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Occupational Disease: Interpretation and Need for Statutory Revision of the Illinois, Indiana and Kentucky General Definition

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OCCUPATIONAL DISEASE: INTERPRETATION AND NEED FOR STATUTORY REVISION OF THE ILLINOIS, INDIANA AND KENTUCKY GENERAL DEFINITION

A claimant for workmen's compensation was employed as a bore grinder. In order to perform his duties he would constantly bend over between two machines and turn his head from side to side. This work routine eventually resulted in a temporarily disabling wryneck. The Board awarded compensation for an occupational disease, but on appeal by the employer the Indiana Appellate Court reversed the award with two judges dissenting.[1] The court conceded that the work caused the disability, but stated, "[W]e cannot hold it probative of a finding that the appellee was suffering from an occupational disease as defined by the Acts. . . ."[2] It is doubtful that the Indiana court would reach the same result today, as a subsequent case[3] approved the dissenting opinion expressed in the case above. Another pertinent question is, what result will the Kentucky court reach as to a work-caused "wryneck" or other work-induced illnesses?

Illinois,[4] Indiana[5] and Kentucky[6] have similar elaborate definitions of occupational disease. Illinois and Indiana have had more experience in occupational disease litigation than Kentucky. Since Kentucky enacted its occupational disease statute in 1956, there have been no cases before the Workmen's Compensation Board involving occupational diseases other than silicosis, which is specifically referred to as an occupational disease in KRS 342.316(4) and (6).[7] This article will trace the application of the definition of occupational disease in Indiana. From this study it is hoped that the reader will gain a clearer understanding of what an occupational disease is, the

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[1] McGill Mfg. Co., Inc. v. Dodd, 116 Ind. App. 66, 59 N.E.2d 899 (1945).

[2] *Id.* at –, 59 N.E.2d at 900.

[3] Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221 (1953).

[4] Ill. Rev. Stat. ch. 48, § 172.36(2)(d) (1959). (Enacted in 1936).

[5] Burns Ind. Stat. § 40-2206 (1952). (Enacted in 1937).

[6] Ky. Rev. Stat. § 342.316(1) (1960). (Hereinafter cited as KRS). (Enacted in 1956), Ky. Acts 1956, ch. 77, § 12.

[7] Note, 48 Ky. L.J. 563, 565 (1960). Although silicosis is referred to as an occupational disease, presumably it would not be an occupational disease today unless it was proven to "arise out of the employment" as required by KRS 342.316(1).

Coverage for diseases is not altogether new in Kentucky. In 1924, the Kentucky legislature provided compensation for disability from inhalation in mines of noxious gases, smoke and bad air. Ky. Acts 1924, ch. 70, presently KRS 342.005. In 1934, the Kentucky legislature added compensation for silicosis for employees engaged in glass manufacturing, quarrying, and sand mining or handling sand. Ky. Acts 1934, ch. 89, § 1. An amendment in 1944 extended coverage for silicosis. Ky. Acts 1944, ch. 82. But, Kentucky has had its general coverage statute only since 1956.

practicability of the definition and the need for statutory change. Most of all, this is an opportunity for the Kentucky bar, court and legislature to benefit from an understanding of Indiana's experience; thus Kentucky may be able to avoid many of the difficulties which Indiana has encountered.

The Indiana statute provides:

> (a) As used in this Act . . . the term "occupational disease" means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this section.
> (b) A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workmen would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin as a risk connected with the employment and to have flowed from that source as a rational consequence.[8]

The exact source of the language used in this definition is not known. It may have come from a research report,[9] an accidental injury case,[10] or from the Illinois statute.[11] The same language is used

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[8] Burns Ind. Stat. § 40-2206 (1952).

[9] Gr. Brit. Home Dept., Report of the Departmental Committee for Industrial Diseases 1, 2-3 (1907). This report relates to establishing scheduled occupational diseases and the scheduled work processes from which resulting diseases will be deemed occupational, but the report clearly manifests the intent to exclude any ordinary diseases of life to which the general public is exposed, and the report also refers to such terms as "nature of the employment." This phrase, as used in this report, is applied in a very strict sense. An example of its application might be, that by the very nature of underground coal mining persons who work in an underground coal mine are subjected to the risk of contracting silicosis. Silicosis is therefore a compensable occupational disease where it is contracted by a coal miner.

