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THE KENTUCKY OCCUPATIONAL DISEASE ACT:
NATURE AND CONDITIONS OF EMPLOYMENT

The purpose of workmen's compensation legislation is to create employer liability, regardless of fault of either the employer or employee, for disabilities arising out of and in the course of employment.\(^1\) The philosophy behind compensation liability is belief in the wisdom of providing financial and medical benefits which a community would feel obligated to provide for the victims of work-connected injuries and of allocating the burden of those payments to the most appropriate source of payment, the consumer of the product.\(^2\)

The theory supporting legislation providing for compensation to employees for disability, or to their dependents in case of death, due to occupational disease should be the same as in the case of compensation for disabilities or death due to accidental injuries. In either case, the cost is borne by the industry which caused the disability and then passed on to the public in the form of added costs for commodities, materials or services.

Compensation for occupational disease is a relatively new phase of the workmen's compensation law. The reason for this is that until the utilization by modern industry of various chemicals, compounds and minerals, and of manufacturing processes creating certain dusts and fumes, such diseases were practically unknown. Since accidental injuries were known from earliest times, it is only natural that legislation dealing with the problems they present should have preceded legislation relating to occupational diseases.\(^3\)

Kentucky enacted its first Workmen's Compensation Act in 1914.\(^4\) This act was declared unconstitutional on the ground that it was a compulsory system violating section 54 of the Kentucky Constitution.\(^5\) Again in 1916, a Workmen's Compensation Act was passed by the Kentucky General Assembly,\(^6\) and it was unanimously declared constitutional by the Kentucky Court of Appeals.\(^7\) However, this act contained no provisions allowing recovery for any occupational disease, not even silicosis.

1 Tyler-Couch Constr. Co. v. Elmore, 264 S.W.2d 56 (Ky. 1954).
4 Ky. Acts 1914, ch. 73.
7 Greene v. Caldwell, 170 Ky. 571, 186 S.W. 648 (1916).
In 1924, disability from inhalation in mines of noxious gases, smoke or bad air was made compensable. The 1934 amendment to this legislation provided:

[Employers and their employees engaged in the operation of glass manufacturing plants, quarries, sand mines or in the manufacture, treating or handling of sand may, with respect to the disease of silicosis caused by the inhalation of silica dust, ... voluntarily [by joint application] subject themselves to the Act as to such disease.]

By amendment in 1944, this provision for voluntary coverage in cases involving silicosis was enlarged to include "any employers and their employees" and detailed procedures were set up relating to claims for compensation for disability or death resulting from the disease of silicosis.

In 1956, KRS section 342.316 was given its present form and became what is now commonly referred to as the Occupational Disease Act. This paper is primarily concerned with the following provisions of the act:

1. "Occupational Disease" as used in this chapter means a disease arising out of and in the course of the employment. Ordinary disease of life to which the general public is equally 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.
   (a) 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 condition 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 shall be incidental to the character of the business and not independent of the relationship 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 in a risk connected with the employment and to have flowed from that source as a rational consequence.

In interpreting the meaning of these provisions, and in trying to determine what disabilities will be compensable thereunder, it is necessary to ascertain the intent of the legislature in passing the

10 Ky. Acts 1944, ch. 82.
11 Detailed provisions for procedures in silicosis cases were added to KRS § 342.315 by the 1944 Act. Prior to the 1946 session, the Legislative Research Commission assigned the number KRS § 342.316 to portions of the 1944 Act.
amendment. Since there is no legislative history, such as committee reports and records of hearings relating to the adoption of the amendment, it is virtually impossible to find any objective factors which would indicate the intent of the legislature. It should also be noted that, since the enactment of this statute, 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 section 342.316(4) & (6). Therefore, the only avenue open in an inquiry of this kind is an examination of the case law on the problem existing at the time the amendment was enacted.

There were no common-law rules allowing workmen's compensation for accidental injuries nor for occupational disease. However, at common-law, the employer was held liable to his employee for personal injuries and for a disease sustained by him by reason of the employer's negligence, except insofar as the latter's liability might be affected by the application of the doctrines of assumed risk, contributory negligence and the fellow servant doctrine.\(^1\)

Prior to the 1956 amendment, all diseases, occupational or otherwise, were excluded from the operation of the Workmen's Compensation Act unless the disease was "the natural and direct result of a traumatic injury by accident,"\(^2\) with the exception of silicosis in the event both the employer and employee voluntarily subjected themselves to coverage under KRS section 342.005(2) as it read before the 1956 amendment. Thus, it might be said that "occupational disease" has been synonymous with "non-compensability" in Kentucky in a large portion of the cases.

