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COMPENSABLE AGGRAVATION AND ACCELERATION OF PRE-EXISTING INFIRMITIES UNDER WORKMEN'S COMPENSATION ACT.

KURT GARVE*

Maxon v. Swift & Co.¹ was a case of workmen's compensation litigation. The employee, deceased, had always been well prior to his calamity, save for some hardening of his arteries and high-blood pressure. While in the due performance of his duties he fell about 8 feet striking the concrete floor and injuring his back and head. After the accident he had a lump on his head in its left lower region, no longer had control of his legs and fell down on frequent occasions. He also complained of dizziness, pain in the back of his head and of black spots floating before his eyes. One of the vertebrae had been fractured. He died fifteen months later. An autopsy revealed a recent hemorrhage in the brain substance, hardening of the arteries in an advanced stage having existed already prior to his accident. An examination of the inner surface of the skull showed that it had been fractured in the region of its left lower wall, and that the external lump, fracture and hemorrhage corresponded in their locations with one another.

It was defendant company's contention that the hardening of the arteries and the high-blood pressure had been the cause of deceased's dizziness and inability to keep on his feet, that the stroke which occurred fifteen months later was the culmination of a pre-existing disease, independent of the employment, and that the long interval of time intervening between injury and death removed the basis for any inference that there was a causal connection between the employee's death and injury due to his employment. Claimants on the other hand contended that there was such causal connection. The Industrial Commission adopted claimants's view and awarded compensation. It was from this order that appeal was brought. Affirmed.

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¹ 158 Minn. 491, 198 N. W. 133 (1924)
Was the decision of the commission correct? When are aggravations and accelerations of pre-existing infirmities compensable under workmen's compensation acts?

A FEW MEDICAL FACTS

For the medical man the term "pre-existing infirmities" covers a large territory, ranging from a mere susceptibility to some ailment to the gravest diseases. For the lawyer, however, this expression has a very definite and restricted meaning, when connected with the legal concepts of aggravation or acceleration of a pre-existing disease by reason of the employment. While all disorders, no matter of what description, have as to their nature and activities certain characteristics of their own, they also have in common certain features which probably most conspicuously stand out in the group of infectious diseases. For instance, it is surprising that, considering the enormous numbers of bacteria of the most varied kinds, infection does not occur so often as one may be inclined to believe, even though a large area of the body has been subjected to traumatic injury. Not that bacterial invasion is of infrequent occurrence; quite on the contrary. But in health germs do not usually cause infection and tend to be destroyed very soon after their having entered the tissues. And, even though bacteria invaded the body and established themselves in such a manner that a disease comes into existence, nevertheless they are overcome sooner or later by the defensive forces of the body mobilized to counteract their effects. We may, therefore, divide the defence mechanism of the body into three different forces: the forces of prevention of its:

a.) Invasion by germs;

b.) infection by them;

c.) progress of infection, where bacteria have gotten a stronghold of the body.

It is a consideration of the degrees of presence or absence of sufficiency of the forces of the last class which enters a workmen's compensation case in which compensability of an aggravation or acceleration of a pre-existing disease is at issue. It is

in connection with such cases that terms such as dormant, active, and latent diseases receive their greatest significance and importance.

a.) Active Diseases.
Where the forces of prevention of progress of the disease are very weak, and the bacteria or other pathologic agencies have the upper hand, the disorder is active. Progress of the disorder may be slow or quick, temporary or permanent, until the final stage is reached.

b.) Arrested Disorders.
On the other hand, where the forces of prevention of progress have overcome definitely the vulnerating actions of the invading bacteria, the disease is at least arrested. There is no further progress. The person afflicted does not become worse in his condition. But there may be left a certain susceptibility. The disorder may flare up at any time and again become active and progressing, whenever a sufficiently strong trauma to cause such change is suffered by the diseased.