[10] *In re* McNicol, 215 Mass. 497, 102 N.E. 697 (1913). In expressing a test for an injury to "arise out of the employment," the court stated:

> It arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by

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in varying ways in Virginia,[12] Utah,[13] West Virginia[14] and Arizona.[15] Apparently, the legislatures of all the states using this definition thought it to be clearer than a simple compensation formula of "arising out of and in the course of the employment," but, as will be illustrated, clarity can suffer as much from specificity as from brevity.

The Indiana definition begins with the statement that an occupational disease is one that "arises out of and in the course of the employment." It then excludes "ordinary diseases of life to which the genreal public is exposed," except where they result from an occupational disease. Subsection (b) gives the requirements for "arising out of the employment." Of the disease it must be found that:

(1) it had causation in the *conditions under which the work was performed,* and
(2) it was the natural result from exposure occasioned by the *nature of the employment,* and
(3) the employment was the *proximate cause,* and
(4) the cause was *not a hazard to which the public was equally exposed,* and
(5) it was *incidental to the character of the business,* and
(6) it was *not independent of the employment relationship,* and
(7) it flowed from an *employment-connected risk* as a rational consequence, although it need not have been foreseen or expected.[16]

Since these requirements are written in the conjunctive, it is obvious that even though the work alone caused the disabling dis-

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the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

[11] Sec. Statutes cited notes 4 and 5 *supra.* The Illinois definition was enacted in 1936, whereas Indiana adopted its definition in 1937.

[12] Va. Code Ann. tit. 65, § 42 (Supp. 1960).

[13] Utah Code, Ann. tit. 35, ch. 2, § 26 (1953).

[14] W. Va. Code Ann. ch. 23, art. 4, § 1, § 2526 (1955).

[15] Ariz. Rev. Stat. Ann. tit. 23, ch. 7, § 23-1103 (1956).

[16] The requirements are enumerated and their central elements are emphasized for clarity and convenience in reference.

ease, the statutory requirements *still* may not be fulfilled.[17] Fortunately, the Indiana court has generally ignored the "arising out of" test as written, or avoided any analytical discussion of it. When subsection (b) has been discussed, it has been interpreted in a manner to suit the needs of a particular case. In application the greatest obstacle for compensating has been the exclusion of "ordinary diseases of life." Four cases involving ailments which anyone might contract outside of his or any employment should serve to illustrate the problem of the "ordinary disease of life" exclusion and the court's application of the definition of "arising out of" the employment.

In the case of *Chevrolet Muncie Div. of General Motors v. Hirst*,[18] the court referred to the statutory definition, but offered no explanation or discussion of it. The court was "convinced"[19] that inflammation of the lungs and bronchial tubes was an occupational disease consistent with the legislative requirement. This case upheld an award for a disability from bronchiectasis. Bronchiectasis was found to be an ordinary disease of life, but it resulted from an inflammation of the lungs which was an occupational disease. It is interesting to note that in a subsequent and similar case where a disabling bronchiectasis was argued to be a result of work-caused bronchitis and sinusitis compensation was not allowed by the board or court.[20]

In 1944 a linotype operator was disabled by a cramped hand. The Board found that the claimant was suffering from a neurosis and that his neurosis was an occupational disease. On appeal the court reversed the award, and held that neurosis could not be an occupational disease as neurosis is not peculiar to any particular employment or necessarily to any employment at all.[21] Neurosis is "an ordinary disease of life to which the general public is exposed outside of the employment. . . ."[22] The court did consider whether or not the neurosis resulted from an occupational disease, but concluded that chronic fatigue was not an occupational disease. In its interpretation of subsection (b),[23] the court injected the requirement that the disease be

[17] For example, workers manufacturing linen could be disabled from bronchitis due to breathing great quantities of flax, but under this definition compensation would probably be denied, because bronchitis is an ordinary disease. Likewise, a disease may be caused by the conditions under which the work is performed, but the exposure may not be occasioned by the nature of the employment if a strict sense of the term is applied.