We are entitled to conjecture that the Kentucky legislature got the language of its 1956 Act\(^3\) from either the Virginia,\(^4\) Indiana,\(^5\) or Illinois\(^6\) statute, since they are identical with our own. However, it seems clear that the language is ultimately traceable to the opinion of the Supreme Court of Massachusetts in an early workmen's compensation case involving an accidental injury. In that case the deceased received fatal injuries inflicted by a fellow employee who was in an intoxicated frenzy of passion. The court stated:

> The first question is whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of those words. ... In order that there may be recovery

\(^{12}\)Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923); \(^{13}\)Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972 (1923); 1 Larson, op. cit. supra note 2, § 41.

\(^{13}\)Tafel Electric Co. v. Scherle, 295 Ky. 99, 173 S.W.2d 810, 811 (1943).

\(^{14}\)KRS § 342.316 (1) (1959).


\(^{16}\)Burns Ind. Stat. § 40-2206 (1952).

the injury must both arise out of and also be received in the course of the employment. Neither alone is enough. . . . It is sufficient to say that an injury received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. 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 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.18

This opinion is quoted extensively in order to show the similarity between certain phrases in the Massachusetts court's opinion and those in the Kentucky Act.19 However, the Massachusetts court was faced, not with an occupational disease claim, but rather with a claim for accidental injuries. Essentially the only difference between the wording of the above opinion and the wording of the Kentucky Act is the substitution of the words "occupational disease" for the word "injury." Therefore, the rules of law as above given by that court for the determination of whether an accidental injury arose out of an employee's employment should be equally applicable in determining whether an occupational disease arose out of the employment.

In determining the application of the Kentucky Occupational Disease Act,20 the first determination to be made is whether the disability complained of is the result of a disease. If it is caused by a disease which is not itself the result of a traumatic injury, then we are faced with the task of applying the criteria set out in the Act for determining whether it is a compensable disability.

The traditional distinction between injury and disease has been the element of time-definiteness.21 If the cause of the disability can be traced to a specific date, or within a limited and identifiable period, it is an injury.22 Whereas, if the disability had a gradual develop-

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19 KRS § 342.316 (1) (1959).
20 Ibid.
21 Hillerich & Bradsby Co. v. Parker, 267 S.W.2d 746 (Ky. 1954).
ment, the cause is a disease.\textsuperscript{23} It should be noted that the purpose of distinguishing injury and disease in these cases has usually been to defeat compensation claims on the ground that there was not an accidental injury, where there was no statutory provision for compensation for disabilities arising from occupational diseases.

Under “general coverage”\textsuperscript{24} statutes such as KRS section 342.316, the important boundary now becomes, not the separation of occupational disease from accidental injury, because both are compensable, but rather the separation of occupational diseases from diseases which are common to mankind and not distinctively associated with the employment. Thus, the element of gradualness, so heavily stressed in definitions contrived to distinguish accidental injuries from occupational diseases, loses some of its importance.

The criterion for determining whether a disease is an occupational one and compensable under the Act is whether it “arises out of and in the course of the employment.”\textsuperscript{25} The terms “arising out of” and “in the course of” are not synonymous and if either of these elements is absent, there can be no recovery.\textsuperscript{26} The phrase “in the course of” the employment refers to the time, place and circumstances of the occurrence.\textsuperscript{27} Thus, a disability occurs “in the course of” the employment, if the employee is doing what a man so employed may reasonably be expected to do within the time during which he is employed and at a place where he may reasonably be expected to be during that time.\textsuperscript{28} While seemingly simple in its terms, the test has not received consistent application.\textsuperscript{29} However, in view of the fact that the Kentucky legislature went to great length in setting up the criteria for determining whether a disease “arose out of” the employment, the remainder of this paper will be devoted to consideration of the proper application of this phrase.

The words “arising out of” the employment refer to the cause of the disability.\textsuperscript{30} In order for a disease to be deemed to “arise out of” the employment within the meaning of KRS section 342.316, there must be, among other things, a direct casual connection between

\textsuperscript{23}Kentucky Stone Co. v. Phillips, 294 Ky. 576, 172 S.W.2d 216 (1943).

