Azucarera Don Pedro v. Cesareo De Leon and Leonardo Alla*, G.R. (Phil.) No. L-10036, December 28, 1957.

<sup>278</sup> *Cardiff Corp. v. Hall* [1911], 1 K.B. 1009; *Eastern S.S. Lines v. Monahan*, 21 F. Supp. 535 (S.D. Me. 1937); *Hood v. Wyandotte Oil & Fat Co.*, 272 Mich. 190, 261 N.W. 295 (1935) ("odd-lot doctrine" applies to a temporary total disability as well as to permanent total disability); *Jordan v. Decorative Co.*, 230 N.Y. 522, 130 N.E. 634 (1921) ("odd-lot doctrine" applied to a common laborer sustaining a hernia); *Kuhnle v. Department of Labor and Indus.*, 12 Wash. 2d 191, 120 P.2d 1003 (1942) (a great many courts have adopted the "odd-lot doctrine"); *Kirby v. Howley Park Coal Co.*, 13 B.W.C.C. 168 (1920); see *Lee v. Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433 (1950) (absence of reasonably stable market for injured worker's services as total disability—sporadic employment no bar).

<sup>279</sup> See note 278 *supra*.

<sup>280</sup> *Sullivan's Case*, 218 Mass. 141, 105 N.E. 463 (1914). See also cases in note 58.

<sup>281</sup> *Percival's Case*, 268 Mass. 50, 167 N.E. 352 (1929); *O'Reilly's Case*, 265 Mass. 456, 164 N.E. 440 (1929); "But in the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question." *Id.* at 456, 164 N.E. at 440. See HOBOVITZ, PRACTICE AND PROCEDURE UNDER THE MASS. WORK. COMP. ACT 46-48 (1930).

edge<sup>282</sup> can find the amount he believes the worker would be able to earn in the open labor market, and set that amount as the earning capacity. The difference between his old former wage and the new earning capacity would determine the amount of partial compensation due.

Conversely, the fact that the injured worker has earned his old wage for a time does not saddle him forever with a post-injury earning capacity equal to that old wage. If he is laid off, or quits for reasonable cause or is compelled to retire, and the effects of the original injury have not ceased, an award of partial compensation will be upheld.<sup>283</sup>

### (3) *Effect of Economic Rises and Falls of Wage Levels*

Most acts show an intent that disability payments reflect the true wage loss—the drop in earning ability or capacity due to the injury. If there were no economic rises or falls in wages, there would exist very little trouble in assessing this loss. If seventy-five dollars was the average original wage, and after losing three fingers the worker could at best get a fifty dollar job, his wage-earning capacity would be reduced one-third, or twenty-five dollars. And even if he refused for insufficient reasons of his own to take the fifty dollar job, the administrator could still set his earning capacity at that figure.

However, suppose that after the injury, economic conditions were so poor that the seventy-five dollar job dropped to a sixty-dollar job and fifty-dollar job dropped to a thirty-five-dollar job.

Nearly all statutes provide that the original wage remain fixed in computing the amount of compensation later due. But they also provide that partial compensation shall not be determined by the

<sup>282</sup> See cases cited note 281 *supra*; *Kacavisti v. Sprague Elec. Co.*, 102 N.H. 266, 155 A.2d 183 (1959). Claimant's right thumb was subjected to repeated trauma, and while cleaning wires it blistered. The superior court said there was no evidence upon which to determine earning capacity for a ten per cent permanently incapacitated bruised thumb except "by speculation" and remanded the case. The court should use its "judicial discretion" in determining the loss. This should be measured by the effect upon her ability to earn and not by the percentage of her permanent disability.

<sup>283</sup> *Williams v. Metropolitan Coal Co.*, 76 Commw.L.R. 431 (Austl. 1948) (compelled to retire—pneumoconiosis); *McKeon's Case*, 326 Mass. 202, 93 N.E.2d 534 (1950) (able to work at full wages until factory closed, despite silicosis—can perform other work of a less remunerative kind but cannot continue his old work); *Donnelly's Case*, 243 Mass. 371, 137 N.E. 696 (1923) (factory moved—watchman worked as doorkeeper, with hernia); *accord*, *Percival's Case*, 268 Mass. 50, 167 N.E. 852 (1929) (refused to move forty miles—loss of leg, reasonable to refuse to move family); *Bajdek's Case*, 321 Mass. 325, 73 N.E.2d 253 (1947) (injured three fingers badly, took less dexterous job at same wages—left job for less pay when he heard men were about to be laid off and he had no sufficient seniority—award of partial upheld); *Manley's Case*, 282 Mass. 38, 184 N.E. 372 (1933), and *Morrell's Case*, 278 Mass. 485, 180 N.E. 223 (1932) (out of work generally: loss of fingers, arms without more, this supports award of disability during non-working periods—furnishes some evidence of incapacity); *Dragon's Case*, 264 Mass. 7, 161 N.E. 816 (1928) (temporary layoff—loss of two fingers, awarded twenty-five per cent partial; could not do things he did before the accident which cut down his chances of getting work during layoff); *Birch Bros. v. Brown* [1931], A.C. 605 (subsequent blindness, refused offer of work—error to reduce total to partial compensation even though insurer offered bona fide job as cleaner in their own office, but worker could not do it as practically blind).

"actual" wage earned after the injury but by the "average weekly weekly wage he is *able to earn* thereafter."<sup>284</sup>

Under such wording the amount to be considered is his ability to earn, and not his actual wage.<sup>285</sup> And his ability to earn is to be measured under the market conditions that existed at the time of his original injury.<sup>286</sup> Economic changes, up or down, cannot be considered.<sup>287</sup> In short, the seventy-five dollars is to be measured against his ability to earn fifty dollars, and the effect of the depression in dropping his post-injury wage to thirty-five dollars is to be ignored.<sup>288</sup> His earning capacity has been reduced twenty-five dollars and not forty dollars.

Similarly, if a seventy-five dollar worker prefers to take and does take a thirty-five dollar job when his earning capacity justifies a fifty-dollar job, the administrator must ignore the actual wage earned and must consider only the difference between seventy-five and fifty dollars.<sup>289</sup>

The reverse is also true. If after the original injury, the fifty-dollar post-injury job increases to sixty-five dollars *because of economic condition*, the employee's earning capacity remains at fifty dollars; and the actual wage earner must be ignored by the administrator. His findings should state that the actual wage does not represent the true "earning capacity" and that he ignored the actual wage.<sup>290</sup>

<sup>284</sup> See, e.g., MASS. GEN. LAWS ANN. c. 152, sec. 35 (1958). "Under the statute . . . it is not the wages actually earned after the injury that are the basis of deciding the earning capacity." Korobchuck's Case, 277 Mass. 534, 536, 179 N.E. 175, 176 (1931) (but the board can on proper evidence find that what he actually earned was what he was able to earn); Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916) (board can find he was able to earn more than he actually earned—post injury wages disregarded because affected by depression); Smith v. Tonawanda Paper Co., 238 App. Div. 690, 266 N.Y. Supp. 160 (3d Dep't 1933) (fractured patella, received five dollars at newstand—board could give him an earning capacity higher than five dollars actually received).

<sup>285</sup> Lavallee's Case, 277 Mass. 538, 179 N.E. 215 (1931) ("diminished capacity" resulting from the injury, and not actual post-injury earnings if affected by depression); accord, Lumber Mut. Cas. Ins. Co. v. O'Keffe, 217 F.2d 720 (2d Cir. 1954) (earning capacity found to be less than actual post-injury wages—serious back injury); Carignan v. Winthrop Spinning Co., 95 N.H. 333, 63 A.2d 241 (1949) (the test is "earning capacity" and not actual wages); Gagne v. New Haven Road Const. Co., 87 N.H. 163, 175 Atl. 818 (1934) (ability to earn rather than actual earnings are measurement of his working capacity after the injury).

<sup>286</sup> Whyte v. Industrial Comm'n, 71 Ariz. 338, 227 P.2d 230 (1951), 7 NACCA L.J. 105 (1951); Carignan v. Winthrop Spinning Co., 95 N.H. 333, 63 A.2d 241 (1949).

<sup>287</sup> Whyte v. Industrial Comm'n, 71 Ariz. 338, 227 P.2d 230 (1951), citing Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916); Peak v. Nashua Gunned & Coated Paper Co., 87 N.H. 350, 179 Atl. 355 (1935) (if he was for any reason, either over or underpaid after his return to work, then his wages would not show actual earning capacity); Industrial Comm'n of Ohio v. Royer, 122 Ohio St. 271, 171 N.E. 337 (1930) (the fact of increased or decreased earnings has no essential relation to earning capacity), approved, State v. Industrial Comm'n, 50 N.E.2d 680 Ohio App.), *aff'd*, 140 Ohio St. 193, 51 N.E.2d 643 (1943). See also note 286 *supra*.

<sup>288</sup> Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916) (post-injury wages not binding on board).

<sup>289</sup> Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916); Whyte v. Industrial Comm'n, 71 Ariz. 338, 227 P.2d 230 (1951); Lavallee's Case, 277 Mass. 538, 179 N.E. 214 (1931) (may give higher earning capacity than actual wages received); Smith v. Tonawanda Paper Co., 238 App. Div. 690, 266 N.Y. Supp. 160 (3d Dep't 1933).

<sup>290</sup> Whyte v. Industrial Comm'n, 71 Ariz. 338, 227 P.2d 230 (1951); Luckenbach S.S. Co. v. Norton, 96 F.2d 764 (3d Cir. 1938) (general economic increases, partial compensation allowed despite earning full wages); Shaffer v. Midland Empire Packing Co., 127 Mont. 211, 259 P.2d 340 (1953), 12 NACCA L.J. 55 (1953); Carignan v. Winthrop Spinning Co., 95 N.H. 333, 63 A.2d 241 (1949), 3 NACCA L.J. 177 (1949) (partial compensation awarded although as a result

In short, actual post-injury wages can be ignored whenever they are an unreliable basis for estimating capacity.