c.) Dormant or Latent Diseases.
Things are different as to latent or dormant diseases. Naturally, arrested disorders are dormant. They have the dormancy of susceptibility, or potentiality of renewal of activities of the causes of the disorder, whenever favorable conditions are present. But there is another type of dormancy. The forces of prevention of progress of the disease are somewhat weaker than the vulnerating forces of the bacteria. The disease is active, but its activity is hidden, non-manifest. The dormancy is more apparent than real. The process progresses without obvious manifestations of symptoms, sometimes until the fatal issue has been reached. "Probably no word in connection with the description of syphilitic processes is more misunderstood and abused than the expression 'latent syphilis.' As it is ordinarily used, it does not refer to a condition where, as a result of immune processes or loss of pathogenicity, the disease is held in check and is truly latent. On the contrary, in the vast majority of these cases, it is only syphilis without obvious external manifestations and frequently accompanied by active pathologic involvements of the aorta, the meninges, the brain, or
cord. There seems to be a demand for a term with which to designate this class of cases and the word 'latent' is misused to this end. It would seem that a better designation might be found, such as syphilis without external manifestations, non-manifest syphilis, repressed syphilis, concealed syphilis, or endosyphilis. . . . A truly latent syphilis would give a consistently negative Wassermann reaction and would be without manifestations or active pathologic processes in any organ.”

**Vulnerability of Pre-Existing Diseases**

There are certain diseases which cannot be aggravated by an industrial accident or injury. Thus, where an employee sustained a fracture of his right leg and while disabled was committed to a hospital for the insane, the industrial commission found after extended medical expert testimony that dementia praecox is a type of insanity which trauma cannot enter into either as a direct cause or as a precipitant. It was held that applicant was entitled to compensation solely for the disability incident to the fracture. Dementia praecox or adolescent insanity is “a group of morbid symptoms occurring at about the period of sexual development with, in general, a somewhat characteristic affective type, tending to ultimate dementia with more or less rapid course.” Kraepelin compares it with a tree that had sufficient soil for its growth to a certain point and that when this is exhausted, it fails. The comparison is not an inapt one and assists in the comprehension of the actual state of the cause of this disorder.

Other diseases are subject to the vulnerating forces of industrial agencies, so that they may be accelerated or aggravated up to their fatal termination. Thus, where a cook, suffering from a pre-existing heart disease, who was employed upon a lighter where his employment required him to live, made several trips to and from the deck of the craft when sinking, in an attempt to save some of his belongings and a surveying instrument, died soon thereafter, there was evidence that the exertion

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*Syphilis,* by Hazen, 1928, p. 46 (The C. V. Mosby Company, St. Louis).


*Ibidem,* p. 293.
and the excitement incidental thereto so aggravated and accelerated his heart disease as to cause his death.\textsuperscript{7} And, where a concrete worker, who prior to his accident was suffering from an apparently inactive syphilis, was struck on his arm and and his forehead by a flying piece of concrete, and at the time there seemed to be only a superficial wound, which, had the employee been healthy, would have caused but little or no disability, and where, after a short while, an abscess with other diseased conditions in the head about the point of contact appeared so that he became disabled, it was held that his disability was due to the intervention of the industrial accident, and that the infection had been set into motion and been aggravated by that injury.\textsuperscript{8}

\textbf{Elements of Chain of Events in Cases of Aggravation of Pre-Existing Infirmities}

Furthermore, quite unique features are to be found in the chain of causation in cases involving pre-existing disorders as part of the employee's disability allegedly initiated by his accident or injury due to the employment. There are a number of links of the chain of events which are so characteristic for this class of cases that they deserve mentioning. An analysis of such chain shows that it consists of:

1.) the industrial vulnerating force, due to the employment;
2.) a primary injury to the employee due to such an industrial vulnerating force—the original injury per se;
3.) the after-effects of such primary injury which are reasonably immediate in time;
4.) the after-effects which are remote in time;
5.) a pre-existing infirmity;

But, as the industrial vulnerating force of the original injury in cases of compensable acceleration or aggravation of a pre-existing infirmity must by necessity have also influenced the disorder, we have in addition the elements of

6.) strength of penetration of the industrial vulnerating force into the territory of the pre-existing infirmity, and when arrived at the sphere of influence thereof, not only a vulnerative

\textsuperscript{7}In re Brightman, 220 Mass. 17, 107 N. E. 527 (1914).
\textsuperscript{8}Dickson Construction & Repair Co., et al. v. Beasley, 146 Md. 568, 126 A. 907 (1924).
capacity, but also a vulnerating effect upon the disease without interruption of the chain of events;

7.) the effects of the vulnerating force of the primary injury upon the pre-existing condition;

8.) the after-effects, reasonably immediate in time, and, finally,

9.) the after-effects, remote in time.