[18] 113 Ind. App. 181, 46 N.E.2d 281 (1943).

[19] *Id.* at —, 46 N.E.2d at 284.

[20] Schlechtweg v. McQuay-Norris Mfg. Co., 116 Ind. App. 375, 64 N.E.2d 664 (1946).

[21] Star Publishing Co. v. Jackson, 115 Ind. App. 221, 58 N.E.2d 202 (1944).

[22] *Id.* at —, 58 N.E.2d at 203.

[23] *Ibid.* The court stated:

Section 6 . . . defines occupational diseases and outlines the circum-

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one that "gradually develops" which is one element the definition does not require, and which in fact the statute specifically denies.[24] The interpretation included only requirements (1), (2), (4) and (7) (*supra* at page 565), and concerning requirement number (2), the word "particular" was added as a modifier of the word "employment." Subsequently, however, the court has specifically refused to adopt the idea of "particular employment" as part of the meaning of the phrase "nature of the employment" in requirement number (2).[25]

With apparent confusion, the majority in *McGill Mfg. Co. v. Dodd*[26] denied compensation for a temporarily disabling wryneck. The court expressed the view that the legislature did not intend to provide general health insurance, and that to be compensable a disease must be incidental to the character of the business and result from a risk connected with the employment. The court concluded its interpretation of subsection (b) by stating that the act intended "to exclude . . . diseases arising out of a hazard to which workmen would have been equally exposed outside their employment and independent of the relation of employer and employee."[27]

Three or four of the seven elements of subsection (b) are used in this analysis and they are conveniently jumbled into a (5)-(7)-(4) or (5)-(7)-(4) and (6) order. The combination of requirements (4) and (6) is very confusing. As the two are combined, it appears that outside of the employment means the same thing as independent of the employment relationship, and the result is one requirement. On the other hand, it may be that the court meant to include not only requirement (4), which requires that the disease not come from a common hazard, but also requirement (6), which requires that the disease not arise independently of the employment relation-

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> stances under which diseases shall be considered to be occupational. Under the statute, to be occupational, a disease must be one which gradually develops from, and bears a direct casual connection with the *conditions* under which the work is performed, and which results from an *exposure* occasioned by and naturally incidental to a particular employment. It is not such as comes from a hazard to which workmen would have been equally exposed outside the employment, but must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

[24] Burns Ind. Stat. § 40-2226 (1952). The section provides: "An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists."

[25] Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221, 225, 228 (1953).

[26] 116 Ind. App. 66, 59 N.E.2d 899 (1945).

[27] *Id.* at –, 59 N.E.2d at 901.

ship. These two elements are independent and should not be combined. As the definition is written, requirement (6) is meant to be supplementary to requirement (5). These two provide that, "the disease must be incidental to the character of the business and not independent of the relation of employer and employee."[28] Requirement (4) makes necessary a finding that the work created an unusual exposure to which the public is not equally exposed.

After attempting to show that the disease did not arise out of the employment as required by subsection (b), the majority admitted that the work caused the disease, but denied compensation because the disease of wryneck or wryneck resulting from neurosis was an ordinary disease of life.

The dissenting opinion presented a clearer understanding of the problem and of the Occupational Diseases Act, and expressed a more liberal view and one that is in line with the most recent interpretations by the Indiana court. The dissent interpreted the "ordinary diseases of life" exclusion to mean "where an ordinary disease of life is contracted as a result of conditions appertaining to or depending on the employment which arose out of and in the course of the employment, there is a compensable occupational disease."[29] This interpretation of subsection (b) included all seven elements with only slight variations from the language of the statute.[30] The most significant change involved the phrase "nature of the employment" in requirement (2), which was changed to read "work pertaining to the employment." The dissent attempted to give a more liberal meaning to "nature of the employment" than the strict historical meaning.[31] Subsection (b), being in the conjunctive, can only be as liberal as its strictest requirement.