Unreliability of post-injury wages may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by the claimant after the accident; payment of wages disproportionate to capacity out of sympathy to the claimant; and the temporary and unpredictable character of post-injury earnings.<sup>291</sup>

Larson states in his comprehensive treatise that it has been held uniformly, "without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of actual post-injury earnings equalling or exceeding those received before the accident."<sup>292</sup>

And the recent as well as the older cases have uniformly upheld findings of weekly disability compensation, whether partial, permanent partial or total compensation, even where the post-injury wages equalled or exceeded the original wages at the time of injury.<sup>293</sup>

of a general wage increase the employee's earnings were actually more than he received before the accident); *State v. Industrial Comm'n*, 50 N.E.2d 680 (Ohio App. 1943) (error to deny continuing compensation for double hernia merely because he continued to work at old wage—earning capacity, not actual earnings govern; error for board to make a rule in advance for two weeks compensation if operation is refused).

<sup>291</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW sec. 57.21, at 5 (1952) (citing many cases).

<sup>292</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW sec. 57.21, at 5 (1952). Riesenfeld, *Contemporary Trends in Workmen's Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531 (1954): "Accordingly, the receipt of the same or higher wages after the injury, especially from the same employer, does not necessarily bar the finding of disability any more than continued lack of employment is conclusive of disability." *Id.* at 554.

<sup>293</sup> *Goodyear Tire & Rubber Co. v. Downey*, 266 Ala. 344, 96 So. 2d 278 (1957) (broken leg as permanent partial disability of the body as a whole—fact that no substantial decrease in post-injury wages is no bar to award); *Great Am. Indem. Co. v. Segal*, 229 F.2d 845 (5th Cir. 9156). 18 NACCA L.J. 128 (1956) (total disability allowed despite greater post-injury wages at lighter work given by employer); *Whyte v. Industrial Comm'n*, 71 Ariz. 338, 227 P.2d 280 (1951) (post-injury wages not binding, whether higher or lower); *Smith v. Perry Jones, Inc.*, 185 Kan. 565, 345 P.2d 640 (1959) (twenty per cent permanent partial disability, though earning old wages); *Davis v. C. F. Braun & Co.*, 170 Kan. 177, 223 P.2d 958 (1950), 7 NACCA L.J. 104 (1951) (award fifteen per cent permanent partial disability despite higher post-injury wages). "An award, however, is not necessarily prevented by the fact that the employee has received the same wages after he returned to work as he had received before he was injured." *Garrigan's Case*, 169 N.E.2d 870, 873 (Mass. 1960). It is sufficient if "the employee is less efficient in his former employment" or if the injury "diminished his earning capacity in some other employment." *Id.* at 873. At time of award employee was not working, but had previously had post-injury wages equalling his original wage. Here, after heart attack, he had to go on reduced schedule, and his earning capacity was reduced from \$107 to \$85 weekly. *Accord*, *Shea v. Rettie*, 287 Mass. 454, 192 N.E. 44 (1934) (patrolman could not thereafter do full duties, but received old pay). In Massachusetts and elsewhere there is no recovery for future lost wages, but there is recovery for loss of ability to earn even where post-injury wages at the time of the trial or jury verdict exceed old wages. *Yates v. Dann*, 167 F. Supp. 174 (D. Del. 1958) (tortfeasor not entitled to reduction where through unusual exertion post-injury wages became higher).

*Lumber Mut. Cas. Ins. Co. v. O'Keefe*, 217 F.2d 720 (2d Cir. 1954), 15 NACCA L.J. 184 (1955) (partial compensation awarded for entire back period despite higher post-injury wages for over eight years); *Pillsbury v. United Eng'r Co.*, 187 F.2d 987 (9th Cir. 1951) (entitled to compensation though earning full wages); *Luckenbach S.S. Co. v. Norton*, 96 F.2d 764 (3d Cir. 1938) (partial compensation for hernia although earning full wages after injury); *Hartford Acc. & Indem. Co. v. Hoage*, 85 F.2d 420 (D.C. Cir. 1936) (partial compensation award upheld for entire period although receiving higher wages—"dropped wrist," worked with one hand); *Betz v. Columbia Tel. Co.*, 224 Mo. App. 1004, 24 S.W.2d 224 (1930) (compensation awarded, though earning former wages); *Friedt v. Industrial Acc. Bd.*, 345 P.2d 377 (Mont. 1959) (test is loss of ability to earn in the open market, not whether there has been a loss of income); *Ludwickson v. Central States Elec. Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942) (total continued, eventually earning \$1,500 a year as instructor—under Nebraska statute, there was no "decrease of incapacity due solely to the injury"); *Carigan v. Winthrop Spinning Co.*, 95 N.H. 333, 63 A.2d 241 (1949), 3 NACCA L.J. 177 (1949) (partial compensation despite general wage increase making post-injury wages higher); *Weinstock v. United Cigar Stores Co.*, 137 Pa. Super. 128, 8 A.2d 799 (1959) (partial compensation despite higher post-injury wages); see also *Crawford v. N. P.*

The courts properly reason that in "determining loss of earning capacity, earnings after the injury must be corrected to correspond with the general wage level in force at the time pre-injury earnings were calculated."<sup>294</sup>

In a leading case, the Arizona Supreme Court expressly held that the words "able to earn *thereafter*" must be construed to refer to conditions existing immediately after the accident, not to conditions existing many years later.<sup>295</sup> Larson states: "The Arizona court's holding is the only possible result, if 'capacity' is to be given any rational meaning. Anyone who rejects this result would, to be consistent, have to include economic falls in wage levels in disability calculations as well."<sup>296</sup> In such economic falls insurers have successfully insisted, and the courts have held, that the wage level in force at the time of the original injury alone must be considered.

Post-injury wages equalling or in excess of the original-injury wages do not necessarily bar the finding of disability any more than the continued lack of employment is conclusive of disability. The trier of fact is justified in disregarding post-injury wages on proof that they are an unreliable basis for measuring the injured employee's working capacity. Such proof is supplied when the fact-finder is satisfied that a post-injury wage is high or low because of, or in part affected by, any of the following factors: (1) economic changes in the labor market which caused wages to rise or fall;<sup>297</sup> (2) differences in the number of hours worked since the injury;<sup>298</sup> (3) post-injury training or change in age and maturity;<sup>299</sup> (4) the

Nielson, 78 Idaho 526, 307 P.2d 229 (1957) (lost only good eye and became totally blind; entitled to second injury fund payments although he remained employed at same job at same pay); Jones v. Employers Mut. Liab. Ins. Co. of Wis., 114 So. 2d 602 (La. App. 1959) (despite increase in pay from one dollar to one dollar and forty cents per hour); Peak v. Nashua Gunned & Coated Paper Co., 87 N.H. 350, 179 Atl. 355 (1935); Cory Bros. v. Hughes [1911], 2 K.B. 738. *accord*, Russell v. Southeastern Util. Serv. Co., 230 Miss. 272, 92 So. 2d 544 (1957) (foreman at higher wages—fifty per cent loss of wage earning capacity was not improper). This same rule governs millions of federal workers: See In the Matter of Willie M. Sowers Brown & Veteran's Administrator, No. 57-41, ECAB, Sept. 23, 1957 (loss of earning capacity though still earning old wages—laundry worker after injury could never again do old work), citing case of Elvin H. Tietze, 2 ECAB 38, 41.

<sup>294</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW sec. 57.32, at 13 (1952).

<sup>295</sup> Whyte v. Industrial Comm'n, 71 Ariz. 338, 227 P.2d 230 (1951).

<sup>296</sup> 2 LARSON, WORKMEN'S COMPENSATION LAW sec. 57.32, at 14-15 (1952).

<sup>297</sup> Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916) (economic depression); Carignan v. Winthrop Spinning Co., 95 N.H. 333, 63 A.2d 241 (1949) (general wage increases); Mikno v. Endicott Johnson Corp., 278 App. Div. 598, 102 N.Y.S.2d 45 (3d Dep't 1951) (economic conditions reduced earnings—remitted to see how much of reduction was due to injury).

<sup>298</sup> Franklin County Coal Corp. v. Industrial Comm'n, 398 Ill. 523, 76 N.E.2d 457 (1947) (entitled to partial award where hourly wage has fallen but offset by working longer hours—if not figured in original wage, overtime should not be figured in post-injury wages); Brandfon v. Beacon Theatre Corp., 300 N.Y. 111, 89 N.E.2d 617 (1949) (if employee held two concurrent jobs, and only one figured in average wage, post-injury wages in other job not to be considered); DiMezzo v. G. Levor & Co., 281 App. Div. 719, 117 N.Y.S.2d 828 (3d Dep't 1952) (injured tannery worker, after disabling back injury, was elected to part time position of town supervisor at higher wages than at tannery—these wages were properly excluded in determining his reduced earnings); Devlin v. Iron Works Creek Constr. Corp., 164 Pa. Super. 481, 66 A.2d 221 (1949).

<sup>299</sup> Epsten v. Hancock-Epsten Co., 101 Neb. 442, 163 N.W. 767 (1917) (change in training and education); Taber v. Tole, 188 Kan. 312, 362 P.2d 17 (1961) (total permanent disability ordered for laborer suffering heatstroke despite subsequent education and teaching position at \$3,900 a year—ability to perform work he was able to do before injury governs); Greenfield v. Industrial Acc. Bd., 133 Mont. 136, 320 P.2d 1000 (1958) (sixteen-year old boy—compensation adjusted, upon his reaching maturity, to earnings as an adult in work of the type in which he

amount paid as "wages" is disproportionate to earning capacity because of employer-sympathy<sup>300</sup> or because fellow workers helped him with his work,<sup>301</sup> or (5) for any other reason<sup>302</sup> the fact-finder is satisfied that the actual post-injury wage does not fairly represent the earning capacity of any employee still suffering from the effects of his industrial injury.

However, in any case where the employee has been working regularly and has been earning wages since the injury, the trier of fact has the power to conclude on all the evidence before him, that the actual post-injury wage in fact represents what the employee is "able to earn"<sup>303</sup>—that it represents his earning capacity; but he cannot exclude or ignore evidence tending to show that the actual post-injury earnings have been abnormal or unreliable or affected by economic conditions, and therefore should be disregarded in fixing the employee's earning capacity.<sup>304</sup>

Where the statute speaks of "average" weekly wages earned thereafter,<sup>305</sup> post-injury earning capacity cannot be figured on a sliding scale, changing week by week, but must be computed on an "average" earning capacity over any reasonable period.<sup>306</sup>

was employed at the time of the injury); *Ludwickson v. Central States Elec. Co.*, 142 Neb. 308, 6 N.W.2d 55 (1942) (completed education, but physical impairment unchanged; statute allowed changes only when decrease in incapacity was "due solely to the injury"—should not be penalized for training himself for more remunerative employment); *Bowhill Coal Co. v. Malcolm* [1910], Sess. Cas. 447 (Scot.) (eighteen-year old minor with bad hernia could not lift heavy weights after injury—not necessarily barred from compensation because getting same wages over year later).

