Wyoming Law Journal

Volume 4 | Number 3 Article 9

December 2019

Ear Injuries Arising out of Employment

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not bound by the strict rules of evidence applying to *trials,* but may consider many matters not admissible on the issue of guilt or innocence, since such a proceeding is not a trial in the ordinary sense of the word." Federal Courts in Ohio, *16* and Illinois,*17* and the Illinois Supreme Court*18* have expressed this same view in similar language.

Dr. Sheldon Glueck, the noted criminologist and penologist, Professor of Criminal Law at Harvard University, has made a suggestion which might lead to the most satisfactory solution to this problem. In his article, "Principles of a Rational Penal Code,"*19* Professor Glueck suggested that each state set up a "Socio-Penal Commission" to be composed of trained specialists in the social science field, which would take over after the trial court had rendered a verdict, and through the use of scientific examinations and investigation determine the psychiatric, social or peno-correctional treatment appropriate in each individual case.

This type of procedure has been accepted by many states as a better means of dealing with their juvenile delinquent and youth rehabilitation problems. In California*20* their commission is called The Youth Authority, and Minnesota*21* it is called the Youth Conservation Commission. While Professor Glueck's plan is not limited to juvenile or youthful offenders, these programs are very definitely a step in the right direction.

Such a plan as Professor Glueck's should satisfy those demanding a complete investigation in each case as well as those who object to any abandonment by the courts of the evidentiary rules and due process protection, for the investigation and treatment commission would not be a part of the court, but merely supplementary thereto.

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EAR INJURIES ARISING OUT OF EMPLOYMENT

Appellee suffered permanent loss of hearing caused by the intensity of the noise of long continued gunfire to which he was subjected in his employment as a pistol range instructor from June, 1943 to December, 1944. *Held* that the workman's injury should be considered "personal injury by accident" within the meaning of the Kansas Workmen's Compensation Act. The term accident must be applied in its ordinary sense and to permit the progressive nature of each shot's contribution to the injury to remove the case from the act, would be a strict and technical interpetation unwarranted by the theoretical basis of the compensation Act. *Winkleman v. Boeing Airplane,* 166 Kan. 503, 203 P. (2d) 171 (1949).

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16. Hunter v. United States, 149 F. (2d) 710 (C.C.A. 6th 1945).
17. Stobble v. United States, 91 F. (2d) 69 (C.C.A. 7th 1937); United States v. Standard Oil Co., 155 F. 305 (N.D. Ill. 1908).
18. People v. McWilliams, 348 Ill. 333, 180 N.E. 832 (1932).
19. 41 Harv. Law Rev. 453 (1928).
20. C. 1, Div. 25, Cal Welfare and Institutions Code.
21. Laws of Minnesota, Chapt. 595, 1027 (1947).

No other court to date has advanced a definition of "accident" so liberal as to include loss of hearing incurred by a process as gradual as that leading to the trial of the present case. Yet the facts of the case demonstrate one of only two possible types of auditiory impairment, i.e., gradual deterioration of the organ, as opposed to sudden distruction of the mechanism.[1]

Instances of sudden damage to the ear satisfy by definition the well established[2] requirement that an "accident," as used in the acts, be attributable to a specific incident; therefore, in such cases, recovery for injuries has hinged alone upon the sufficiency of proof that the injury occured in, and arose out of, the employment. It was in this respect that compensation was permitted an employee deafened by a fall from a derrick,[3] denied another whose hearing was allegedly damaged through being struck on the head by a bucket,[4] denied a third worker struck on the ear by the limb of a tree,[5] and denied a fourth who was struck on the cheekbone by a forge handle.[6]