"EARMARKS" OF COMPENSABLE AGGRAVATION OR ACCELERATION OF PRE-EXISTING DISORDER

In considering compensability of aggravation of pre-existing infirmities two groups of evidentiary facts are met with. The first class pertains to the proof of the fact that, in all probability, a culmination of the disorder, independent of the employment, had not taken place, while the other group points towards the aggravation or acceleration by reason of the employment.

1.) IMPROBABILITY OF INDEPENDENT CULMINATION

a.) Apparently in Good Health Prior to the Accident.

While the fact of the workman’s apparent good health prior to the accident does not exclude positively that the pre-existing disorder was on its way to its culmination quite independently of the employment, in absence of any indications to the contrary, it seems it may be reasonably assumed that but for the employment and its ensuing accident the infirmity would probably have remained substantially in the condition it had been prior to the accident, and that the employee would have continued to appear healthy and capable of performing his duties in the same manner as before. This thought is clearly expressed in Lachance’s Case.9 "Though apparently a robust and vigorous man,” said the court of last resort, “Lachance for 2 years before the accident had had what physicians recognized by its signs and symptoms, as a cardiac limitation. But this had been compensated or recovered from temporarily, in nature’s way. The heart was carrying the added load efficiently. A dropsy of the subcutaneous cellular tissues of the feet and legs had disappeared. The man was working, each following day and bear-

9 121 Me. 506, 118 Atl. 370 (1922).
ing the heavy burden of a blacksmith's toil, uncomplainingly and uninterruptedly, to and inclusive of that day just before the injury. Witnesses speak of his great capacity, till then, for unremitting industry. Idleness on his part seems to have been unknown. Then came an unusual strain with an accompanying traumatic condition, as the immediate result of what happened while Lachance was doing what he was employed to do. Soon afterwards the man was observed by those persons who met him in his daily walk, to be suffering from breathlessness; also, the circulation of blood was impaired, due to failure of the aortic valves to function regularly; . . . His physical failure was rapid. At the end of scarcely more than five months, he died, age 56 years. But for the injury, there is nothing to indicate that the man would not have had an expectancy of life embracing a period of years."

b.) Successful Medical Treatment or Remission of Infirmity.

Where a pre-existing disorder because of medical treatments administered to the employee had been prior to the accident brought out of the danger zone of its culmination, independent of the employment, there is evidence that the coinciding industrial accident had proximately caused also an aggravation of such disorder, where it is shown that it had become worse after the accident. In *Blair v. Village of Coleraine*, the employee, suffering from high-blood pressure, while answering a fire alarm as a voluntary fireman and riding on a hose truck, came down stiff-legged and received a jar by reason of misjudging the distance when leaving the moving truck, in consequence of which he suffered a stroke which became manifest about an hour later. There was evidence that he had been feeling perfectly well at the time he responded to that alarm. For about 8 months preceding the accident and during all these months he had been treated for his blood-pressure, and it had been greatly reduced so that about 2 weeks prior to his calamity it was about normal for a man of his age. Compensation was awarded and affirmed. However, stress can be laid upon medical treatment prior to the accident only in the case that the treatment did actually cause some improvement. If the pre-existing disease be such as could not have been reduced in its hazards at

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10 177 Minn. 376, 225 N. W. 284 (1929).
least temporarily, and if the progress of the disorder could not have been stopped a reasonable time prior to the accident, the injured employee could hardly avail himself of such treatment as evidence of an acceleration of his ailment by reason of his employment. Length and frequency of treatments, it would seem, are often quite important circumstances in this connection. On the other hand, the mere fact that no medical treatment had been undergone, does not categorically exclude the possibility of an aggravation of the pre-existing infirmity by reason of the employment, as there may have taken place a remission of the disorder sufficiently strong before and at the time of the accident to warrant the conclusion of the ailment having become aggravated by reason of the employment.\footnote{Compare "Pre-Existing Diseases, Independent of the Employment, versus Industrial Accidents," Kurt Garve, Illinois Medical Journal, June, 1933, p. 521 et seq.}

2.) EVIDENTIARY FACTS POINTING TO PROBABILITY OF AGGRAVATION BY REASON OF EMPLOYMENT.