<sup>300</sup> *Shaw's Case*, 247 Mass. 157, 141 N.E. 858 (1923) (employer sympathy—part of wage really a "gift"); *Hartford Acc. & Indem. Co. v. Hoage*, 85 F.2d 420 (D.C. Cir. 1936); *Hulo v. City of New Iberia*, 153 La. 284, 95 So. 719 (1922); *Donahoe v. Ford Motor Co.*, 295 Mich. 422, 295 N.W. 211 (1940); *Sporic v. Swift & Co.*, 149 Neb. 246, 80 N.W.2d 891 (1948) (assigned different work after injury).

<sup>301</sup> *Raffaghelle v. Russell*, 103 Kan. 849, 176 Pac. 640 (1918) (permanent partial awarded though getting former wages—no abuse of discretion in awarding the compensation in a lump-sum instead of weekly); *Norwood v. Lake Bisteneau Oil Co.*, 145 La. 823, 83 So. 25 (1919) (other workmen through sympathy would start the engine for him); *Quick v. Dow Chemical Co.*, 293 Mich. 215, 291 N.W. 638 (1940) (delegated the harder work to a helper).

<sup>302</sup> *National Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950) (paraplegic with irregular, unreliable post-injury job—entire earnings disregarded and total payments continued); *Zakon v. Metropolitan Life Ins. Co.*, 323 Mass. 486, 104 N.E.2d 603 (1952) (employment irregular, but made several thousand dollars in business transactions—total and permanent disability affirmed) (accident policy case); *Lee v. Minneapolis St. Ry.*, 230 Minn. 815, 41 N.W.2d 433 (1950) (lost eye and arm, developed neurosis); *Texas Indem. Ins. Co. v. Bonner*, 228 S.W.2d 348 (Tex. Civ. App. 1950) (iceman with ruptured disc performed odd jobs—not deprived of total permanent disability). See cases cited in note 277 *supra* and 317 *infra*.

<sup>303</sup> *Korobchuk's Case*, 277 Mass. 534, 179 N.E. 175 (1931); *Lavallee's Case*, 277 Mass. 538, 179 N.E. 214 (1931) (demonstrated earning capacity governs, not actual post-injury wages).

<sup>304</sup> *Miles v. Industrial Comm'n*, 73 Ariz. 208, 240 P.2d 171 (1952) (commission in error to give seventy-five per cent earning capacity since actual comparison of wages here is reliable); *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 61 So. 2d 789 (1953) (trier of fact denied compensation because post-injury wages greater than pre-injury wages—reversed with direction to consider factors that might have accounted for the increase); see also cases cited in notes 297-302 *supra*.

<sup>305</sup> Many statutes follow verbatim the original English wording "able to earn thereafter." For cases construing such statutes, see, e.g., *Whyte v. Industrial Comm'n*, 71 Ariz. 338, 227 P.2d 230 (1951); *Korobchuk's Case*, 277 Mass. 534, 179 N.E. 175 (1931). "[S]tatutory variations in the phrasing of the test" have not changed the result that "actual post-injury earnings" may be disregarded in establishing earning capacity. 2 LARSON, WORKMEN'S COMPENSATION LAW sec. 57.21; at 5 (1952).

<sup>306</sup> The "sliding-scale" method usually results in the loss of many dollars to employees drawing partial compensation weekly. Consider the following example. The pre-injury wage was eighty dollars, and the administrator finds a present earning capacity of sixty dollars and awards the employee twenty dollars weekly (the full difference is awarded by statute in Massachusetts). The employee then gets a job with earnings which vary weekly. The administrator finds that his actual weekly earnings represent what he is "able to earn"; therefore he goes over the payroll

(4) *Permanent Total Disability*

Where the statute use the words "permanent and total" disability it is clear that the disability need not be permanently total, without intervals of relief, or totally permanent. It is sufficient if at the time of the award the injury is both total and permanent.<sup>307</sup> And even though the "and" is missing, the words "permanent total" are still two adjectives modifying disability, and the same rules apply.<sup>308</sup>

The overwhelming weight of authority permits awards of permanent total disability even though the employee is not absolutely helpless or physically broken for all purposes other than to live.<sup>309</sup> Nor does occasional work over a long or short period, with small remuneration, bar recovery.<sup>310</sup> Where the injuries are especially serious—the employee has become a paraplegic or has lost a leg—the weight of authority permits the trier of fact to disregard as "earning capacity" any income derived from heroic efforts of the victim to better himself, such as working in pain;<sup>311</sup> from post-injury

on a sliding scale, week by week. Those weeks in which the worker earns less than sixty dollars, he gets only twenty dollars weekly. Those weeks in which he earns eighty dollars or more he gets nothing in compensation. The result is that the employee is financially worse off than if the "average" earning capacity over the entire period is taken as required by the typical statute—"average weekly wages he is able to earn thereafter." The same problem arose under England's statute, from which the Massachusetts' and other statutes are copied verbatim. As one English Court stated: "I am quite clear that the County Court Judge has exceeded his jurisdiction in making his award on a sliding scale. We are told that the learned Judge is in the habit of making awards in this form, and I only desire to say now that, if this is so, I think it is time it was stopped. Sometime ago we considered this very point in *Baker v. Jewel* [1910], 2 K.B. 673. The appeal must be allowed and the case sent back." *Newhouse & Co. v. Johnson*, 5 B.W.C.C. 187 (1911) (County Judge had awarded two-thirds the weekly difference between one pound and what he actually earned, or ten shillings whichever was less). "In estimating the average the arbitrator may take such period immediately before his award as he thinks proper for the purpose." WILLIS, *WORKMEN'S COMPENSATION* 300 (37th ed. 1945), citing *Watson v. Quinn* [1928], Sess. Cas. 6 (1922). In the *Watson* case, the arbitrator in fixing partial omitted the eighteen month period when wages were abnormally high, and used only the last three months for the "average weekly earnings thereafter." Willis states that if Quinn had been uninjured he probably would have been earning double his old wage during the period of high wages. The arbitrator properly used his own good sense to work out the average. *Sullivan's Case*, 213 Mass. 141, 105 N.E. 463 (1914) (English decisions on incapacity, because we copied the English words, are of weight).

<sup>307</sup> *Vass' Case*, 319 Mass. 297, 65 N.E.2d 549 (1946); *McDonald v. Industrial Comm'n*, 165 Wis. 372, 162 N.W. 345 (1917).

<sup>308</sup> See Horowitz, *The Meaning of Disability Under Workmen's Compensation Acts*, 1 NACCA L.J. 32, 41-42 (1948).

<sup>309</sup> *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951), 9 NACCA L.J. 105 (1952) (lost use parts of both feet, no education beyond seventh grade); *Kuhnle v. Department of Labor & Indus.*, 12 Wash. 2d 191, 120 P.2d 1003 (1942) (broken neck, odd-lot theory applied); *In re Iles*, 56 Wyo. 443, 110 P.2d 826 (1941). See also *Berry v. United States*, 312 U.S. 450 (1940) (one leg amputated and stump constantly chafed—was totally and permanently disabled) (veterans policy case). "It was not necessary that petitioner be bedridden, wholly helpless," he was unable "to work with any reasonable degree of regularity at any substantially gainful employment." *Id.* at 455.

The following formula is followed in the Social Security Acts pamphlet. "A person must be unable to engage in any substantial gainful activity due to a medical condition which is expected to continue for a long and indefinite time without any real improvement. This does not mean that a person must be helpless to qualify."

<sup>310</sup> *Endicott v. Potlatch Forests, Inc.*, 69 Idaho 450, 208 P.2d 803 (1949) (could not secure employment, but did keep a few cows and chickens); *Casger v. Fuger*, 79 Idaho 56, 310 P.2d 812 (1957) (earned less than \$500 per year in each of two succeeding post-injury years); *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951) (lost use of parts of both feet—earned only \$300-\$400 a year for five years); *Cleland v. Verona Radio, Inc.*, 130 N.J.L. 588, 33 A.2d 712 (Sup. Ct. 1943) (feeding chickens); *In re Iles*, 56 Wyo. 443, 110 P.2d 826 (1941) (broken hip, bladder and back trouble—disabled for all practical purposes).

<sup>311</sup> It is error to charge the jury that working despite pain prevents a permanent disability award. "Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work . . ." *Mabry v. Travelers Ins. Co.*, 193 F.2d 497, 498 (5th Cir. 1952) (totally and permanently disabled even though

education;<sup>312</sup> or from dragging himself to work irregularly and sporadically, and by telephone or other means, earning even substantial amounts.<sup>313</sup> Hence, to constitute an "earning capacity" chargeable to the employee, the work must be of a substantial character, and not of a trifling nature,<sup>314</sup> and regard must be had to all the circumstances, including age, experience, capabilities and training.<sup>315</sup>

In addition, the weight of authority requires that the work be of a regular, continuous character; sporadic, irregular work is not the type of work upon which the injured employee can rely for a livelihood.<sup>316</sup> To rule otherwise would be to punish the victims of industrial accidents by taking away their rights to permanent total disability because they attempted to eke out a living by sporadic work, but failed in fact to earn a livelihood.<sup>317</sup> "Earning capacity" is not actual wages earned, but is the power or capacity to earn; and a power that is so destroyed that it prevents regular, continuous work may be disregarded as an "earning capacity"<sup>318</sup> by the trier of fact.

It is not the percentage of physical loss determined on a purely medical basis that determines the loss of earning capacity;<sup>319</sup> the

working); *Texas Indem. Ins. Co. v. Bonner*, 228 S.W.2d 348 (Tex. Civ. App. 1950) (disc injury, worked despite pain—no bar, even though receiving old pay at regular job); *accord*, *Great American Indem. Co. v. Segal*, 229 F.2d 845 (5th Cir. 1956).