However, the fact that the injury need not occur instantaneously is established by the decision affirming an award to a jackhammer operator whose previously perfect ears were found to be defective after his use of his loudly vibrating machine within twelve inches of his head "for a few hours."[7] A like decision was reached in favor of an oil field worker whose hearing was impaired after a twelve hour shift during which he was working within eight to ten inches of the exhaust of a pump, when it was shown that he had formerly had good hearing.[8] In the opinion of the latter case, the court, although conceeding it had been determined in the jurisdiction that inhalation of cement dust "over a considerable period of time" could not be considered an accident since the injury resulted gradually,[9] contended that the opposite result would have to have been reached had a cement sack been dropped, smashed, and the rising dust inhaled, a definite time of injury being set thereby.[10]

Although there can be no absolute determination of exactly what length of time would separate "sudden destruction" from "gradual deterioration," acceptance of deafness existent after a few hours or after a sudden blow as being of the first classification, would tend to relegate to the second category pain and temporary deafness allegedly sustained by a dictograph tester through working at his type of employment for three weeks.[11] The tester was denied compensation in this instance when the court held his testimony, unsupported by that of a physician, to be insufficient to establish liability, avoiding consequently, and perhaps intentionally, need for determination whether or not there had been an

1. 166 Kan. 503 P. (2d) 171, 172. Given in testimony by Dr. Ernest M. Seydell, a specialist in otolarygology.
2. Prosser on Torts 525 (1st ed., 1941).
3. Burns v. Roxana Petroleum Corp., 140 Okla. 57, 282 P. 606 (1930); Seaux v. G. B. Zigler Co., 183 So. 564 (La. App. 1938).
5. Frands v. Republic Production Co., 193 So. 379 (La. App. 1938).
6. Magnolia Petroleum Co. v. Proctor, 169 Okla. 513, 38 P. (2d) 7 (1935).
7. Andrews Mining Company v. Atkinson, 192 Okla. 322, 135 P. (2d) 960 (1943).
8. Vaughn and Rush v. Stump, 156 Okla. 125, 9 P. (2d) 764 (1932).
9. U.S. Gypsum Co. v. McMichael, 146 Okla. 74, 293 P. 773 (1930).
10. See note 8 supra at 765.
11. Ferst v. Dictagraph Products Corp., 184 N.Y.S. 422, 193 App. Div. 564 (1920).

"accident." Also left out of consideration by the New York Court was examination of the possibility that the result of the employee's work was an occupational disease, although New York is one of the one-third of the states which compensate for all occupational diseases.[12] Holding that an injury is within an occupational disease statute, though not an accident within a workmen's compensation act, would likewise evade a decision that any possible recovery for an injury arising gradually (sudden deafness being better left to a compensation act), must be sought in an ordinary tort action with its accompanying pitfalls of contributory negligence, assumption of risk, and the fellow servant rule.[13]

Deciding that there had been either an "accident" or an occupational disease was unnecessary, also, in an action involving a telephone operator who had been working with standard equipment for seven or eight years, who testified that she had received at various times vibrations, static, load noises, etc., through her earphones.[14] Consideration could be restricted to sufficiency of proof of causation in reversing the Workmen's Compensation Board's denial of her claim, due to a liberally atypical[15] statute which defined a compensable injury not only as one "by accident" but also "any disease proximately caused by the employment."[16] Thus this case, although involving the gradual type of loss of hearing illustrated by the *Winkleman* case, does not adopt the latter's liberalness of reasoning in taking the case out of the more belligerent atmosphere of the Common Law concerning employee injuries, into the somewhat clearer air created by the statutory compromises enacted during the past generation.