Other evidentiary facts may point in a positive manner to the probability of the aggravation of the pre-existing disorder by reason of the coinciding injury due to the employment.

a.) Termination At Earlier Time Than Reasonably to be Expected.

The termination of the course of a disorder at an earlier date than is reasonably to be expected according to the nature and extent of the ailment and according to the usual and probable course of like or similar disorders may give a clue as to whether or not the workman’s pre-existing condition had been directly influenced by the industrial accident. As a general rule, the closer in time of the accident the termination of the disorder the greater the possibility that the accident at least hastened or approximately contributed to the final termination. Where, therefore, a fatal termination issues immediately, or within a short time, after the occurrence of an accident it may be assumed that there may have been an aggravation of the ailment by reason of the employment. Thus, where a steam crane operator, afflicted with heart disease, became excited and exhausted from over-exertion when a steam pipe of the crane broke, so that he died the same day, and where there was medi-
cal expert testimony that over-exertion and excitement had caused an acute dilation of his heart, there was sufficient evidence of the proximate contribution of the accident to the speedy fatal termination of the heart trouble. In a Pennsylvania case the employee, who prior to his accident had suffered from a sac-like tumor, filled with some morbid fluid and situated in one of his abdominal organs, slipped and fell during his employment, in consequence of which he died soon thereafter. There was medical testimony of a physician who had been present at the post-mortem examination, that the employee’s fall had caused a rupture of blood vessels surrounding the sac resulting in the escape of large quantities of blood into the abdominal cavity, that the rupture had caused in turn the rupture of the sac and the ensuing death, and that the employee might have lived for many years notwithstanding his diseased condition. The findings of the commission that the accident had been the superinducing cause of the employee’s death were upheld on appeal.

Sudden rapid progress of an active disorder which prior to and up to the time of the accident advanced only gradually, is also suggestive of an aggravation of a pre-existing disorder by reason of the employment in absence of any proof of an intrinsic clinical cause of an acute exacerbation, independent of the employment. The longer in time such disease advanced slowly prior to the employee’s calamity and the sooner such rapid progress appears thereafter, the greater the value of the inference of causal connection between employment, the industrial vulnerating force which caused the accident and the sudden progress of the pre-existing disorder. In Natalini v. Riefler & Sons, Inc., claimant had been suffering for a number of years from a progressive nervous disease which up to the time of his accident had affected only one arm causing the member to tremble without interfering with his work. He suffered a severe fall while in the performance of his duties. Since that time claimant had not done any work because the trembling thereafter extended to the other arm and his back. It was held that there was no evidence pointing to a spontaneous flare-up of his diseased condition.

14 286 Pa. 301, 133 A. 547 (1926).
Where the disorder had been arrested, and a reasonable time after the accident, takes a manifest course of development towards the employee’s disability, the evidence of aggravation by reason of the employment is still stronger. In *Heileman Brewing Co. v. Schultz*\(^1\) it appeared that the workman in previous good health suffered an injury by reason of an explosion and gas fumes while varnishing a drum. After a few days’ medical treatment he was discharged as well. Immediately after the accident he complained of throat trouble and for that reason refused to drink his customary beer at the brewery. About 10 weeks later the diagnosis of tuberculosis was made, and the workman died four months after the accident. Physicians testified that the inhalation of gas fumes would furnish an opportunity for a latent condition at the time of the accident to become kindled into an active stage, and that, while usually an infection of the type deceased had been suffering after the accident would run its course from four to six weeks, yet it might continue for a period of three to four months. An award in favor of the widow was affirmed. However, it is essential to discriminate between inactive and active latent disorders. Where the disease has been reasonably quickly progressing in its course prior to the accident, the mere coincidence of accident and culmination of the pre-existing ailment does not necessarily point to the accident as the moving cause. *Spring Valley Coal Co. v. Industrial Commission, et al.*,\(^2\) is a good illustration of a counterpart to the Heileman case. The claimant was struck in his eye by a piece of coal while working in defendant’s mine. But the injury was only superficial and did not reach the interior of his eye, leaving some impairment of vision but not causing total blindness. Some short time after the employee had been discharged from medical care, he became totally blind and it was for this disability that he sought to recover compensation. There was medical testimony that there was also a deep-seated eye ailment which had nothing to do with the original injury. The employee would have gone blind anyway in the same length of time because the disease was progressive, though hidden in its effects to the employee. It could have completed its course to total blindness within two weeks. An award

\(^1\) 161 Wis. 46, 152 N. W. 446 (1915).