With regard to jury trials, see 10 NACCA L.J. 111 (1952). Jury trials in compensation cases still exist in Maryland, Ohio, Oregon, Texas, Vermont and Washington. The finding of a jury and the finding of an administrator are treated alike, and in most states, the finding is final if based on evidence or reasonable inference from the evidence.

<sup>312</sup> *Tabor v. Tole*, 188 Kan. 312, 362 P.2d 17 (1961) (back injury, went to teacher's college, no physical change in back). In effect, this recovery rejects the harsh contention that the injured worker should be penalized for rehabilitating himself.

<sup>313</sup> *National Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950) (learned typing and bookkeeping, earned \$5,500 in eleven years); *Zakon v. Metropolitan Life Ins. Co.*, 328 Mass. 486, 104 N.E.2d 608 (1952), 10 NACCA L.J. 114 (1952) (earned several thousand dollars over a two-year period by placing construction mortgages) (accident policy case, citing workmen's compensation cases). See also *Taber v. Tole*, 188 Kan. 312, 362 P.2d 17 (1961) (salary as teacher disregarded).

<sup>314</sup> *Frennier's Case*, 318 Mass. 635, 63 N.E.2d 461 (1945).

<sup>315</sup> *Endicott v. Potlatch Forests, Inc.*, 69 Idaho 460, 208 P.2d 803 (1949) (fifty-five year old, eighth grade education, kept chickens); *Frennier's Case*, 318 Mass. 635, 63 N.E.2d 461 (1945); *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951) (forty-seven years old, seventh grade education, rural background); *Colvin v. E. I. duPont De Nemours Co.*, 227 S.C. 465, 88 S.E.2d 581 (1955), 17 NACCA L.J. 49 (1956) (only qualified for common labor, and could not do that because of injury—total and permanent award upheld).

<sup>316</sup> *Boss v. Travelers Ins. Co.*, 296 Mass. 18, 4 N.E.2d 468 (1936) (continuing earning capacity upon which one can rely to a substantial degree for a livelihood) (insurance policy case, citing workmen's compensation cases); *Zakon v. Metropolitan Life Ins. Co.*, 328 Mass. 486, 104 N.E.2d 608 (1952) (occasional employment, although business transactions highly remunerative, does not necessarily prove continuing and steady ability to perform) (insurance policy case, citing workmen's compensation cases); *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951), 9 NACCA L.J. 105 (1951) (not continuous or steady employment).

<sup>317</sup> *National Fuel Co. v. Arnold*, 121 Colo. 220, 226, 214 P.2d 784, 787 (1950), 5 NACCA L.J. 103 (1950) (employment under unusual circumstances not employee's undoing in compensation granted by statute); *Endicott v. Potlatch Forest, Inc.*, 69 Idaho 460, 208 P.2d 803 (1949), (not penalized for obtaining trivial or unusual employment—no slamming door of hope or ambition on cripples); *Taber v. Tole*, 188 Kan. 312, 362 P.2d 17 (1961); *Honeycutt v. Carolina Asbestos Co.*, 235 N.C. 471, 70 S.E.2d 426 (1952); see also cases in note 277 *supra* and note 318 *infra*.

<sup>318</sup> *National Fuel Co. v. Arnold*, 121 Colo. 220, 214 P.2d 784 (1950) (injury to spinal cord, partial paralysis of legs); *Lee v. Minneapolis St. Ry.*, 230 Minn. 315, 41 N.W.2d 433 (1950) (lost left eye, seventy-five per cent loss of use of left arm, severe post-traumatic neurosis). "An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled." *Id.* at 320, 41 N.W.2d at 436. *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951), 9 NACCA L.J. 105 (1952) (lost use of parts of both feet). See also cases in note 317 *supra*.

<sup>319</sup> *Castle v. City of Stillwater*, 235 Minn. 502, 51 N.W.2d 370 (1952), 10 NACCA L.J. 109 (1952); *Shaffer v. Midland Empire Packing Co.*, 127 Mont. 211, 259 P.2d 340 (1953).

bodily functional loss is not necessarily proportional to the loss of earning capacity. For example, a bodily function loss of thirty per cent may result in a one-hundred per cent loss of earning capacity and thereby render the injured worker totally and permanently disabled for work.<sup>320</sup> In reverse a high physical loss can result in a very small loss of earning capacity.<sup>321</sup>

In many states the total and permanent award is made subject to change if the worker's condition improves.<sup>322</sup> Under such circumstances awards can alternate from time to time—from no compensation to total compensation to partial compensation to permanent total compensation.<sup>323</sup> Because a partially physically disabled employee, unable to market his remaining capacity for work, has totally lost his "earning capacity" during periods of unemployment, he may be awarded total or permanent total disability payments.<sup>324</sup> And "total" in temporary total disability cases is governed by exactly the same criteria as "total" in permanent total disability cases.<sup>325</sup>

The weight of authority regards permanent as not necessarily meaning "for life," but as covering disabilities which will continue indefinitely<sup>326</sup> into the future. The fact that it is conceivable or possible that a future operation may help, or that doctors may later discover a cure, or that it is possible that claimant's condition may improve, is not a bar to an award for permanent total disability.<sup>327</sup> Otherwise claimants could be compelled to wait for years, beyond the period when any award would help them, before the trier of fact would decide the issue.

<sup>320</sup> *Castle v. City of Stillwater*, 235 Minn. 502, 51 N.W.2d 370 (1952), 10 NACCA L.J. 109 (1952) (sixty-nine year old chief of police, injury to cervical spine affecting legs and right hand).

<sup>321</sup> *Shaffer v. Midland Empire Packing Co.*, 127 Mont. 211; 259 P.2d 230 (1953), 12 NACCA L.J. 55 (1953) (failed to produce evidence that earning capacity reduced, though physical loss high).

<sup>322</sup> *Casger v. Fuger*, 79 Idaho 56, 310 P.2d 812 (1957) (permanent total benefits awarded, can change award if he improves); *Kentucky-Jellico Coal Co. v. Jones*, 299 Ky. 69, 184 S.W.2d 216 (1944); *Cummings v. T. H. Mastin & Co.*, 17 So. 2d 40 (La. App. 1944) (if condition improves, employer can have new hearing) (infection, ulcers, and pain following fracture of leg); *Vass' Case*, 319 Mass. 297, 65 N.E.2d 549 (1946); *Cramer v. Industrial Comm'n*, 144 Ohio St. 135, 57 N.E.2d 233 (1944); *Evans-Wallower Zinc, Inc. v. Hunt*, 195 Okla. 518, 159 P.2d 720 (1945).

<sup>323</sup> *Vass' Case*, 319 Mass. 297, 65 N.E.2d 549 (1946); *Hingle v. Maryland Cas. Co.*, 30 So. 2d 281 (La. App. 1947) (change in type of compensation permitted if employee improves); *Hummer's Case*, 317 Mass. 617, 59 N.E.2d 295 (1945).

<sup>324</sup> *Gramolini's Case*, 323 Mass. 86, 101 N.E.2d 750 (1951) (sought employment and was refused, earning capacity just as impaired as if physically disabled); *Fennell's Case*, 289 Mass. 89, 193 N.E. 885 (1925).

<sup>325</sup> *Frennier's Case*, 318 Mass. 635, 63 N.E.2d 461 (1945) (same rules govern); *accord*, *Vass' Case*, 319 Mass. 297, 65 N.E.2d 549 (1946); *Hingle v. Maryland Cas. Co.*, 30 So. 2d 281 (La. App. 1947).

<sup>326</sup> *Yoffa v. Metropolitan Life Ins. Co.*, 304 Mass. 110, 23 N.E.2d 108 (1939) ("indefinitely" is sufficient); *Logsdon v. Industrial Comm'n*, 143 Ohio St. 508, 57 N.E.2d 75 (1944) (indefinite period of time without present indication of termination).

<sup>327</sup> *Yoffa v. Metropolitan Life Ins. Co.*, 304 Mass. 110, 23 N.E.2d 108 (1939) (mere possibility of future recovery does not bar award) (accident policy case); *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951) suggestion that claimant might train self for elevator job falls in realm of speculation and conjecture). See also *Lauble's Case*, 170 N.E.2d 720, 722 (Mass. 1960): "It is no bar to a finding of the fact in such cases that there is a possibility that the claimant's condition will improve . . . ."

Permanent total disability is usually a question of fact.<sup>323</sup> On appeal, the finding below will be sustained whenever rationally possible, whether the injury is the loss of four fingers and the thumb of one hand,<sup>329</sup> or some fingers on both hands,<sup>330</sup> or even for a disabling neurosis.<sup>331</sup> The law does not distinguish between functional and organic injuries, and a combination of both has been repeatedly held to be a proper basis for awards of permanent total disability.<sup>332</sup>

The liberal construction applicable to other questions of workmen's compensation is also applicable to matters involving permanent and total disability payments.<sup>333</sup> This is especially true in dealing with those victims of industry who need all the help that the workmen's compensation acts can give them—the crippled worker who is permanently and totally disabled.

#### G. SCHEDULE INJURIES

Under most acts, if an injury has left the claimant with a permanent bodily impairment, compensation for a specified number of weeks is payable to the employee. These payments are usually referred to as "schedule benefits," "specific benefits" or sometimes as "permanent partial disability" payments. Whatever the nomenclature, such payments are made without regard to the presence or absence of wage loss during that period.<sup>334</sup> Thus, the loss of a leg or arm, by loss of use or by amputation, is generally called a "schedule loss," and the compensation payable is a fixed, arbitrary amount which varies from state to state.<sup>335</sup>

In addition many states now provide scheduled amounts for disfigurement. Some states have limited this to "serious facial" dis-

<sup>323</sup> Grammolini's Case, 328 Mass. 86, 101 N.E.2d 750 (1951), 9 NACCA L.J. 104 (1951) (a question of fact for the board); Sheldon Oil Co. v. Thompson, 176 Okla. 511, 56 P.2d 1171 (1936) (merely question of fact—three doctors said permanent and total, two doctors said only partial); Pacific Employers Ins. Co. v. Brasher, 234 S.W.2d 698 (Tex. Civ. App. 1950), 7 NACCA L.J. 101 (1950) (affirmed jury finding of total and permanent disability—question of fact).

<sup>329</sup> Gramolini's Case, 328 Mass. 86, 101 N.E.2d 750 (1951), 9 NACCA L.J. 103 (1951).