No Wyoming case has been reported which involves an injury arising either suddenly or gradually out a worker's employment. The Supreme Court has decided a case involving somewhat analagous problems, however. In *Pero v. Collier-Latimer*,[17] an employee who had previously been in excellent health, was for six weeks engaged in work where rock particles entered his lungs causing chronic silicosis. Wyoming is one of the many states, as is that in which the *Winkleman* case arose, not having an occupational disease statute, and since the Workman's Compensation Act states, "The words 'injury' and 'personal injury' shall not include . . . a disease, except, as it shall directly result from an injury incurred in the employment,"[18] recovery could only be based upon a decision that

12. 21 Ind. L.J. 490.
13. As well as, in Pennsylvania, the "unbending test" of negligence that the ordinary usage of equipment and methods in the industry establishes the standard of conduct to be followed in such use by a particular business in that industry. By the use of this test, recovery was denied a workman who sought recovery for a permanent partial nerve deafness caused by continued exposure to the noises of an airplane factory while employed there for five years. Cool v. Curtis-Wright, Inc., 362 Pa. 60, 66 A. (2d) 287 (1949).
14. Brown v. North Dakota Workman's Compensation Bureau, 55 N.D. 491, 214 N.W. 622 (1927).
15. See note 2 supra.
16. Laws 1919 (North Dakota), c.162.
17. 49 Wyo. 131, 52 P. (2d) 690 (1935).
18. Among them were decisions in which judgment was entered for employees when: cuts and scratches sustained by a girl over a period of a year, resulted in arthritis, Savage v. Burrell and Sons, 13 B.W.C.C. 277; a workman gradually contracted phosphorous poisoning during a three year period, Victor Sparkler and Specialty Co. v. Franks, 147 Mo. 368, 128 A. 635 ( ); and when an injury resulted from inhaling cement dust during three weeks time, Tri-State Contractors, Inc. v. Althouse, 166 Okla. 296, 27 P. (2d) 1041.

Pero's misfortune was the result of an "accident." The court reviewed a number of cases involving varying fact situations,*19* including one*20* in which the court compared the grinding of silica dust upon a workmen's lungs to the grinding of rocks on his employer's car tires, which thus blows out a tire, wrecks the car, and likewise injures the workman, terming each occurrence an accident. In another of those decisions considered, the court said, " . . . it would not seem that the unexpected, unforeseen, and, therefore, accidental inhalation of deleterious matter could be deprived of its accidental quality by the mere consideration of whether it took five days or five months to produce the result."*21* The Wyoming court concluded: "Whether the abnormal condition produced in claimants lungs in consequence of his inhalation of particles of rock dust be regarded as a disease or a mechanical hurt, growing progressively worse, on account of the sharp particles retained in his lungs—for disease and injury sometimes overlap as the courts have pointed out—in our opinion, without the design or expectation of anyone, it 'directly' resulted 'from' an injury incurred in the 'employment' as contemplated by our state statute."*22*

It is necessary, whether the injury resulted suddenly or gradually, that substantial proof be presented that the employee's deafness does exist and can actually be attributed to his employment, of course, in order to avoid the obvious dangers of fraud as well as the honest and natural but unacceptable tendency by the worker to attribute a non-work connected injury to a job. But the great difficulty of obtaining very definite proof due to the very nature of internal ear injury, should be taken into account when judgment is rendered. As for the additional obstacles appearing where deafness progresses gradually, it is fairly well settled in most jurisdictions whether or not "wear and tear" will be considered an accident. Fortunately, Wyoming apparently stands with the more liberal minority. Where there is no statutory provision to cover occupational diseases at all, this view would seem to be most expedient, although it can be argued that such a result should be dictated by the legislature. There are indications that the courts are less reticent to adopt the broader principal where there is no occupational disease law at all than when there is one covering some but not all such diseases. Unquestionably, the employee is disabled as definitely as would he by an "accident" as defined by the most stringent courts and consequently, although it is certainly not within the purpose of workmen's compensation acts to require industry to pay for every misfortune befalling an employee, the underlying hypothesis, that injuries from the work should be borne as a production cost, would seem to sanction, if not demand, an approach as realistic as that of the *Winkleman* case.

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20. Beaver v. Morrison-Knudsen Co., 55 Idaho 275, 41 P. (2d) 605, 97 A. L. R. 1399 (1934).
21. Mcneely v. Carolina Asbestos Co., 206 N.C. 567, 174 S.E. 509, 512 (1934).
22. See note 17 supra at 699.