Briefly, the dissent seems to provide that where a disease "arises out of the employment" according to the above test it is compensable. The fact that the disease is an ordinary disease of life is immaterial. Wryneck or neurosis would be an occupational disease caused by an increased exposure due to the conditions, work and character of the occupation. The work was considered to have caused the disabling disease. The constant turning of the head was a hazard to which the appellee would not be equally exposed outside of the employment. The dissent also pointed out that there was substantial evidence on which the Board's award should have been affirmed.

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[28] Burns Ind. Stat. § 40-2206(b) (1952).
[29] McGill Mfg. Co. v. Dodd, 116 Ind. App. 66, 59 N.E.2d 899, 901 (1945).
[30] *Id.* at —, 59 N.E.2d at 902.
[31] See generally Gr. Brit. Home Dept., *supra* note 9.

The dissent was approved in *Schwitzer-Cummins Co. v. Hacker*.[32] This case is the latest and most complete attempt to interpret the Indiana definition, but some confusion remains and the interpretation is possibly erroneous in part. The disease complained of was bronchiectasis resulting from an inflammation of the lungs, the same as in *Chevrolet Muncie Div. of General Motors v. Hirst*.[33] This time, however, the court was not merely "convinced" that the requirements of subdivision (b) were met. The appellee worked in a poorly ventilated shop, and was positioned between two grinding wheels. He was forced to breathe considerable dust and foreign matter which were irritating to the lung and bronchial tissues. The appellant contended that to qualify as an occupational disease: (1) it must not be an ordinary disease of life to which the general public is exposed; (2) it must result from conditions of the work to which all employees as a class are exposed; (3) it must result from a long period of exposure to common elements of the industry; and (4) it must be a natural and common result rather than an unexpected one.[34]

The court gave a negative reply to each contention and added that if these contentions were adopted, the Act would become useless and impotent. As to the appellant's first contention, the court stated, "[T]he disease itself may be 'ordinary' in the sense that it is an ailment to which many people are exposed to and suffer from. . . ."[35] This argument concluded that if the "nature and conditions" of the employment are such that a workman in that employment is likely to acquire the disease, and these conditions are not the same as those to which the general public is exposed, and if the causal connection is established, the disease arises out of the employment.

The second contention was answered by stating, "There is nothing in our Act which requires or implies that the work conditions must subject all employees as a 'class' to the same exposure."[36] The court specifically refused to adopt the narrow meaning of the term "nature of the employment" expressed in the New York case of *Goldberg v. 954 Marcy Corp*.[37] The court removed all doubt that it

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[32] 123 Ind. App. 674, 112 N.E.2d 221 (1953).
[33] 113 Ind. App. 181, 46 N.E.2d 281, 284 (1943).
[34] Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221, 227-228 (1953).
[35] *Id.* at —, 112 N.E.2d at 228.
[36] *Ibid.*
[37] 276 N.Y. 313, 12 N.E.2d 311 (1938). The claimant was a cashier in an outside ticket booth of a theater. The court held that the disease which she contracted as a result of an electric heater alternating on and off, which caused her feet to be numb, weak and blotched, was not an occupational disease. The disease was not the result of the nature of the employee's work, but it was caused

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intends to apply a strict interpretation to requirement (2). Requirements (1) and (2) now mean practically the same thing. Subsection (b) could provide: "A disease . . . arises out of the employment only if [there is] apparent . . . a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the" *conditions under which the work is performed.*[38]

The third contention was answered: "In section 26 of the act, Burns 1952 Replacement, section 40-2226, it is provided: 'An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when *for any length of time, however short,* he is employed in an occupation or process in which the hazard of the disease exists.' "[39]

As to the fourth contention, the court merely replied, "[S]ubdivision (b) provides that 'The disease need not have been foreseen or expected. . . .' "[40]

In affirming the Board's award and in expressing its interpretation of the definition as a whole, the court stated:

> It is noted that Subd. (b) . . . *does not except such ordinary diseases from its provisions.* Such Subdivision (b) requires the establishment of conditions and circumstances of employment, consistent with the provisions of the act which provide a risk or hazard of disease, and that the acquired disease bears a casual connection with such conditions and circumstances of employment, and results as a natural incident of exposure thereto. Thus, it appears that even though the Act provides in Subd. (a) that the secondary disease (in this case the bronchiectasis) in order to be compensable be not an ordinary disease to which all members of the public are alike exposed, yet it contains no such provision in Subd. (b) as to the primary disease (in this case the inflammation of the lung tissues and bronchial tubes). Therefore, we hold *that in the instant case,* the appellee *having*

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by extrinsic conditions under which she worked. In defining "nature of the employment," the New York court stated at 12 N.E.2d at 313:

> [A]n occupational disease is one which results from the nature of the employment, and by nature is meant, not those conditions brought about by the failure of the employer to furnish a safe place to work, but conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general.

[38] The quote is from the first part of subsection (b) and the emphasized phrase is a substitution for the phrase "nature of the employment."

For a good discussion of the problem, see Note, "The Kentucky Occupational Disease Act: Nature and Conditions Of The Employment," 48 Ky. L.J. 563 (1960).

[39] Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221, 228-229 (1953).

[40] *Id.* at —, 112 N.E.2d at 229.

> *established a special hazard in his employment* which causally resulted in the said primary disease, no bar is raised because such primary disease may be one to which the general public under sufficient conditions may be also exposed.[41]

This interpretation and holding is in part erroneous, and the language should be illustrative of the confusion associated with this definition. The statement provides that subdivision (b) does not except "ordinary diseases of life," but it gives the test for occupational disease, which is a disease that "arises out of" the employment. The court then innovates the idea of "primary and secondary" diseases, and concludes that a "primary" disease satisfying subdivision (b) may be an "ordinary disease of life" notwithstanding the exclusion in subdivision (a). The court is wrong in its contention that a "secondary" disease may not be an ordinary disease. An "ordinary," "secondary" disease may be compensable if it is disabling and if it follows "as an incident of an occupational disease. . . ."[42] The claimant was in fact compensated for his disability from bronchiectasis, and the opinion is clear on this point as it concludes that: "[S]uch substance irritated the bronchial tubes and lung tissues and caused inflammation thereof, from which appellee suffered a disease known as bronchiectasis which was an incident of an occupational disease as defined in section 6. . . ."[43]

It is unfortunate that a statute should require such judicial contortions as have been presented, but without them the whole Act would be useless. Why should bronchiectasis,[44] a more serious and less "ordinary" disease than bronchitis, be a "secondary" disease and not an occupational disease under the above circumstances? If inflammation of the bronchial tubes can be an occupational disease, how can bronchitis not be an occupational disease?[45] In spite of the

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[41] *Id.* at —, 112 N.E.2d at 230. Of the requirements of subsection (b), enumerated in the text at page 565, requirements (1) and (4) are the only elements used in determining causation in this case.

[42] Burns Ind. Stat. § 40-2206(a) (1952).

[43] Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221, 230 (1953).

[44] Bronchiectasis is defined in Dorland's Illustrated Medical Dictionary (23d ed. 1957), as "A chronic dialation of the bronchi or bronchioles marked by fetid breath and paroxysmal coughing, with the expectoration of mucopurlent matter."

[45] Bronchitis is defined in Webster's New International Dictionary (2d ed. 1957), as "Inflammation, accute or chronic, of the bronchial tubes or any part of them." In Schlechtweg v. McQuay-Norris Mfg. Co., 116 Ind. App. 375, 64 N.E.2d 664 (1946), the complaint was for bronchitis and nasal pharyngitis resulting in bronchiectasis. Compensation was denied and it was found that the claimant's disability was not directly or indirectly the result of any occupational disease arising out of the employment. This case actually turned on the substantial evidence rule, but there was evidence to show a work-connected cause. The board was undoubtedly influenced by the idea that bronchitis and bronchiectasis were "ordinary diseases of life."

stifling effect of subsection (b), Indiana has found that diseases can "arise out of" one's employment. Indiana has also found a method of circumventing the exclusion of "ordinary diseases of life" in subsection (a), whether it be by the "primary-secondary" method, or whether it be by the argument used against the appellant's first contention in the *Schwitzer-Cummins* case, which in essence was, that if the conditions of the employment are not ordinary conditions of life to which the general public is exposed, the resulting disease is compensable whether it is ordinary or not.