<sup>330</sup> Frennier's Case, 318 Mass. 635, 63 N.E.2d 461 (1945).

<sup>331</sup> Peavy v. Mansfield Hardwood Lumber Co., 40 So. 2d 505 (La. App. 1949), 4 NACCA L.J. 191 (1949) (total and permanent for traumatic neurosis, following fall of eight feet); see neuroses cases cited in notes 34-37 *supra*.

<sup>332</sup> Casger v. Fuger, 79 Idaho 56, 310 P.2d 812 (1957) (severe neck injury, complicated by traumatic neurosis and loss of libido—no longer available on the labor market); Lee v. Minneapolis St. Ry., 230 Minn. 315, 41 N.W.2d 433 (1950) (loss of eye, bad left arm, severe traumatic neurosis); see also cases cited in notes 34-37 *supra*.

<sup>333</sup> National Fuel Co. v. Arnold, 121 Colo. 220, 214 P.2d 784 (1950) (liberal interpretation and application in order to fully effectuate its purposes); Castle v. City of Stillwater, 235 Minn. 502, 51 N.W.2d 370 (1952) (workmen's compensation is type of social insurance); see also cases cited in notes 4, 199, 240, and 308-17 *supra*.

<sup>334</sup> The term "permanent partial disability" must be viewed with caution. In some states it is purely a schedule benefit, giving a specified number of weekly payments, regardless whether the injured employee goes back to work. In other states, it is like temporary compensation, measured by the loss in earning capacity.

U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 29 (Rev. 1960), uses the word "permanent partial disability" to include two classes: (1) schedule injuries and (2) non-schedule injuries such as a disability caused by injury to the head or neck. A study of tables 8 and 9, with the footnotes, indicates the hopeless confusion existing nation-wide.

<sup>335</sup> U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 35, table 9 (Rev. 1960).

figurement; others have broadened it to cover all types of disfigurements, such as "bodily" disfigurement, or disfigurement without limitations. There is a third group of schedule injuries which provide for the loss of bodily functions, such as the loss of eyesight, hearing or eating (loss of teeth).

Some courts and authors consider that schedule losses are based on wage loss, not demonstrable perhaps at the time of the injury, but representing what in the long run will be the impairment of the employee's earning capacity. This presumed loss is converted into a conclusive presumption, and gives the hapless industrial victim now what eventually would be his long-term impairment.<sup>336</sup>

Other courts and writers consider these schedule payments as arbitrary amounts unrelated to any present or future loss of earning capacity.<sup>337</sup> Some argue that they are substitutes for the common-law action taken away from the employees by the exclusive features of compensation acts, and are the result of legislative jockeying. Dean Pound<sup>338</sup> suggests that these detailed schedules of relief are reminiscent of the schedules of payments for injuries in the codes of Hammurabi, Ethelbert and The Twelve Tables. Financially they are clearly a poor substitute for modern common-law damages. One is inclined to agree with the venerable Dean when one tries to figure out why a great toe is worth fifteen weeks of payments in one state, and sixty weeks in another; a first finger eighteen weeks of payments in one state and fifty-five weeks in another; and an arm at the shoulder fifty-four dollars a week for 500 weeks in state A and only thirty-nine dollars a week for 175 weeks in state B. Similar discrepancies appear in the schedules for loss of hands, thumbs, second fingers, third fingers, legs, feet, other toes, eyesight and hearing in one or both ears.<sup>339</sup> Surely the cost of living does not vary that much from state to state.

Unfortunately most of the payments provided are so low as eventually to pauperize the seriously injured victims of industry.

<sup>336</sup> *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955) (conclusively established wage loss, no proof of wage loss needed); *National Distillers Prod. Co. v. Jones*, 309 Ky. 394, 217 S.W.2d 813 (1948) (award not in nature of insurance or damages for permanent impairment of power to earn money). See 2 LABSON, *WORKMEN'S COMPENSATION LAW* sec. 58.32, at 51 (1952).

<sup>337</sup> *Swift & Co. v. Industrial Comm'n*, 302 Ill. 38, 134 N.E. 9 (1922) (is an arbitrary amount); *Cooper v. Cities Serv. Oil Co.*, 137 N.J.L. 181, 59 A.2d 268 (Ct. Err. & App. 1948), 2 NACCA L.J. 237 (1948) (indemnity for personal injury sustained rather than for loss of earning power); Bear & Bear, *Workmen's Compensation*, in 1956 ANNUAL SURVEY OF MASSACHUSETTS LAW 184, 191 (1957) ("... arbitrary principle of extra compensation payments . . . for the purpose of providing an extra subsistence benefit" for widows, to alleviate failure of compensation act to provide subsistence payments).

<sup>338</sup> Pound, *The Foundation of Law*, 10 AM. U.L. REV. 124 (1961). "In order to relieve the overcrowded dockets of our courts many are now advocating recurrence to the method of Hammurabi, The Twelve Tables and Ethelbert—the expedient of the Workmen's Compensation Acts." *Id.* at 132.

<sup>339</sup> U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, *STATE WORKMEN'S COMPENSATION LAWS* 35, table 9 (Rev. 1960).

Nevertheless, the statutes being what they are, the courts have no recourse but to construe them as best as they can.

(1) *Amputation and Loss of Use—Selecting the Greater Remedy*

Most statutes provide for weekly payments for non-scheduled disabilities—temporary total and temporary partial disability for such injuries as back strains and internal injuries. A few states<sup>340</sup> try to reduce everything to schedule compensation by allowing a fixed amount for loss of use of the body as a whole, and then taking a per cent of that amount for every conceivable type of injury, even for neurosis.

The great majority, however, provide specific amounts for loss of extremities and parts of extremities. Suppose an employee loses only his hand but pain renders the arm useless, or partially useless, so that if the worker could receive compensation for a per cent of the arm he would get more money than for a hand. Or suppose two amputated fingers cause complications in the hand. Can the injured worker demand the greater sum?

Bearing in mind that the acts must be construed liberally, the great majority of courts, give the employee the choice of the greater amount, where the effects of the loss of the member extend to other parts of the body and interfere with their efficiency.<sup>341</sup> In short, the lower schedule amount is not the exclusive remedy in these cases.

Other courts give the employee the election to select the better remedy even where there is only partial loss of a member with no resulting complications.<sup>342</sup> Thus the loss of three and one-half fingers was considered loss of a hand,<sup>343</sup> and partial loss of the use of both feet amounted to total disability, not two separate smaller

<sup>340</sup> *Cooper v. Cities Serv. Oil Co.*, 137 N.J.L. 181, 59 A.2d 268 (Ct. Err. & App. 1948) (twenty-eight weeks of compensation affirmed for loss of seven teeth—but for neurosis, five per cent of total held proper); *Fidelity & Cas. Co. v. Patterson*, 204 Tenn. 673, 325 S.W.2d 259 (1959) (leg partly useless, but allowed to get greater amount by taking percentage of "body as a whole"); U.S. BUREAU OF LABOR STANDARDS, DEPT OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS, table 8, note 13 (Rev. 1960). In Oregon, Washington, and Wyoming, the laws specify flat monetary amounts rather than a percentage of wages. In Massachusetts, schedule compensation for everyone is at a flat twenty dollars per week, regardless of wages; Oregon awards a certain sum for each degree of disability in permanent partial injuries schedule.

<sup>341</sup> *Alm v. Morris Barick Cattle Co.*, 240 Iowa 1174, 38 N.W.2d 161 (1949); *Miller v. Massman Constr. Co.*, 169 Kan. 499, 219 P.2d 429 (1950) (causalgia induced by foot injury); *Zazo v. International Paper Co.*, 275 App. Div. 831, 88 N.Y.S.2d 740 (3d Dep't 1949) (pain from heel); *Wilson v. State Industrial Acc. Comm'n*, 189 Ore. 114, 219 P.2d 138 (1950) (pain and nervousness accompanying loss of vision will support disability award beyond loss of eyes); *Hendricks v. Patterson*, 163 Pa. Super. 534, 67 A.2d 652 (1949) (stiffening of hip socket).

<sup>342</sup> *Cox v. Black Diamond Coal Mining Co.*, 93 F. Supp. 685 (E.D. Tenn. 1950), relying on *Johnson v. Anderson*, 188 Tenn. 194, 217 S.W.2d 839 (1949) (two parallel benefits covered uncomplicated loss of a leg leading to total disability—rule of liberal construction allows claimant the more favorable remedy); *Rockwell v. Lewis*, 168 App. Div. 674, 154 N.Y. Supp. 893 (3d Dep't 1915); *Standard Glass Co. v. Wallace*, 189 Tenn. 213, 225 S.W.2d 35 (1949) (seventy-five per cent loss of use of hand for partial loss of several fingers); *Fidelity & Cas. Co. v. Patterson*, 204 Tenn. 673, 325 S.W.2d 259 (1959) (schedule injuries included injury to "the body as a whole"—serious injury to upper thigh making the leg partly useless, but allowed the greater amount based on a percentage of "the body as a whole").

<sup>343</sup> *Rice v. Public Meat Mkt.*, 166 Pa. Super. 328, 70 A.2d 443 (1950) (meat cutter in a butcher shop could no longer grip tools).

losses.<sup>344</sup> And where a miner so injured his leg that he was unable to perform labor, a total permanent disability award was upheld.<sup>345</sup> But until we later reach *Van Dorpel v. Haven-Busch Co.*<sup>346</sup> and *Alaska Industrial Bd. v. Chugach Elec. Ass'n*,<sup>347</sup> few courts had allowed the worker to obtain *both* remedies!

## (2) *Loss of Functions*

Many acts have provisions for loss of eyesight, hearing, eating (loss of teeth), or other bodily functions. These provisions vary widely. However, where the statutes are silent on disputed issues concerning these functions the majority of courts have given a broad and liberal interpretation to these sections of the acts.

Thus "loss of sight" is held to include the destruction or enucleation of a defective<sup>348</sup> or even of a blind eye.<sup>349</sup>

Loss of hearing, partial<sup>350</sup> or total,<sup>351</sup> is compensable as an occupational disease where it is related to continual noise at work. Where found to be a schedule loss, the cost is usually placed upon the last<sup>352</sup> employer or carrier. Where a schedule award is allowed for loss of a "member of the body," the ear is considered such a member, and loss of hearing in one ear is compensable.<sup>353</sup>

Loss of teeth are compensable under a statute giving a schedule payment for the serious and permanent impairment of a physical function; and the fact that some teeth were missing before the accident is no defense, for the worker thereby "depended more on those remaining."<sup>354</sup> And where the statute based schedule payments on

<sup>344</sup> *Berg v. Sadler*, 235 Minn. 214, 50 N.W.2d 266 (1951) (farm and road worker, and could not do work involving walking or standing).