\(^2\) 289 Ill. 315, 124 N. E. 545 (1919).
in favor of claimant was reversed. Here we have a latent pre-existing disorder which was active and progressing. There was a phase which was non-manifest, to wit, the phase immediately preceding total blindness. The period of non-manifestation coincided in its termination with the reasonably immediate after-effects of the accident. Thus, no inference of the accident having influenced the disease can reasonably be drawn in view of the scientific fact that the disorder might have terminated in final incapacity at any time. Had the period of non-manifestation been given as much longer than the time the superficial injury occurred and its after-effects lasted, no doubt, the commission would have been justified in concluding that the accident had accelerated the ailment.

b.) Seat of Manifestation of Disorder Corresponds with Injury.

The seat of the manifestation of the pre-existing disorder after the accident may also be of value in determining compensable aggravation. Where a vulnerating force due to the employment attacks a certain part of the employee’s body and thereafter a latent infirmity manifests itself reasonably near the same place, the suggestion is strong that the injury aggravated the latent condition. Two different situations arise out of such a set of facts. Where there is a more or less localized pre-existing ailment and where the vulnerating force is directed against it or its neighboring tissues, a subsequent appearance of symptoms of such ailment suggests causal connection. In *Dewees v. Day & Zimmerman, Inc., et al.*, plaintiff, although apparently in good health and able to work before the accident, had been suffering from a latent inflammation of the bones and joints of his spinal column. On the day of the accident he accidentally fell 35 feet and thereby sustained a scalp wound and a fracture of the bodies of some of the vertebrae. Hospitalization followed. But soon after having left the hospital an inflammation of the bones and joints in the location of the previous spinal column injury developed, resulting in total disability. It was held that the fall had aggravated the previous condition. And, where the employee, while performing services for his employer, received a blow against his right shoulder joint which had prior to the accident become completely stiffened by reason of a pre-

*291 Pa. 379, 140 A. 345 (1938).*
existing disease in the nature of a combination of a syphilitic and tuberculous infection, localized in that joint and arrested, and where there was evidence that his condition would not have materially progressed without a new exciting cause, it was held that the blow immediately lighted up the morbid condition producing the incapacity of the employee to work. In Slemba v. William C. Hamilton & Sons, et al., the employee was injured in his right knee. Shortly thereafter he was taken to a hospital where his trouble was diagnosed as a malignant tumor with offshoots thereof in the lungs. An operation was performed, and for a while the employee seemed to be doing well, but later he became worse. He died shortly thereafter. Held that while the injury did not cause the tumor, yet such an injury as suffered by deceased could aggravate it and cause its rapid development.

Somewhat complicated is the second situation. The area of the pre-existing disorder is not localized. There is a primary injury due to the employment. An analysis of this type of cases shows that there is:

a.) a primary injury due to the employment;

b.) a complex of features of such injury characteristic thereof;

c.) nothing in such injury to suggest the presence of the pre-existing ailment immediately or soon after the accident;

But suddenly, after a certain time this primary injury changes its appearance. It takes on some or all of the traits of the pre-existing ailment. Is there evidence justifying the assumption that the employment with the original injury had been the proximate cause of an aggravation of the ailment? Prima facie, it would seem as though there had taken place the culmination of the pre-existing infirmity independent of the employment. The disease merely chose to become manifest in the place of the original injury. However, it caused a state of lowered resistance in the tissues near or at the wound. The underlying pre-existing condition has now an opportunity to successfully attack the primary injury, thus altering its original pathologic aspects. As to this spot the pre-existing condition leaves its state of dormancy and appears to become active and

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Bongialatte v. H. Wales Lines Co., et al., 97 Conn. 548, 117 A. 696 (1922).

290 Pa. 267, 138 A. 841 (1927).
manifest. In *F. H. Gilcrest Lumber Co. v. Rengler*\(^{20}\) the employee while in the course of his duties was injured by a bundle of maple flooring which fell against his leg causing a slight abrasion without breaking the skin. Three days later, owing to a pre-existing syphilitic infection, an ulcer developed which remained for about a year, thus causing a prolonged disability for which the employer was held liable. On appeal it was held that the injury brought about the condition which in turn caused the disease to become active.

c.) Retardation or Absence of Return to Former State of Health.