\textsuperscript{24}There are two types of coverage statutes: “general coverage” and “schedule coverage.” \textsuperscript{1} Larson, Workmen’s Compensation, § 41.11 (1952).

\textsuperscript{25}KRS § 342.316 (1) (1959).

\textsuperscript{26}Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372 (Ky. 1952).

\textsuperscript{27}Ibid.

\textsuperscript{28}Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 281, 204 S.W. 152, 160 (1918).


\textsuperscript{30}Stapleton v. Fork Junction Coal Co., 247 S.W.2d 372 (Ky. 1952).
the "conditions" under which the work is performed and the occupational disease, and it must follow as a natural incident of the work as a result of the exposure occasioned by the "nature" of the employment.

What is meant by "nature" and by "conditions" of employment might be best illustrated by reference to a noted New York decision. In that case, the claimant was a theater cashier. Her feet became numb and weak because of alternating heat and cold which resulted from turning an electric heater in the ticket booth on and off. New York had a statute which specifically named certain diseases as occupational diseases. There was also a general provision for compensation for all occupational diseases if contracted in one of the industries to which the Workmen's Compensation Law pertained. The Industrial Board found the disease to be an occupational one due to the nature of the employment and awarded compensation. The Court of Appeals affirmed because the award could be sustained as one for injury, but denied that the claimant had an occupational disease within the meaning of the New York statute. The court stated:

[...]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.

Her occupation was that of handling cash and theater tickets, and it is obvious that this work in and of itself could not have caused the . . . disease. The "disease" which befell her, therefore, was caused not by the nature of her employment, but by the failure of her employer to furnish her with a proper and safe place in which to work.

Thus, the "nature" of the employment refers to the type of work done (i.e., selling tickets and handling money) and "conditions" refer to the environment (i.e., working in an exposed place requiring the use of a heater and resulting in alternating heat and cold).

Should the Kentucky courts follow what might be called the "New York rule" as laid out in the Goldberg case, that in order to be compensable the disease must result from the type of work done, compensation for disability resulting from disease would be severely limited.  


limited. However, it is believed that the Kentucky court should not follow this rule for two reasons: (1) the language of the Kentucky Occupational Disease Act is ultimately traceable to the McNicol case which did not require that the injury result from the "nature of the employment," at least within the meaning of the Goldberg case; and (2) the Kentucky courts when dealing with injuries have not required that they result from the "nature of the employment."

The deceased in the McNicol case was a checker in the employ of a firm of importers and was fatally injured when struck by a fellow employee who was intoxicated. The nature of the employment was checking for the importers and the condition was working with the intoxicated employee. The court allowed compensation, yet it cannot be said that there was a risk that this type of injury would arise from the nature of the employment. The deceased was a checker, not a bar-tender. Therefore, the logical deduction would be that the court felt it was not necessary that the injury result from the "nature of the employment," regardless of the fact that these words are used in their test for "arising out of" the employment, but rather it was sufficient that the injury resulted from the "conditions of the employment." This is further evidenced by the following statement of the Massachusetts court:

Although it may be that upon the facts here disclosed a liability on the part of the defendant for negligence... might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work.

If the conclusion that the language of the Kentucky Occupational Disease Act is traceable to the McNicol case is correct, it would seem to follow that since the words "nature of the employment" were used in a different way in that case from the usage in the Goldberg case, the Kentucky court should not follow the Goldberg case in determining whether a disease followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment.

The Kentucky courts have consistently allowed compensation claims for injuries resulting from the "conditions of the employment," which had no relation to the "nature of the employment."

34 Hereafter, when the words "nature" or "condition" of the employment are used, they will be used as in the Goldberg case in note 33 supra.
Phil Hollenbach Co. v. Hollenbach provides a classic example substantiating the above proposition. Hollenbach worked as a cellar foreman in a wholesale liquor business. The business used electric lights for illuminating the toilet. On the day of the accident, he had been engaged in bottling wines and placing them upon shelves in the basement. At the end of the day, in preparation for going home, Hollenbach went to the wash basin and was electrocuted when he came in contact with an uninsulated, electrically charged wire placed there as a prank by a fellow employee. The court cited the "nature" and "conditions" requirement from the "arising out of test in the McNicol case, yet they allowed compensation. It is evident that the death did not result from the "nature of the employment," but rather was the result of one of the "conditions of the employment."