The first portion of Kentucky's definition of occupational disease has one additional, but very significant, word which could be used to avoid the "ordinary disease" exclusion, if the logic of the Indiana court is followed. The phrase following "ordinary diseases of life" is, "to which the general public is *equally* exposed outside of the employment."[46] (Emphasis added). On the basis of this phrase, one could very easily argue that bronchiectasis, not merely inflammation of the bronchial tubes (bronchitis), is an occupational disease. Bronchiectasis is an ordinary disease, but the public is not *equally* exposed outside of the employment, because the public is not subjected to the increased hazard created by the conditions and characteristics of the employment. Such an approach may or may not be a correct interpretation of the legislative intent, but it does remain within the purview of the statute and it should clearly satisfy the social policies underlying workmen's compensation.

The Indiana court has had little difficulty in awarding compensation for disabilities caused by unusual diseases often recognized as occupational diseases, such as silicosis, as opposed to the "ordinary diseases of life." If anything, the court has been too lenient, and required very little to establish causation. A mere showing of disability from silicosis with some exposure to silica dust has been sufficient to justify compensation.[47] This was shown in *Inland Steel Co. v. Voutos*[48] where the court held that to recover for silicosis, one need prove only an exposure to silica dust as a result of his employment and the court will infer that silica dust was sufficient in quantity to cause the disease. There, the claimant was a crane operator in a steel mill. The dust and silica content in the air was the same inside as outside the mill for a radius of three miles. Three factors save the court from any condemnation for leniency in this case, however: The disease was a mere recurrence of silicosis; the air samples had

[46] KRS 342.316(1).
[47] Small, Workmen's Compensation Law of Indiana (Supp. 1958, at 107).
[48] 118 Ind. App. 335, 77 N.E.2d 126 (1948). See also Square D. Co. v. O'Neal, 117 Ind. App. 92, 66 N.E.2d 898 (1946).

only been taken for two years; and the court merely affirmed the award on the basis of the substantial evidence rule. There was sufficient evidence to find causation, even though the evidence was conflicting.

Causation must be established in all cases, but it may be that where an employee contracts an unusual disease normally associated with his employment that this in itself is evidence of causation. It is doubtful, however, that a court would find even silicosis to be an occupational disease where the employee works in an air-conditioned office at a stone quarry, but lives in an unair-conditioned house across the road where he will receive almost all of the silica dust that he inhales.

A general survey of the cases reveals that Indiana has found carbon monoxide poisoning,[49] tuberculosis pneumonia associated with silicosis,[50] pneumonconiosis of anthracosis type,[51] inflammation of the lung and bronchial tissue,[52] and silicosis[53] to be occupational diseases under the Occupational Diseases Act. In addition, lead poisoning was held to be an occupational disease and not covered by the Workmen's Compensation Act in a negligence case prior to the enactment of the Occupational Diseases Act.[54] Nevertheless, neurosis resulting in a stiff hand,[55] neurosis resulting in wryneck,[56] bronchitis and sinusitis,[57] and bronchitis resulting in bronchiectasis[58] have been held not to be occupational diseases.