<sup>345</sup> *Department of Mines & Minerals v. Castle*, 240 S.W.2d 44 (Ky. 1951). *Contra*, *Arview v. Industrial Comm'n*, 415 Ill. 522, 114 N.E.2d 698 (1953) (three scheduled awards due for loss of one arm and two legs, but claimant compelled to take permanent total disability award paying less).

<sup>346</sup> 350 Mich. 185, 85 N.W.2d 97 (1957), 21 NACCA L.J. 207 (1958).

<sup>347</sup> 356 U.S. 320 (1958).

<sup>348</sup> *Old Dominion Stevedoring Corp. v. O'Hearne*, 218 F.2d 651 (4th Cir. 1955), 16 NACCA L.J. 161 (1955) (defective eye with twenty per cent vision before injury; award for loss of useful vision); *Pizzano's Case*, 331 Mass. 380, 119 N.E.2d 390 (1954) (defective eye must start above 20/70).

<sup>349</sup> *Hemphill v. Cooperative Refinery Ass'n*, 174 Kan. 301, 255 P.2d 624 (1953), 12 NACCA L.J. 105 (1953) (refused to read in limitation that eye be perfect); *Mosgaard v. Minneapolis St. Ry.*, 161 Minn. 318, 201 N.W. 545 (1924) ("loss of an eye" includes sightless eye); *McKenzie v. Gulf Hills Hotel, Inc.*, 221 Miss. 723, 74 So. 2d 830 (1954), 16 NACCA L.J. 497 (1955) (blind thirty years prior to injury); *Crown Woodworking Co. v. Goodwin*, 100 N.H. 431, 128 A.2d 918 (1957) (blind from infancy; "eye lost"); *Riegle v. Fordon*, 273 App. Div. 213, 76 N.Y.S.2d 523 3d Dep't (blind eye was enucleated when scratched by weeds; is loss of "member of the body"), *aff'd*, 298 N.Y. 560, 81 N.E.2d 101 (1948).

<sup>350</sup> *Marie v. Standard Steel Works*, 319 S.W.2d 871 (Mo. 1959), 23 NACCA L.J. 160 (1959) (result of work noise over long period); *Slawinski v. J. H. Williams & Co.*, 273 App. Div. 826, 76 N.Y.S.2d 838 (3d Dep't) (partial deafness due to tinnitus), *aff'd*, 298 N.Y. 546, 81 N.E.2d 98 (1948).

<sup>351</sup> *Green Bay Drop Forge Co. v. Wojcik*, 265 Wis. 38, 61 N.W.2d 847 (1953) (both ears: result of exposure to the noise of drop forge hammers).

<sup>352</sup> *Travelers Ins. Co. v. Cardillo*, 225 F.2d 187 (2d Cir. 1955) (no apportionment; loss of hearing is a schedule loss, whether occupational disease or injury).

<sup>353</sup> *Long v. Cappel*, 216 S.C. 243, 57 S.E.2d 415 (1950), 5 NACCA L.J. 107 (1950).

<sup>354</sup> *Macaluso v. Schill-Wolfson, Inc.*, 56 So. 2d 429 (La. App. 1952), 11 NACCA L.J. 98 (1953) (similar to aggravation cases; even though dentures help, chewing function is "seriously and permanently impaired").

a percentage loss of the body as a whole, the loss of seven teeth justified the payment of twenty-eight weeks of compensation.<sup>355</sup>

### (3) *Disfigurement*

Where the statute limits payments to serious facial disfigurements or uses the word "disfigurement,"<sup>356</sup> facial scars of all types have been held compensable. Enucleation of an eye which results in a noticeably artificial eye is a disfigurement.<sup>357</sup>

Where there is no limitation as to the location of the disfigurement, or the statute specifies "bodily" disfigurement or merely "disfigurement," the courts have again shown liberality in interpretation. Where the defense was that clothing covered the scars or mutilated parts of the anatomy, the court properly pointed out that there was no such limitation in the statute, and that furthermore the parts of the body covered by clothing has shrunk drastically in the years past.<sup>358</sup> The overwhelming weight of authority considers loss of teeth as a disfigurement despite newly installed, good-looking dentures.<sup>359</sup>

Where the statute is silent as to whether the schedule payments for loss of function or for other losses shall specifically absorb and exclude payments for disfigurement, the majority of courts will allow both types of awards.<sup>360</sup> There is no reason why loss of use and disfigurement of the same member cannot both be compensated. Hence, a person collecting for loss of teeth as a loss of the function of eating may also collect for the disfigurement caused by the loss of these teeth, despite the use of adequate false teeth as a replacement.<sup>361</sup> And the loss of, or loss of use of, legs, arms, or parts of legs or arms, is considered a disfigurement;<sup>362</sup> and usually gives rise

<sup>355</sup> *Cooper v. Cities Serv. Oil Co.*, 137 N.J.L. 181, 59 A.2d 268 (Ct. Err. & App. 1948).

<sup>356</sup> *National Distillers Prods. Corp. v. Jones*, 309 Ky. 394, 217 S.W.2d 813 (1948).

<sup>357</sup> *McCoy v. Easley Cotton Mills*, 218 S.C. 350, 62 S.E.2d 772 (1950), 7 NACCA L.J. 63 (1951) (common knowledge that facial disfigurement is handicap in obtaining employment).

<sup>358</sup> *Bethlehem Steel Co. v. Wilson*, 210 Md. 568, 124 A.2d 249 (1956) (scars below knee and on thigh; disfigurement can be anywhere on body).

<sup>359</sup> *Betz v. Columbia Tel. Co.*, 224 Mo. App. 1004, 24 S.W.2d 224 (1930) (also loss of earning power; inability to chew resulted in stomach ailment). "The loss of 31 teeth is a serious handicap to any one. It is a severe mutilation and permanent disfigurement. To say otherwise is to speak contrary to nature. No one could be so devoted to the practical and artificial as to claim for 'store teeth' equal advantage with the sound and natural incisors and molars. If there be such a one, we apprehend that time holds for him certain and complete disillusionment." *Id.* at 1018, 24 S.W.2d at 229. *Grinnell Co. v. Smith*, 203 Okla. 158, 218 P.2d 1043 (1950), 6 NACCA L.J. 91 (1950) (loss of four teeth is "serious and permanent disfigurement" despite excellent denture); *Cagle v. Clinton Cotton Mills*, 216 S.C. 98, 56 S.E.2d 747 (1949), 5 NACCA L.J. 106 (1950) (loss of four front teeth is serious injury to "member or organ of the body").

<sup>360</sup> *Case v. Pillsbury*, 148 F.2d 392 (9th Cir. 1945); *Morley's Case*, 328 Mass. 652, 102 N.E.2d 493 (1951) (allowance for loss of use of hand and for disfigurement); *Boynton's Case*, 328 Mass. 145, 102 N.E.2d 490 (1951) (disfigurement compensation for loss of four toes; specific payments for the amputations); *Elkins v. Lallier*, 38 N.M. 316, 32 P.2d 759 (1934); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E.2d 570 (1942); *Jewell v. R. B. Bond Co.*, 198 S.C. 86, 15 S.E.2d 684 (1941).

<sup>361</sup> *Macaluso v. Schill-Wolfson, Inc.*, 56 So. 2d 429 (La. App. 1952) (loss of teeth is loss of function); *Boynton's Case* 328 Mass. 145, 102 N.E. 2d 490 (1951) (loss of function is catch all; can only collect for any two of: loss of use, disfigurement, or loss of bodily functions where all three relate to the same member); see *Betz v. Columbia Tel. Co.*, 224 Mo. App. 1004, 24 S.W.2d 224 (1930).

<sup>362</sup> *Haynes v. Ware Shoals Mfg. Co.*, 198 S.C. 75, 15 S.E.2d 846 (1941) (carpenter lost first joint of thumb; condition equivalent to deformity).

to payments both for amputations (loss of use) and for disfigurement.<sup>363</sup>

Disfigurement payments vary throughout the United States and provide for a limited amount in dollars, on a discretionary scale dependent on severity,<sup>364</sup> or for a specific arbitrary amount; and they are usually payable whether or not the employee returns to work.<sup>365</sup>

#### (4) Heritability

The courts are hopelessly divided<sup>366</sup> on whether the unpaid balance of schedule or other payments, due on and after the day of death, pass on death to the employee's next of kin or dependents. The great weight of authority, however, gives the estate the right to accrued but unpaid installments up to the day of death.<sup>367</sup> The dispute is as to payments due after the death of the employee. A reasonable argument can be made either way; but since compensation acts are to be construed liberally, silence on this issue should favor the next of kin or dependents.<sup>368</sup>

Recent statutory amendments have been in the direction of compelling employers or insurers to pay any balance of the schedule award to the dependents.<sup>369</sup>

<sup>363</sup> See cases cited note 360 *supra*.

<sup>364</sup> See, e.g., MASS. GEN. LAWS ANN. c. 152, sec. 36(h) (1958). Massachusetts provides up to \$2500 for bodily disfigurement. The amount is to be determined by the board, but must be "proper and equitable compensation."

<sup>365</sup> *Haynes v. Ware Shoals Mfg. Co.*, 198 S.C. 75, 15 S.E.2d 846 (1941) (payments even though working).

<sup>366</sup> No survivorship in favor of next of kin is illustrated by: *United States Steel Corp. v. Baker*, 266 Ala. 538, 97 So. 2d 899 (1957) (but changed by statute); *Bartoni's Case*, 225 Mass. 349, 114 N.E. 663 (1916) (changed by MASS. GEN. LAWS ANN. c. 152, sec. 36A (1958)); *American Woolen Co. v. Grillini*, 78 R.I. 50, 78 A.2d 795 (1951); *Pacific States Cast Iron Pipe Co. v. Industrial Comm'n*, 118 Utah 46, 218 P.2d 970 (1950); *Dowe v. Specialty Brass Co.*, 219 Wis. 192, 262 N.W. 605 (1935).