Indiana has a statute which is identical with Kentucky's, yet the Indiana courts have for all practical purposes eliminated the "nature" requirement. In Schwitzer-Cummins Co. v. Hacker, the claimant operated two milling machines equipped with cutting wheels which were used to cut off end portions of cast iron bars. Prior to cutting, the bars were painted with a paint composed of iron oxide and zinc chromate. When subjected to heat in the cutting process, the zinc chromate turned into an oxide which could be irritating to the lung tissues. There were also dry grinders in the room using no wet or oil solutions and the ventilation was sub-standard. The claimant contracted bronchiectasis and the Indiana Workmen's Compensation Board allowed recovery, finding that it was an occupational disease within the meaning of the Indiana statute.

It is apparent that the disease did not result from the nature of the employment, but rather was caused by the conditions in this particular work place resulting from the employer's failure to use available safety measures.

The Kentucky court should construe the Kentucky statute simi-

36 181 Ky. 262, 204 S.W. 152 (1918).
37 For other Kentucky cases which did not require that the injury arise out of the nature of the employment, see Hayes Freight Lines, Inc., v. Burns, 290 S.W.2d 836 (Ky. 1956) (injury resulting from horseplay in which employer acquiesced); Clear Fork Coal Co. v. Roberts, 279 S.W.2d 797 (Ky. 1955) (injury occurring during ride from bathhouse to mine in private truck); Adams v. Bryant, 274 S.W.2d 791 (Ky. 1955) (injury resulting from efforts to rescue fellow worker under direction of employer); Bales v. Covington, 312 Ky. 551, 228 S.W.2d 446 (1950) (logger killed by lightning while putting horses in barn on high ridge).
38 See notes 14 & 16 supra.
40 From the opinion we have no direct characterization of the conditions as a whole in the industry. However, from the wording of the opinion, it is evi-
larly. If it requires that a disease result from the "nature of the employment," compensation for occupational diseases would be severely limited, and the purpose of enacting a "general coverage" statute such as ours would be largely defeated.

The law as applied to injury cases should be equally applicable to cases involving diseases. The purpose of compensating for disease and for injury is the same. There is no logical reason why a disease should go uncompensated when under similar circumstances an injury would not. When enacting our statute, the Kentucky legislature must have been cognizant of the fact that the creeping, incidious progress of disease often may be more devastating, crippling and lethal to a workman than the disablement resulting from an accidental physical injury, and that to deny compensation under such circumstances would be untenable.

The Kentucky Occupational Disease Act is a practical statute with a definite humane purpose. It should be applied in the spirit of its objective and not shrouded in a haze of overtechnical interpretations.

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A dent that the court was thinking in terms of tracing the cause of the injury to the conditions of the employment within the meaning of the Goldberg case.

The court spoke of the use of "dry grinders using no wet or oil solutions," the failure to use "blowers" and the absence of "ventilation," which would lead us to believe that these precautions were taken in the industry as a whole. 112 N.E.2d at 223. This is also substantiated by the fact that this case arose in 1951, a period when employers were cognizant of particular work hazards.

The following quotation from the opinion also dealt specifically with this problem (112 N.E.2d at 224):

[The appellant . . . appears to urge upon us a limitation of the scope and application of the Act to a few diseases of an unusual nature which are natural incidents of employment in a particular calling or occupation, and which are from common experience known to be usual and customary incidents to such callings or occupations. The ultimate result of the acceptance and approval by us of such a premise would be establishment of the doctrine that the . . . Act should be construed as if the same required the scheduling or specific designation of certain particular diseases as falling within its provisions and that such diseases only would be compensable. . . . Such was not the intent or the spirit of the Act. . . .

The court also cited with approval the dissent in McGill Mfg. Co. v. Dodd, 116 Ind. App. 66, 59 N.E.2d 899 (1945). In that case, the majority applied the statute strictly, as the New York statute was applied in the Goldberg case, but the dissent stated that the statute should be applied liberally and favored the application of the rule that it is sufficient that the disease result from the "conditions" of the employment and not be restricted to the "nature" of the employment.

Therefore, after a close reading of the opinion in the Schwitzer-Cummins Co. case and after consideration of the period in which this case arose, we are lead to but one conclusion—that the Indiana court does not require that the disease result from the "nature" of the employment within the meaning of the Goldberg case.

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