If any of the latter diseases should "arise out of the employment" today, it is possible that any of them could be held compensable under the interpretation of the definition of occupational diseases which is implicit in *Schwitzer-Cummins Co. v. Hacker*.[59] When these diseases are involved, the result will be overrulings, more inconsistencies, additional nebulous distinctions and further confusion of the law. The legislature could help alleviate this problem by enacting a new defi-

[49] Louchs v. Diamond Chain & Mfg. Co., 218 Ind. 244, 32 N.E.2d 308 (1941).
[50] Harbison-Walker Refactories Co. v. Turks, 110 Ind. App. 563, 39 N.E.2d 791 (1942).
[51] Walter Bledsoe & Co. v. Baker, 119 Ind. App. 147, 83 N.E.2d 620 (1949).
[52] Chevrolet Muncie Div. of General Motors v. Hirst, 113 Ind. App. 181, 46 N.E.2d 281 (1943); Schwitzer-Cummins Co. v. Hacker, 123 Ind. App. 674, 112 N.E.2d 221 (1953).
[53] Inland Steel Co. v. Voutos, 118 Ind. App. 335, 77 N.E.2d 126 (1948); Square D Co. v. O'Neal, 117 Ind. App. 92, 66 N.E.2d 898 (1946).
[54] General Printing Corp. v. Umback, 100 Ind. App. 285, 195 N.E.2d 281 (1935).
[55] Star Publishing Co. v. Jackson, 115 Ind. App. 221, 58 N.E.2d 202 (1944).
[56] McGill Mfg. Co. Inc. v. Dodd, 116 Ind. App. 66, 59 N.E.2d 899 (1945).
[57] Russell v. Auburn Cen. Mfg. Co., 107 Ind. App. 17, 22 N.E.2d 889 (1939).
[58] Schlechtweg v. McQuay-Norris Mfg. Co., 116 Ind. App. 375, 64 N.E.2d 664 (1946).
[59] 123 Ind. App. 674, 112 N.E.2d 221 (1953).

nition that leaves the determination of causation completely within the court's discretion.

Another area of confusion is in distinguishing occupational diseases from accidental injury. Due to an over-extension of workmen's compensation for injury and the present liberal meaning of occupational diseases, the question may arise whether to make a claim for an injury or a disease. Where a disabling disease such as tuberculosis[60] or pneumonia[61] results from a weakened condition caused by an injury, it seems clear that the claim should be made for the injury. Where typhoid fever[62] or gastroenteritis[63] result from drinking contaminated water on the job, it appears more rational to consider these as disabling diseases that result from an accidental injury rather than as occupational diseases. But, in the future, should a disease resulting from unusual overheating caused by conditions of the employment,[64] or a disease caused by a long time occupation of bracing a dolly bar against a riveting operation,[65] be compensable as an occupational disease or as an accidental injury? Both of these situations appear to satisfy the present liberal view expressed in the *Schwitzer-Cummins* case, but both were compensated as injuries. The former case arose in 1917 and the latter was decided in 1940, subsequent to the Occupational Diseases Act of 1937. It may be that the latter would not have been compensable as an occupational disease in 1940, but assuming that it would be compensable as such today, should the claimant be able to recover for either an injury or a disease? A definition of occupational disease that would cover the over-extended area of compensation for injury would assist in arriving at more logical and reasonable results in these cases; and, at the same time compensation would not in fact be extended, as the diseases caused by a one-time exposure and gradual "injury" are already compensable.

The inconsistency and the apparent confusion is not the fault of the court. In its quest for justice the court is caught between a lack of knowledge of the true legislative intent and an impossible definition. The court has done much to make the statute workable, but what is needed is a definition more in accord with the view of the court. Today, the Indiana definition is a judge-made definition.

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[60] Retmier v. Cruse, 67 Ind. App. 192, 119 N.E. 32 (1918).
[61] Ft. Wayne Rolling Mill Corp. v. Buanno, 69 Ind. App. 464, 122 N.E. 362 (1919).
[62] Wasmuth-Endicott Co. v. Karst, 77 Ind. App. 279, 133 N.E. 609 (1922).
[63] State v. Smith, 93 Ind. App. 83, 175 N.E. 146 (1931).
[64] United Paperboard Co. v. Lewis, 65 Ind. App. 356, 117 N.E. 276 (1917).
[65] American Maize Products Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940).

The statutory definition has never been fully applied. Certain requirements in subdivision (b) have been completely rejected or interpreted to mean the same thing as another requirement, and the historical exclusion of ordinary diseases has been circumvented.