Allowance of survivorship in favor of next of kin is illustrated by: *Parker v. Walgreen Drug Co.*, 63 Ariz. 374, 162 P.2d 427 (1945); *Morganelli's Estate v. City of Derby*, 105 Conn. 545, 135 Atl. 911 (1927); *Mahoney v. City of Payette*, 64 Idaho, 443, 133 P.2d 927 (1943) (liquidated damages go to estate); *Gennari v. Norwood Hills Corp.*, 322 S.W.2d 718 (Mo. 1959); *Wood Coal Co. v. State Compensation Comm'r*, 119 W. Va. 581, 195 S.E. 528 (1938).

<sup>367</sup> *Bartoni's Case*, 225 Mass. 349, 114 N.E. 663 (1916); *Stetu v. Ford Motor Co.*, 277 Mich. 468, 269 N.W. 236 (1936); *Calkins v. Department of Labor & Indus.*, 10 Wash. 2d 565, 117 P.2d 640 (1941). Where death is due to unrelated causes, compensation due to date of death may be collected by the widow or administratrix even if the award has not been rendered: *Smith v. State*, 52 Cal. 2d 751, 344 P.2d 293 (1959) (due from second injury funds); *Wascom v. Miller*, 101 So. 2d 744 (La. App. 1958); *Kozielec v. Mack Mfg. Corp.*, 29 N.J. Super. 272, 102 A.2d 404 (Middlesex County Ct. L. 1953) (even if deceased failed to request schedule payment during his lifetime, widow can file petition after his death).

<sup>368</sup> In *Parker v. Walgreen Drug Co.*, 63 Ariz. 374, 162 P.2d 427 (1945), the court said that the schedule compensation amount was fixed and enjoyment was merely delayed by monthly payments; thus they should go to the estate.

For further reasons for allowing heritability see: *Morganelli's Estate v. City of Derby*, 105 Conn. 545, 135 Atl. 911 (1927); *Mahoney v. City of Payette*, 64 Idaho, 443, 133 P.2d 927 (1943); *Gennari v. Norwood Hills Corp.*, 322 S.W.2d 718 (Mo. 1959); *Wood Coal Co. v. State Compensation Comm'r*, 119 W. Va. 581, 195 S.E. 528 (1938).

<sup>369</sup> See discussion of such statutes in: *Tennessee Coal & Iron Div., United States Steel Corp. v. Hubbert*, 268 Ala. 674, 110 So. 2d 260 (1959) (statute amended to permit widow or children to receive unpaid balance; but held not retrospective); *Henderson's Case*, 333 Mass. 491, 131 N.E.2d 925 (1956).

(5) *Use of Charts and Predetermined Administrative Policies*

Many boards are given statutory power to make rules but these rules are usually required to be consistent with the compensation act for carrying out its provisions.<sup>370</sup>

This statutory power does not entitle boards to create charts and predetermine in advance of cases the amounts due for disfigurements, loss of function, amputations or loss of use. Where the amounts are specifically fixed by statute, no charts are necessary. Where the compensation act gives any discretion to the trier of fact, or calls for observation of the injured part to determine the relative loss, or creates a discretionary sliding scale of awards, each case must be decided on its own merits.<sup>371</sup> As much as it would save time to use charts, the charts can not substitute for the requirements of the substantive provisions of the workmen's compensation acts. And obviously the requirement that the award be a "proper and equitable" amount cannot be pre-determined in advance of trial on the basis of charts or administrative directives. "Proper and equitable" undoubtedly permits the trier of fact to consider such factors as the nature of the work and the age, sex, and training of the injured employee.

(6) *Obtaining Both Remedies* (scheduled and non-scheduled)

Recently the question arose whether a seriously injured worker could obtain temporary total payments *following* schedule payments. Massachusetts, by statute, allows the injured employee to collect concurrently weekly temporary compensation plus schedule compensation; also either one can follow the other, as the statute expressly states that "specific" (or schedule) compensation is *in addition* to all other compensation.<sup>372</sup>

Some compensation acts specifically provide that temporary total payments shall cease when an end result is reached and schedule payments shall begin. For example, a worker loses his leg at work and for a time he collects temporary total payments; when nothing more can be done for him medically (an end result), his temporary total payments end and schedule payments begin.<sup>373</sup>

<sup>370</sup> See, e.g., MASS. GEN. LAWS ANN. c. 152, sec. 5 (1958). Cf. *State ex rel. Waller v. Industrial Comm'n*, 50 N.E.2d 680 (Ohio Ct. App. 1943) (cannot make rule limiting certain hernia cases to two weeks of compensation).

<sup>371</sup> *Cross v. Endicott-Johnson Corp.*, 278 App. Div. 865, 104 N.Y.S.2d 228 (3d Dep't 1951), 8 NACCA L.J. 89 (1951) (predetermined board policy allowing twenty per cent compensation in certain specific types of cases is error).

<sup>372</sup> "In case of the following specified injuries . . . [payments] shall be paid, in addition to all other compensation. . . . MASS. GEN. LAWS ANN. c. 152, sec. 36 (1958).

<sup>373</sup> U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 85, Table 9 (Rev. 1960). See also *Alaska Industrial Bd. v. Chugach Elec.* 356 U.S. 320 (1958).

In a few states it is required by statute that temporary payments be deducted from the schedule payments.<sup>374</sup> Under these statutes, if after the payment of schedule compensation the employee is still unable to get a job, most administrators feel that the injured worker is without relief—that the schedule compensation was “in lieu” of all other payments, or that it excludes further payments for disability flowing from the injuries for which the schedule payments were made.<sup>375</sup>

But suppose that the statute provides for continuing disability payments and also provides for schedule payments, but the statute is silent as to whether a worker can have both; and after the schedule payments are made the employee is still unable to work and earn money in his old employment or elsewhere. Can he be restored to continuing disability payments?

Michigan, in a four to four decision, answered in the affirmative.<sup>376</sup> It was stated that: “[A]s new interpretative issues should arise judicially under these acts all fair and reasonable doubts should be resolved in favor of upholding the basic purposes of the legislation, in this case compensating in some measure the broken and injured workman who cannot work.”<sup>377</sup> The court ruled that schedule compensation is first given to the worker to tide him over at a time when his need is greatest, without inquiring into the exact length of time he will be out of work; and then if the number of weeks stated in the statute turns out to be inadequate because at the end of that period he is still unable to earn wages, he can turn to the section dealing with temporary or unscheduled payments. In short, the legislature intended:

. . . to consult broad industrial experience and lay down an irreducible minimum number of weeks allowable for certain common specific losses—thus removing the issue from costly and delaying litigation at a time when the workman was most helpless and his need the greatest—

<sup>374</sup> See U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 35, Table 9 (Rev. 1960). See also *Alaska Industrial Bd. v. Chugach Elec. Ass'n*, 356 U.S. 320 (1958).

<sup>375</sup> This was the law as it existed under *Curtis v. Hayes Wheel Co.*, 211 Mich. 260, 178 N.W. 675 (1920). It was subsequently overruled in *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957), 21 NACCA L.J. 207 (1958). See also *Smith v. Industrial Comm'n*, 69 Ariz. 399, 214 P.2d 797 (1950); *New Amsterdam Cas. Co. v. Brown*, 81 Ga. App. 790, 60 S.E.2d 245 (1950); *Lappinen v. Union Ore Co.*, 224 Minn. 295, 29 N.W.2d 8 (1947); U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 35, Table 9 n. 1 (Rev. 1960).

<sup>376</sup> *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957), 21 NACCA L.J. 207 (1958). Claimant received 200 weeks of payments for amputated right leg and 100 weeks for losing four fingers. At the end of the 300-week period he was still disabled and unemployed. He sought and received further compensation under a section providing for total disability, although the award was limited to 750 weeks from date of injury. The court reasoned, in overruling *Curtis v. Hayes Wheel Co.*, 211 Mich. 260, 178 N.W. 675 (1920), that the question to be answered at the end of the schedule payments is: can the injured employée in fact continue to work and earn wages in his former employment? If he cannot, and if there is competent proof to support his claim of continuing disability, the compensation should be continued. See 56 MICH. L. REV. 827 (1958), discussed in 22 NACCA L.J. 432 (1958).

<sup>377</sup> *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957).

leaving the question of further disability and compensation to be determined on proofs made at a hearing in an orderly manner (in which the healed workman could be present and intelligently participate) in the light of his recovery or lack of it, having due regard for the nature and extent of his injuries, the then capacities and general condition of the workman and the kind of job he had before his injury.<sup>378</sup>

In 1958 the United States Supreme Court reached a similar result.<sup>379</sup> Under Alaska law an employee who lost his left arm, right leg, and four toes of his left foot received temporary compensation for thirty-eight weeks, and then was paid a bulk or lump sum award for "permanent and total disability." By statute, loss of two members was considered permanent total disability. After the bulk or lump sum was paid, the employee was still disabled for work, and his left foot had not yet healed. Less than three weeks after receiving his bulk sum check—from which the amount of temporary compensation had been deducted—the employee asked for continuing total benefits for the non-healed left foot. The board awarded temporary compensation for the left foot from the date of the last amputation nearly three years earlier, and this was upheld by the Supreme Court.

The rationale is clear: (1) although called "total and permanent disability," the lump sum award was really for a schedule loss—a legislative judgment as to the average degree of impairment—and was paid to this employee without regard to actual wage loss; (2) despite this payment, there may be a continuing ability to work, and as long as that ability exists, there is a factual basis for a temporary disability award; (3) this latter type of award takes care of lost wages during the healing period and also compensates the claimant for any remaining loss of earning power based on wage-earning capacity. Therefore, absent an express provision that schedule payments eliminate the right to other types of payments found in a compensation act, the injured worker can look to other sections for further or additional relief.

Looking behind all this reasoning that is used to reach a just result, one gets the feeling that the justices are expressing their inner thoughts: (1) that workmen's compensation payments are tragically low—below subsistence levels,<sup>380</sup> and (2) that merely because

<sup>378</sup> *Id.* at 137, 85 N.W.2d at 102.