The fact that the injured employee, suffering from a pre-existing disease, did not return after the accident to his former state of health, or that such return was greatly retarded, considering the usual course of injuries of the kind received by him, is also of great evidentiary value in establishing compensable aggravation of a pre-existing ailment. The strength, effectiveness of the vulnerating force, and the extent and course of the primary injury will be controlling. Where a like or similar injury to a normal person would not have reached the magnitude of disability it did in the case of the employee afflicted with a pre-existing disorder, and would not have prevented substantial recovery as it did as to such employee, the suspicion is strongly justified that the primary injury in fact proximately caused an aggravation of his pre-existing disorder, in absence of any showing to the contrary. Similar principles apply to the case of the employee’s recovery being substantially retarded beyond the period of time the effects and after-effects of like or similar accidents or injuries would ordinarily have needed for their termination. Thus, where the employee, of apparently previous good health, in the course of his duties lifted and changed the position of an iron yoke, weighing between 175 to 200 pounds, and while lifting this weight was seized with a severe pain in the back which he described as a twist, it was held that he had suffered an accident. He was confined to bed over a month thereafter, received hospital treatments for some 61 days and at the time of the hearing was in a plaster cast and still under medical care. There was medical testimony that a

\(^{20}\)109 Neb. 246, 190 N. W. 578 (1922).
pre-existing arthritis had been aggravated by the strain. The case is correct in its decision as it is rather uncommon for ordinary strains to be retarded in their healing process for such a long time and to require plaster casts and hospital treatments for more than two months, unless there is an inherent infirmity contributing to the retardation of the course of recovery.

The Law of Aggravation or Acceleration of Pre-Existing Disorders

As a general rule, liability for compensation for an accident or injury to an employee is imposed upon the employer only where the servant is performing services growing out of his employment or such as are incidental thereto, provided the employee is acting within the scope of his employment, and provided, further, that the accident or injury is proximately caused by his employment. Where the disability or death of the employee arises solely from the disease and independently of the employment, no recovery may be had. However, by accidents and injuries due to the employment are meant not only their effects and after-effects, reasonably immediate in time and remote in time, but also all these effects and after-effects even though remote in time, of a pre-existing infirmity, which thru the intervention of the industrial vulnerating force of the employment have been directly caused. It is the application of the doctrine of proximate causation to this last consequence which gives this type of cases and particularly the case of Maxon v. Swift & Co. singular features. Defendant's contention that the long interval of time intervening between injury and death removes the basis of inference of causal connection between them is, therefore, not well founded in law and of little evidentiary value, if there is proof to the contrary. However, defendant company was able to reenforce its contention. In arteriosclerotic brain disease there is in fact a complex of symptoms which very much resemble that of the injured employee after he had received his injury. "Not infrequently disagreeable subjective symptoms (headache, vertigo, tinnitus aurium) are associated with these manifestations. Occasionally the motor weakness is particularly prominent, and the gait and all other movements

become slower and more uncertain. The patients frequently walk with short dragging steps, fall easily, cannot help themselves very well, etc. For very evident reasons this condition is not infrequently associated with true apoplectic attacks of a light or even of a grave sort.”

But this theory was counter-balanced by medical testimony of the claimant widow’s medical experts who were of the opinion that the primary injury at the time of the accident had caused a slight hemorrhage sufficient to account for the lack of control of the legs and leaving a weak spot in the circulatory tree of the arteries of that part of the brain which showed the later fatal hemorrhage and which matched with the bump and the fracture of the skull. It was this version which the commission adopted.