A definition of occupational disease to be properly applied must be based on certain principles and philosophies which are clearly understood. It is therefore suggested that the Act be amended to contain a statement of purpose. Generally speaking, the basic principle for all workmen's compensation, injury or disease, is that in a modern industrial society, occupational diseases are a social risk to be borne by the consumer as a part of the cost of production through the price of the product.[66] Where the injury or disease arises out of and in the course of the employment, the price of the product should include the cost thereof; but, where the disease is a result of a hazard other than the employment and of normal conditions to which the employee is equally exposed outside of the employment, the cost should be borne by the individual, his family, or as a last resort, the community as a whole.

One of the most difficult problems associated with occupational disease, in a legal and an administrative sense, is that of defining the term. From the beginning there has been confusion and inconsistency in and between statutory definitions and judicial interpretations. The older statutes contained schedules classifying certain diseases as occupational. If an employee contracted one of these diseases from a scheduled process, and if he was disabled, he was compensated unless the employer could prove that in fact the disease did not result from the employment.[67] Some states have a schedule-type statute today,[68] but one shortcoming of this type is that as new diseases are found to be caused by an occupation, workers contracting them may be denied compensation before the legislature amends the law. As a result, there are several states which include their schedule with a general definition to take care of the new situation.[69] However, where diseases are scheduled there appears to be a tendency to overlook causation to a greater extent when the claimant has contracted one of the scheduled diseases. The lone general definition avoids the criticism of both the schedule and the schedule with a general definition statutes. The question remains, however, what should the definition include?

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[66] Goldberg, Occupational Diseases In Relation To Compensation And Health Insurance 148 (1931).

[67] Gr. Brit. Home Dept., Report of the Departmental Committee for Industrial Diseases 1, 3 (1907).

[68] 1 Larson, Workmen's Compensation § 43.31 (1952).

[69] *Ibid.*

The only real query needed in a general definition of occupational disease is: Did the work cause the disease? The primary factor restraining broad coverage for diseases has been the difficulty in establishing that the work caused the disease. When schedules of diseases were first developed it was thought that, "To ask a court of law to decide [causation] would be to lay upon it an impossible task."[70] The problem is not one to be brushed aside lightly. Where there is an accident on the job, it is comparatively easy to establish that the work was the cause, as opposed to establishing that a disease was caused by the work. Since causation must be determined, however, boards and courts are the logical choice for making this determination on the basis of the circumstances of each case. If compensation is based on causation alone, fairer results can be attained. A common ailment may be compensated as an occupational disease under certain circumstances, and compensation may be denied where it is shown that a disease such as silicosis was not caused by the employment. If it is rational to put the burden on the product and the consumer in a given situation, the worker should be compensated. If it appears under all of the circumstances that the work did not cause the disease, the insured or uninsured individual, his family or the community should bear the cost. The court should be free to apply its own reasoning in carrying out this philosophy in each situation.

In view of the problems incurred under the present definition as presented in this note, and in view of the underlying policies of workmen's compensation the following definition is therefore submitted:

> 1. "Occupational disease" as used in this Act means any disease that arises out of and in the course of the employment.
>
> a. A disease shall be deemed to arise out of the employment when it is apparent to the rational mind, upon a consideration of all of the circumstances, that the disease resulted from a work-connected cause.
>
> b. A disease shall be deemed to arise in the course of the employment when it is apparent to the rational mind that the cause arose in a work-connected place, at a work-connected time and in a work-connected activity.

Since the Indiana Occupational Diseases Act, as most workmen's compensation acts, does not allow compensation for the first seven days unless the disability continues for longer than twenty-eight days,[71] coverage will not be extended to colds and similar ailments even if they do clearly arise out of the employment. Therefore, if the above definition were adopted, it would improve the law and aid

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[70] Gr. Brit. Home Dept., *supra* note 67, at 2.
[71] Burns Ind. Stat. § 40-2208(a) (1952).

th court far more than it would extend or liberalize the present coverage. If Kentucky adopts the proposed definition, it can avoid many of the difficulties which the Indiana court has encountered.

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