<sup>379</sup> *Alaska Industrial Bd. v. Chugach Elec. Ass'n*, 356 U.S. 320 (1958) (where "permanent and total" is, in effect, only a schedule or specific payment, and the payment was made in a lump sum, it does not prevent an award thereafter for temporary total disability). See 22 *NACCA L.J.* 215 (1958).

<sup>380</sup> "There seems to be widespread agreement that the compensation benefits under most laws are woefully inadequate, especially in the cases of serious and permanent disability. In addition, the benefit formulae are erratic and frequently overly rigid. In view of the past experience of more than forty years it must seriously be doubted whether the needed relief will come from the law makers on the state level. There is urgent cause for an 'agonizing reappraisal' whether the time has not come for the establishment of national social insurance against industrial acci-

the legislature has failed in its duty to correct the situation is not a sufficient reason why the courts should not, by liberal construction, give the worker the greatest measure of relief possible under existing statutes.<sup>381</sup> As stated in the well-expressed thoughts of one court:

No living man can possibly measure the amount of poverty and pain and human indignity suffered by Michigan workmen and their families because of the unfortunate Curtis case. It has lain across the jugular vein of workmen's compensation far too long. Rather than attempt to distinguish that case—as we are aware we might—we prefer to sweep away the last vestiges of the Curtis case and at long last align Michigan squarely behind the more modern and liberal decisions which refuse to limit workmen's compensation benefits to the scheduled allowance.<sup>382</sup>

#### IV. CONCLUSION

A half-century has passed since the earliest acts received their first judicial interpretations. The early legislatures held the hope that payments, though small at the start, would subsequently be made sufficient for subsistence and would keep up with the rising cost of living. In most jurisdictions this hope has been tragically unrealized.<sup>383</sup>

dents and diseases." Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 578 (1954). It should be noted that England has eliminated private workmen's compensation insurance and has placed compensation under a social insurance system. National Insurance (Industrial Injuries) Act, 1946, 9 & 10 Geo. 6, c. 62, cited in 5 NACCA L.J. 49 (1950).

See Katz & Wirpel, *Workmen's Compensation 1910-1952: Are Present Benefits Adequate?* 4 LAB. L.J. 164 (1953), 12 NACCA L.J. 337 (1953). See also Richter & Forer, *Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203, 214, 221-22, 229 (1951) for a severe criticism of the shortcomings of workmen's compensation.

<sup>381</sup>The courts cannot close their eyes to what everybody knows—that workers and widows are pauperized under workmen's compensation, whereas the same injury under tort, railroad, admiralty or aviation law would bring adequate common-law damages. For example, in an Arkansas tort case \$98,000 was upheld (after remittitur) to a thirty-eight year old widow. *Strahan v. Webb*, 330 S.W.2d 291 (Ark. 1959), 25 NACCA L.J. 379 (1960). Had she been under workmen's compensation she would have obtained a maximum of thirty-five dollars per week for 450 weeks, but not exceeding a total of \$12,500. U.S. BUREAU OF LABOR STANDARDS, DEP'T OF LABOR, BULL. No. 161, STATE WORKMEN'S COMPENSATION LAWS 45, Table 11 (Rev. 1960). In Maryland, \$84,500 was upheld for a widow and four surviving children. *Jennings v. United States*, 178 F. Supp. 516 (D. Md. 1959), 25 NACCA L.J. 381 (1960). Under workmen's compensation the maximum would have been \$15,000 with a weekly maximum of forty dollars.

Still greater discrepancies occur for such injuries as the loss of legs and arms. See the title "Damages" in the index and the chapter on "Verdicts or Awards Exceeding \$50,000" in each issue of the NACCA LAW JOURNAL.

In 1958 employer premiums reached almost \$1.8 billion. About one-third of the amount expended was for medical and hospital benefits. The loss ratio of private carriers amounted to only fifty-six per cent. See the estimate by Alfred M. Skolnick, Division of Program Research Office of the Commission (Social Security) in the July 1960 issue of the *A.B.C. Newsletter*.

<sup>382</sup>*Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97, 106 (1957).

<sup>383</sup>"Implicit in the law and explicit in the decisions is the principle that industry should take care of its own casualties. Yet even with the best that under the law can be done for this plaintiff, the discrepancy between what he will have gained and what he has lost is rather shocking." *Kitts v. American Mut. Liab. Ins. Co.*, 133 F. Supp. 937, 941 (E.D. Tenn. 1955) (compensation rate mere fraction of the wage; must fight ill health and poverty the rest of his life). In this case the employee's hospital bill was \$2,369.92 to 1955. In 1960 the maximum weekly payment in Tennessee reached thirty-four dollars, with medical compensation stopping at \$1,800 and all compensation at \$12,500.

"[I]t is high time that the legislatures investigate the fate of the families in which the breadwinner has suffered a permanent disability . . . ."

"[T]he law relating to the structure and level of benefits shows the distressing signs of legislative lethargy and patching and repatching . . . ." Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 8 NACCA L.J. 21, 32-33 (1951).

As long ago as 1954 Max D. Kossoris of the U.S. Dep't of Labor warned: "There is a need today for stronger public concern with the inadequacies of workmen's compensation legislation and administration. In spite of the tremendous forward strides in other social and economic

But the history of judicial decision has been an entirely different one. The early courts construed the acts with caution and erroneously inserted into workmen's compensation cases inapplicable common-law doctrines in disguised garb.<sup>384</sup> But step by step these courts uncovered their own errors and righted their decisions.<sup>385</sup> They rejected the doctrine that their mistakes were forever embalmed in the law because of the doctrine of legislative acquiescence by silence. It was aptly stated that: "We reject as both un-Christian and legally unsound the hopeless doctrine that this Court is shackled and helpless to redeem itself from its own original sin, however or by whom ever long condone."<sup>386</sup>

The history of judicial developments in the field of workmen's compensation is a history of growth, of commendable imagination, and of improvement in the administration of justice<sup>387</sup> for the vic-

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areas our compensation legislation and administration on the whole lag far behind." Kossoris, *Workmen's Compensation in the United States*, U. S. BUREAU OF LABOR STANDARDS, DEPT OF LABOR, BULL. No. 1149 (1954).

Hawaii has made some strides forward because a courageous administrator dared to become a politician for a time and fight the lobbyists. U. S. BUREAU OF LABOR STANDARDS, DEPT OF LABOR, BULL. No. 186, at 12 (Rev. 1959).

Ceilings and limitations on the benefits have caused "compensation payments to fall so sadly behind the rise in wages and living costs" that it "has brought the whole system into disrepute." Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531 (1954). *Accord*, Pollack, *A Policy Decision for Workmen's Compensation*, 372 INS. L.J. 14 (1954) (since 1940, benefits have become even less adequate, especially where the need is greatest); Somers & Somers, *Workmen's Compensation—Unfulfilled Promise*, 7 IND. & LAB. REL. REV. 33 (1953).

<sup>384</sup> "[C]are must be exercised lest long judicial habit in tort cases allows judicial thought in compensation cases to be too much influenced by a discarded or modified factor of decision." *Hanson v. Robitsek-Schneider Co.*, 209 Minn. 596, 598, 297 N.W. 19, 21 (1941). *Accord*, *Beran's Case*, 336 Mass. 342, 145 N.E.2d 726 (1957) (compensation allowed for a stray bullet; overruling an old case). *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876 (1960) (defense of horseplay has no place in workmen's compensation cases).

One of the greatest changes has occurred in the reversal of many aggressor-assault cases where common-law doctrines appeared in disguised garb to mislead the early courts. See cases cited in notes 8, 93, 97-102, and 111 *supra*.

<sup>385</sup> See, e.g., *State Compensation Ins. Fund v. Industrial Acc. Comm'n*, 38 Cal. 2d 659, 242 P.2d 311 (1952), 9 NACCA L.J. 64 (1952). See also *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 26 Cal. 2d 236, 158 P.2d 9 (1945) (a horseplay case overruling thirty year old decision). See 22 NACCA L.J. 175 (1958).

<sup>386</sup> *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 147, 85 N.W.2d 97, 103 (1957). Recalling Justice Cardozo's views concerning *stare decisis*, the court stated: "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment." *Id.* at 151, 85 N.W.2d at 105.

<sup>387</sup> Dean Roscoe Pound, former Editor-in-Chief of the NACCA LAW JOURNAL, in *V JURISPRUDENCE* 345 (1959) concludes: "But, on the whole, most of the courts have increasingly come to appreciate the purpose and spirit of the [workmen's compensation] act . . . in its interpretation and application."

Prof. Riesenfeld in *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 552 (1954), states: "All in all it can be said that American courts in a liberal spirit have steadily extended the scope of protection under workmen's compensation."

In recent years courts have openly encouraged injured claimants to be represented in contested cases by experts in workmen's compensation: *Miner v. Industrial Comm'n*, 115 Utah 88, 202 P.2d 557 (1949), 3 NACCA L.J. 188 (1949). "From our experience in a number of recent cases we are convinced that applicants would fare better in contested cases if they were timely informed by the Commission that while it was not necessary for them to employ counsel, such assistance in the presentation of their case might be desirable." *Id.* at 92, 202 P.2d at 559. And when attorneys' fees are chargeable to insurers, these courts have allowed reasonable and substantial fees: see *Neylon v. Ford Motor Co.*, 27 N.J. Super. 511, 99 A.2d 664 (App. Div. 1953), 13 NACCA L.J. 95 (1952) (\$2,850 fee upheld although only \$296.43 compensation awarded to injured worker).

Industrial commissions also are granting substantial as well as reasonable fees: see *Anderson v. Bituminous Cas. Corp.*, No. 1-636, Claim No. U-97588, Fla. Sept. 30, 1957 (\$7,500 fee of claimant's attorney charged to insurer). And in a recent hard fought case which involved a payment of over \$100,000 to a paraplegic, the attorney for the claimant was awarded \$20,000. *Maryland Cas. Co. v. Marshall*, 108 So. 2d 655 (Fla. 1958) (mem.) (author's information on fees from claimant's attorney, by letter dated Aug. 14, 1961).

tims of industrial accidents, 2 million of whom look annually to the courts for understanding and help. The spirit of liberal and broad interpretation is now engrained in the warp and woof of workmen's compensation, as clearly shown by the above review of the words "personal injury by accident arising out of and in the course of employment" and the additional important word "disability."

Judicial developments have given hope to those who desire to improve the lot of industry's casualties—the injured workers.