**Acceleration Versus Accident—Amount of Compensation**

An interesting problem arises as to the amount of compensation to be awarded and the degree of injury due to the accident, where it has caused a primary injury and also aggravated a pre-existing disorder. As compensation is granted primarily for the employee’s incapacity and is not measured by the extent of his injuries due to the accident, the question arises whether the employee should be held liable beyond that part of the disability which is solely due to the injuries per se and that of the aggravation caused by the accident, or for the whole incapacity even though in part due to the disease, independent of the accident. In *Indianapolis Abbatoir Co. v. Coleman* it was held that the doctrine of degree of disability prior to the injury, the degree caused entirely by the accident, and the degree which might have resulted from the pre-existing infirmity alone is inapplicable to proceedings under the Workmen’s Compensation Act of the state of Indiana. Where the pre-existing disorder is such that the person afflicted therewith may be considered for all practical purposes an individual of substantially average health and average earning capacity, when compared with other, normal persons in a like or similar occupation or trade, no doubt, injuries due to the employment and the ensuing incapacity could be considered as more than a mere aggravation of a pre-

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23 65 Ind. App. 369, 117 N. E. 502 (1917).
existing disorder. Thus where the pre-existing infirmity was only light, arrested, or its progress comparatively very slow, and the incapacity comparatively insignificant, full compensation should be granted. The same rule might be applied to cases where the injury was aggravated by the pre-existing disorder rather than vice versa. Also, where death results from the combined action of the vulnerating forces of the accident and pre-existing disease, one may be inclined to shift the whole liability upon the employer, even though the disease had been an active one. But, where the disease is active and progressive and would have resulted in disability comparatively soon after the after-effects of the accident were worn off, is it not prejudicial to the employer to compel him to respond in full damages regardless of the final outcome of such active and progressing disorder, independent of the injuries due to the employment? Some states have adopted this view and have enacted statutory rules of apportionment. In California no apportionment is made in cases of death, where the injury had been aggravated, or where the arrested disease had become activated in consequence of the accident. In Kentucky the court of last resort has gone farther by applying the rules of apportionment to all cases in which a pre-existing disorder is involved. In Robinson-Pettet Co. v. Workmen's Compensation Board, et al., an employee previously suffering from tuberculosis of the spine which condition had become dormant, was held entitled to compensation of the disability due to the fall only, where the fall had reactivated the tuberculous condition. And where an employee while lifting a cable into its hangers felt a slip in his back and within less than 24 hours was completely paralyzed from his waist down, it was held that the board decide what percentage of the total disability was due to the accident and apportion the award, as the injury had been aggravated by a pre-existing syphilis, both injury and pre-existing syphilis contributing concurrently to produce such disability. In B. F. Avery & Sons v. Carter it was held that compensation for death proximately contributed to by a pre-existing diabetes should be apportioned according

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201 Ky. 719, 258 S. W. 318 (1924).
205 Ky. 548, 265 S. W. 50 (1924).
to the contribution of each just as in the case of mere disability of the employee. The justice of the Kentucky rule becomes very obvious when one considers such a case as *State ex rel. Jefferson v. District Court of Ramsey County* in which the employee had been crushed under a load of lumber and sustained several broken ribs and other lesser injuries, and where the autopsy disclosed that decedent had had pulmonary tuberculosis in such an advanced stage that one lung had been completely destroyed and the other one to a considerable extent; also that he had been suffering from other diseases. Three physicians testified that in their opinion the employee's death had been caused by pulmonary tuberculosis and that the injuries which he had sustained had not been sufficient to cause or hasten his death. But how is one to apportion the award when the workman suffering from high-blood pressure, for instance, had already been apparently constantly on the brink of a fatal disaster, and yet, according to medical science, might have lived many years notwithstanding?

One more class of aggravation or acceleration of a pre-existing infirmity should be mentioned. This is where the injury is solely due to the culmination of the pre-existing disease and would not have reached its extent "but for the employment." In *Peoria Ry. Terminal Co. v. Industrial Board, et al.*, the servant, while engaged in his duties as a fireman on a train, fell from the locomotive and was found unconscious thereafter, dying soon after the accident. A post-mortem showed a hemorrhage of the brain in a soft spot thereof, due to syphilis, which had corroded the blood vessels; also that the skull had been fractured. Held that death resulted from injury by accident, and that death would not have resulted but for the conditions under which he performed his duties. A majority of courts have rejected this doctrine.

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28 *138 Minn. 334, 164 N. W. 1012 (1917).*
29 *279 Ill. 352, 116 N. E. 651 (1917).*
30 *31 Yale Law Review 768, 35 Id. 220.*
The Thirty Third Annual Meeting of the Kentucky State Bar Association will be held in Lexington on July 5th and 6th.

Carroll's Kentucky Statutes and Baldwin's Kentucky Statute Service were adopted as "official" by the 1934 Kentucky legislature.